UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

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General President

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Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station,
Washington, DC 20044

Transmitted via: https://www.regulations.gov

RE: **Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements (IRS REG-100908-23)**

Dear Sir or Madam:

On August 30, 2023, the Internal Revenue Service ("IRS") published a notice in the *Federal Register* requesting comments on a notice of proposed rulemaking ("NPRM" or "proposed rule") regarding the implementation of the prevailing wage and registered apprenticeship requirements ("PWA") in the Inflation Reduction Act of 2022[1] ("IRA") for increased tax credits or deductions.[2] Please consider this submission to be the United Brotherhood of Carpenters and Joiners of America's ("UBC") comments regarding the NPRM.

I. Introduction and Statement of Interest.

With hundreds of thousands of members employed primarily in the construction and wood products industries, the UBC is one of North America's largest building-trades unions. The UBC has a continent-wide presence composed of its international union headquarters in Washington, D.C., eighteen affiliated councils, hundreds of affiliated local unions. There are also 250 labor-management administered registered apprenticeship programs nationwide. Since its founding, the UBC has led efforts to curb the abuse of labor in the construction industry.

[1] Pub. L. No. 117-169, 136 Stat. 1818 (August 16, 2022).
[2] *Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements*, 88 Fed. Reg. 60018 (August 30, 2023).

The UBC has consistently encouraged improvements to make America's construction markets fairer, safer, more productive, and more favorable for both workers and honest employers. To that end, the UBC and its affiliated councils and local unions frequently engage with construction workers, contractors, lawmakers, community leaders, workers' compensation insurers and federal and state law-enforcement agencies regarding the current and growing flagrant instances of serious tax fraud, insurance fraud, wage theft, labor trafficking, child labor, threats to safety, and other abuses of labor and employment laws occurring in the construction industry. It is this interest in equity, the dignity of labor, the rule of law and building a diverse middle class that brings us to comment on the NPRM.

The NPRM describes the prevailing wage and apprenticeship standards that must be met by taxpayers to be eligible for the five-fold tax credit when building qualified solar, wind turbine, clean transportation fuel and other clean-energy facilities. Such a tax credit is a powerful incentive that will assist in recruiting and training the necessary construction workforce. In addition to the "carrot," the NPRM provides a substantial "stick" for taxpayers who abuse the program by claiming the credit without meeting their obligations. Given the growing violations in the construction industry of federal and state labor-standards and employment-tax laws, the strong incentives and sanctions are welcome, and will advance the administration's goal of fighting climate change, creating energy independent and growing the middle class.[3]

Nevertheless, it would be disingenuous to believe that abuses of the IRA will not occur because of any inducements, sanctions, or trepidation of the IRS. The construction industry has developed sophisticated and successful fraud schemes that leave no job site immune. For instance, one of our UBC affiliated councils has been contacted by a subcontract labor provider[4] (whom we call "labor brokers") about supplying construction workers to a battery-production facility. The labor broker boasted that it could supply up to 6,000 workers to construction sites. When asked how the workers would be classified, the response was the workers would be independent contractors. The council, of course, declined the offer to join the labor broker in a potentially illegal scheme. This incident illustrates the imperative for the IRS to have in place an enforcement plan,

[3] *See, id.* at 60038.

[4] A subcontract labor provider, or "labor broker" as we refer to them, supplies labor to subcontractors. They do not supply "day laborers." Workers contact them for work, and subcontractors contact them for workers. The subcontractors normally exercise significant control over the workers, making them joint employers. Labor brokers can operate locally, statewide or in numerous states. Many operate out of their residences, but some have "brick-and-mortar" offices. Typically, labor brokers pay their employees as independent contractors and report those payments on IRS 1099 MISC forms, or, more often, they pay their workers by check or cash and do not report those payments to taxing authorities or workers' compensation carriers. Labor brokers can operate under shell company identities and change them frequently to evade insurance company or law enforcement investigations. The UBC and affiliated regional councils have seen labor brokers being used on military bases, airports, a semiconductor facility, hospitals, universities, public schools, legislative office buildings, the CDC, an IRS building, luxury high-rise condominiums, convention centers, office buildings and housing developments.

because the sanctions in the IRA and NPRM will have no value unless there is a high probability that they will be effectively delivered.

The UBC's concern is not solely held by us—it is shared by the Financial Crimes Enforcement Network ("FinCEN").[5] On August 15, 2023, FinCEN issued a notice it developed with the assistance of the IRS to financial institutions requiring them to report suspicious transactions by contractors.[6] In its notice, *FinCEN Calls Attention to Payroll Tax Evasion and Workers' Compensation Fraud in the Construction Sector*, FinCEN wrote:

> The Financial Crimes Enforcement Network (FinCEN) is issuing this Notice to call financial institutions' attention to what law enforcement has identified as a concerning increase in state and federal payroll tax evasion and workers' compensation insurance fraud in the U.S. residential and commercial real estate construction industries.
>
> Every year across the United States, state and federal tax authorities lose hundreds of millions of dollars to these schemes, which are perpetrated by illicit actors primarily through banks and check cashers. As described in this Notice, many payroll tax evasion and workers' compensation fraud schemes involve networks of individuals and the use of shell companies and fraudulent documents. These schemes further affect the local and national construction job markets, and put legitimate construction contractors and their employees at a competitive disadvantage.[7]

The UBC supports the NPRM, but it is our in-depth knowledge of the industry's descent that measures our support and informs the suggestions for improvements. Sound tax administration should dictate that the NPRM be amended as we suggest to prevent employment-tax fraud and other abuses of construction workers on IRA projects.[8] First, before we discuss our suggestions

[5] FinCEN is a bureau of the U.S. Department of the Treasury.

[6] *FinCEN Notice: FinCEN Calls Attention to Payroll Tax Evasion and Workers' Compensation Fraud in the Construction Sector*, FIN-2023-NTC1, 1 (August 15, 2023), available at https://www.fincen.gov/sites/default/files/shared/FinCEN_Notice_Payroll_Tax_Evasion_and_Workers_Comp_508%20FINAL.pdf ("FinCEN/IRS Notice").

[7] *Id* at 1.

[8] Indeed, the Department of Treasury and IRS have both recognized the pressing need for more aggressive enforcement of employment taxes. The Treasury Inspector General for Tax Administration has issued a report calling for more focus on employment tax crimes. Treasury Inspector General for Tax Administration Office of Inspections and Evaluations, *A More Focused Strategy is Needed to Effectively Address Egregious Employment Tax Crimes* (March 21, 2017), available at https://www.oversight.gov/sites/default/files/oig-reports/2017IER004fr.pdf . According to the report, the number of employers with twenty or more weeks of delinquent employment tax payments more than tripled in 17 years. *Id.* at 4. The IRS in its IRA strategic operating plan wrote, "We will increase enforcement in key areas where audit coverage has declined, including employment taxes…." *IRS, Internal Revenue Service Inflation Reduction Act Strategic Operating Plan*, FY2023-2031, 76 (2023), available at https://www.irs.gov/pub/irs-pdf/p3744.pdf.

and support, we will describe a growing, lucrative fraud scheme in the construction industry that to date state and federal law enforcement have not effectively countered.

II. The Shocking Disregard of Federal and State Laws in the Construction Industry.

A. Fraudulent Schemes

The construction industry is highly competitive with projects frequently awarded to low bidders. Material costs in any given market will not differ tremendously, so a way to cut costs and win bids is by lowering labor expenses. Other than wages and benefits, contributing to labor costs are employment taxes, unemployment insurance contributions, workers' compensation insurance premiums, and overtime premium pay. Those labor costs are only due on the compensation of *employees*. Accordingly, to evade those costs, scofflaw contractors intentionally misclassify employees as independent contractors and issue a 1099 MISC report or simply pay them "off-the-books" by check or cash with no reporting to state or federal taxing authorities or workers' compensation insurers. A study commissioned by the attorney general's office of the District of Columbia found that contractors who fail to report their true payroll skim 16.7 to 48.1 percent off their labor costs.[9] Thus, breaking the law gives cheating contractors a substantial bidding advantage over law-abiding competitors.

Fraud in the industry is aided by the layering of contractors and subcontractors. On a typical commercial or residential job site specialty subcontractors do the actual construction work. They perform specific types and phases of the construction, such as excavating, pile driving, electrical, plumbing, heating and air conditioning, concrete form work, interior systems installation,[10] and flooring and roofing. Above the specialty subcontractor is a construction manager or owner. A construction manager is hired by an owner or developer to make sure the specialty subcontractors live up to their contractual requirements. The specialty subcontractors will bid to and contract directly with the owner or developer of the property. If the owner or developer is using a general contractor, the subcontractors bid to and have contracts with the general contractor. Much of the fraud occurs at the level of the specialty subcontractor, with or without the knowledge, assistance or willful ignorance of the owners, developers, general contractors, or construction managers.

There are many ways to break the law. The simplest way for a subcontractor to break the law is by paying its employees by check and report the earnings with a 1099 MISC form. But that

[9] Karl Racine, Attorney General for the District of Columbia, *Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry*, economic analysis by Dale Belman and Aaron Sojourner, 1, 2 and 15 (May 22, 2019), available at https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf.
[10] Interior systems specialty subcontractors install, for instance, metal studs, drywall (also called sheetrock), and acoustical ceilings.

leaves the contractor vulnerable, because of the direct payment to the employee and 1099 reporting. To be less vulnerable, the subcontractor could pay employees by check without reporting. Still, there is vulnerability of detection through bank records because of the direct payment with a check.

To insulate subcontractors, some in the construction industry have added a layer of subcontract labor suppliers, or labor brokers, to pay and, sometimes, co-supervise employees. Specialty subcontractors with a labor brokering system will use the brokers to either supply the bulk of their labor or supplement their own directly paid employees.

What is a labor broker? A labor broker can be a foreman of the subcontractor who has been provided a business identity and receives a check to pay the foreman's crew.[11] Labor brokers are also individuals who know workers and supply them as labor in the requisite trade category (carpenters, electricians, laborers) to subcontractors. The broker faces most of the risk from law enforcement authorities. That is the case even if the subcontractor meets statutory or common-law definitions of "employer" of the labor broker's workers. In our experience, law enforcement agencies infrequently use joint-employer or conspiracy doctrines to extend accountability to subcontractors or further up the contract layers. Because labor brokers easily change identities or can be replaced,[12] the failure of accountability for the upper-tier contractors has given oxygen to the growing adoption of the labor-broker model.

A more complex fraud scheme has been developed in the Florida construction market, but it is not just in Florida. Variations have been found, for instance, in New Jersey and New York.[13] The Florida fraud model steps up the protection of labor brokers and facilitates money laundering and other crimes. Before explaining the model, a basic understanding of pricing worker's compensation insurance is needed. This is important because in an industry prone to injuries, like construction, workers' compensation premiums are high, so evading premium costs is among the largest savings.

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[11] *See, e.g, State of Minnesota v. Mehr*, criminal complaint, Prosecutor Case No. 19A00991(4th J.D. 2020). The defendants created company identities for employees, had them obtain a minimum workers' compensation insurance policy and submit hourly billing statements.

[12] Four companies operated by labor broker Carmelo Lugo and J. Carmen Lugo, have been penalized at least five times by the Tennessee Bureau of Workers' Compensation for either not having workers' compensation insurance or for under-reporting payroll. Tennessee Bureau of Workers' Compensation settlement agreements on file with author Matthew F. Capece.

[13] Phaedra Trethan, *Authorities: $100M Money Laundering Scheme Busted*, Courier-Post, August 28, 2017, available at, https://www.courierpostonline.com/story/news/2017/08/28/cash-cars-watches-seized-cinnaminson-money-laundering-arrests/608758001; and Press Release, New York County District Attorney, *D.A. Vance, NYC DOI Commissioner, NYS Inspector General Announce Indictment of Unlicensed Labor Broker for Million-Dollar Insurance Fraud* (Sept. 2, 2019), available at, https://www.manhattanda.org/d-a-vance-nyc-doi-commisssioner-nys-inspector-general-announce-indictment-of-unlicensed-labor-broker-for-million-dollar-insurance-fraud.

Workers' compensation premiums are based upon an employer's payroll, type of work performed, and the employer's history of injuries. Insurance brokers usually work with employers to complete insurance applications that are submitted to insurers like Norguard, Liberty Mutual, The Hartford, and other carriers. When the application is approved, a certificate of insurance ("COI") is issued to the employer. A COI for an interior systems subcontractor with a payroll of $1 million normally looks the same as one for $50,000 for office clerks. Some COIs will disclose the type of work performed but payroll is never shown. Also, if there is a policy in place, insurers are required to cover injuries to all employees, even for those whose wages were unreported. Normally, policies are renewed annually. The insurer will either do an onsite audit or simply request information including the payroll actually paid and the work performed.[14] The policy will be renewed with the employer getting a refund or being charged an additional premium for the preceding policy period if, for instance, payroll was less or more than the estimate at the beginning of the policy period.

A specialty subcontractor is going to require a COI from a labor broker. If a COI is missing, the subcontractor will be charged extra workers' compensation premiums by its insurer during its policy renewal period based upon the payments made to the labor broker. Labor brokers, like other construction employers, get COIs from an insurance broker.

The following describes the complex Florida fraud model:[15]

A labor broker in need of a COI will contact a "facilitator." The facilitator may be another labor broker, a contractor or an individual associated with a money service business or check cashing store. The facilitator will rent to the labor broker, for a fee, a corporate or LLC identity

[14] *See*, Employee Misclassification Advisory Committee, Tennessee Bureau of Workers' Compensation, *The Use of Criminal Prosecution to Reduce Misclassification, Avoidance of Workers' Compensation Coverage and Premium Fraud*, 5 (December 12, 2019), on file with author Matthew F. Capece.

[15] *See*, Press Release, Dept. of Justice, U.S. Attorney's Office Middle District of Florida, *Two Men Plead Guilty to Fraudulent Scheme to Evade Payroll Taxes and Workers' Compensation Requirements in the Construction Industry,* (March 30, 2021) (hereinafter "Two Men Plead Guilty"), available at, https://www.justice.gov/usao-mdfl/pr/two-men-plead-guilty-fraudulent-scheme-evade-payroll-taxes-and-workers-compensation; David Borum & Geoffrey Branch, *How Construction Cons Steal Workers' Comp Premiums: It's a Shell Game*, Journal of Insurance Fraud in America, April 25, 2017, *reprinted by* Property Casualty 360, available at, https://www.propertycasualty360.com/2017/04/25/how-construction-cons-steal-workers-comp-premiums; Press Release, Florida Department of Financial Services, Jeff Atwater, Chief Financial Officer, *CFO Jeff Atwater Announces Additional Arrests in 'Operation Dirty Money,' Workers' Comp Fraud Check Cashing Scheme,* October 1, 2013, available at, https://www.myfloridacfo.com/sitepages/newsroom/pressrelease.aspx?id=4210; and Eighteenth Statewide Grand Jury, Case No. SC 07-1128, Second Interim Report of the Statewide Grand Jury, *Check Cashers: A Call for Enforcement*, 10-14 (March 2008) (the report recounts that an investigation of ten contractors uncovered $1 billion of payments run through money service businesses in three years), available at, https://stoptaxfraud.net/wp-content/uploads/2018/11/Fla-Grand-Jury-Report-on-Fraud-Excerpt-3-08_opt.pdf.

registered with the secretary of state. It will be a shell company. The principals of the company may be persons who have no relation to the construction industry, but on paper they will be officers, directors, or LLC members, who operate the business and not the labor broker. The facilitator will introduce the labor broker to an insurance broker who may know of the scheme. An application for workers' compensation insurance is completed with a minimal payroll number. The application will go to the carrier and, once approved, the insurance broker will be able to issue COIs in the name of the shell company. Once COIs are available for the shell company, the facilitator can then "rent" the shell company and access to COIs to other labor brokers who are completely unrelated to the first labor broker. Insurers do not track the number of COIs issued by insurance brokers. In Florida, this is how a shell company called E South Construction, which claimed only four employees with $43,200 of payroll, acquired 450 COIs.[16] E South's income was over $11 million.[17]

The labor broker can now give the specialty subcontractor the COI and begin providing labor. The labor broker will bill the wages and other costs to the specialty subcontractor weekly. The specialty subcontractor will pay the labor broker by check made out to the shell company. The labor broker brings the check to the money service business associated with the facilitator. Because the labor broker is not a principal of the shell company (because he is renting the name), the endorsement on the check is forged or the money service business will have a rubber stamp with a shell company principal's signature to endorse the check.[18] In a variation, an appointment will be made for a shell company principal to be in the money service business to endorse the check or checks. If the check is $10,000 or more a currency transaction report ("CTR") must be completed. In the former instance where a principal is not at the money service business, the CTR will falsely claim that the principal was the one who negotiated the check.[19] With cash in hand the labor broker then pays the employees in unreported cash, with a deduction for charges the labor broker had to pay to the facilitator, money service business or other co-conspirators. In a more sophisticated operation, the labor broker will change its shell company identity before the close of the workers' compensation policy period. Because the labor broker's name does not appear on articles of incorporation, check endorsements, or insurance applications, the primary threat of law enforcement detection rests with the shell company principals.

[16] Florida Division of Insurance Fraud, Case No. 11-460, *Probable Cause Affidavit, Request for Arrest Warrant*, Defendants Hugo Otoniel Rodriguez, et. al., 12 (July 23, 2012).
[17] *Id.*
[18] *See, Legislature Sends Check-Cashing Bill to Governor Without Database*, WorkCompCentral, March 13, 2012.
[19] Press Release, Dept. of Justice, U.S. Attorney's Office, Southern District of Florida, *Principals of La Bamba Check Cashing Business Sentenced in Connection with $132,000 in False CTRs*, Sept. 15, 2009, available at, https://www.justice.gov/archive/tax/usaopress/2009/txdv09_090915-04.pdf; and Eighteenth Statewide Grand Jury, *supra* note 15 at 12.

This is organized crime. Indeed, the money service businesses involved in these conspiracies may be laundering money for organized crime and drug cartels.[20] Of course, along with the failure to pay workers' compensation premiums comes the failure to pay unemployment insurance contributions, federal and state employment and income taxes, and overtime compensation.[21] Nevertheless, for the specialty subcontractor, the goal is met of attaining labor at a low cost with a remote risk of accountability.

The harm caused by the industry's use of shell companies in committing tax and workers' compensation premium fraud has reached such an alarming level that it has been recognized, as previously discussed, by FinCEN. Much of what we have described above has also been found by FinCEN. For instance:

> Payroll tax evasion and workers' compensation fraud schemes are perpetrated through the use of shell companies and fraudulent documents. The basic structure of the scheme is as follows:
>
> 1. Individuals involved in the scheme will set up a shell company whose sole purpose is to allow certain construction contractors to avoid paying workers' compensation premiums as well as state and federal payroll taxes.
>
> 2. The shell company achieves this by engaging in two kinds of fraud:
>
> - First, once established, the shell company operators take out a minimal workers' compensation policy and rents or sells the policy to construction contractors that employ a much larger number of workers than the policy is designed to cover, thereby committing insurance fraud.
>
> - Second, the shell company operators facilitate tax fraud because the contractors use the shell company to pay their workers "off the books," and without paying the required state and federal government payroll taxes.[22]

Further verification that there is a substantial problem can be found in the red flags in the notice that banks and other financial institutions are required to monitor. Among the eleven red flags are:

> 4. The company's recently acquired workers' compensation insurance policy, which may be verifiable through an official state website, was issued within the last year and covers only a

[20] Borum, *supra* note 15.
[21] *See,* e.g., Two Men Plead Guilty, *supra* note 15 (the violations pled to included workers' compensation premium and tax fraud).
[22] FinCEN/IRS Notice, *supra* note 6 at 2.

small number of employees. However, a high volume of transactions is observed in the company's bank accounts, which is not commensurate with a construction company of that size.
7. A representative of the construction company conducts large or unusual volumes of cash withdrawals or negotiation of checks for cash when accompanied by another involved person(s) or using an armored car service to deliver bulk cash.

8. Large volumes of checks for under $1,000 are drawn on the company's bank account and made payable to separate individuals (*i.e.*, the workers), which are subsequently negotiated for cash by the payee.

9. The company's bank account has minimal to no tax- or payroll-related payments to the IRS, state and local tax authorities, or a third-party payroll company despite a large volume of deposits from clients.[23]

Clearly, fraud in the construction industry is a serious problem. Owners, general contractors and specialty subcontractors have grown confident that their fraud schemes sufficiently insulate them from being held accountable by the IRS, Department of Justice, Department of Labor ("DOL") and other federal and state law enforcement agencies.

B. Fraud in the Construction Industry is Not Isolated or Small and the Cost to Workers, Employers and Taxpayers is Substantial.

A frequently held misconception is that fraud in the construction industry rests largely in the single-family residential construction market. Nothing could be further from the truth. The UBC and its affiliates have uncovered, and shared with law enforcement, fraud schemes on military bases,[24] an IRS office building, a Centers for Disease Control and Prevention building, large industrial facilities, convention centers, hospitals, universities, luxury vertical residential and commercial towers, airports, and even state-legislative office buildings. Many projects are overseen by construction managers and general contractors that are the biggest names in the industry. We see fraud in all states, but state construction markets known to the UBC as dominated by illegal practices include: Colorado, Florida, Georgia, Louisiana, Tennessee, Texas and Utah, just to name a few.

[23] *Id.* at 5-6.
[24] Cases at Fort Knox and Red Stone Arsenal are personally known to Matthew Capece one of the authors of this comment.

Another misconception is that contractors stumble into violating the law because they are confused by state and federal definitions of employment. While that certainly can be the case, if the preceding section on fraud schemes did not demonstrate the reality of intentional conduct, consider this exchange between an undercover journalist and Jaime Juache, a labor broker for interior systems subcontractor Roswell Drywall LLC of Georgia, on the $600 million Music City convention center project in Nashville:

> Q: "How much do you pay by the hour?"
> Juache: "$13 an hour."
> Q: "Any overtime?"
> A: "No."
> Q: "Do I need my Social Security number?"
> A: "No, use any number."
> Q: "How do I deal with taxes?"
> A: "I'll give you a 1099, then you're responsible for taxes."
> Q: "Only $13 you pay?"
> A: "Yeah it's the maximum I can pay for experienced people on the job."[25]

A report on wage theft from the New Mexico Advisory Committee to the U.S. Commission on Civil Rights found that immigrant workers, shamefully, bear a disproportionate impact of the abuses committed in the construction industry.[26] The leverage that construction employers have over workers in need of a job, especially immigrants without work authorization, plays a role in their illegal behavior and exploitation of the construction workforce.[27] An example of this is Ricardo Batres, a labor broker in Minnesota who supplied workers for wood framing and drywall subcontractors.[28] He was arrested in 2018 on charges of labor trafficking and for under-reporting material information to his workers' compensation carrier.[29] The probable-cause statement in the criminal complaint detailed the fear and shocking conditions under which his crews lived and

[25]Demetria Kalodimos, *Is Music City Center Construction funding 'underground economy?'* WSMTV Nashville, July 18, 2011, available at https://www.wsmv.com/news/is-music-city-center-construction-funding-underground-economy/article_ea86e0f8-1d26-5b14-86e2-c4d82eee48b0.html.
[26] The New Mexico Advisory Committee to the U.S. Commission on Civil Rights, *Advisory Memorandum, Wage Theft & Subminimum Wages,* 13 (March 2021), available at https://www.usccr.gov/files/2021/04-15-NM-Advisory-Memorandum-Wages.pdf.
[27] *See, e.g.*, Michael Riley, *Labor brokers cut costs, corners; Fast-growing firms exploit immigrants to feed construction industry*, The Denver Post, February 16, 2003, available at https://www.denverpost.com/2005/05/07/labor-brokers-cut-costs-corners, (labor broker Mike Nobles said of his immigrant workforce, "They're not going to file a big claim and sue you like Americans are. That's what this boils down to." Nobles also said, "We have these people intimidated.").
[28] Press Release, Hennepin, County, Minn., *Crystal man has been charged with labor trafficking*, September 27, 2018.
[29] *Id.*

worked. Batres targeted undocumented workers for hire because they were vulnerable.[30] He misclassified them as independent contractors, paid sub-market wages, worked them long hours without overtime pay, and packed them into living quarters with no hot running water.[31] When workers complained, Batres threatened to call immigration authorities and have them deported.[32] On one documented occasion, he made good on that threat.[33] His crews of allegedly independent contractors were also subjected to unsafe working conditions and were discouraged from getting adequate medical treatment when injured.[34] One worker suffered a broken back when a pre-fabricated wall blew over and pinned him.[35] Batres insisted that the worker go to a massage therapist.[36] Just before trial, Batres pleaded guilty.[37]

The conduct is intentional and costly to taxpayers. A single case in Florida cost taxpayers and workers' compensation insurers millions of dollars. The U.S. Attorney's Office for the Middle District of Florida obtained guilty pleas from Gregorio Jose Fuentes-Zelaya and Dennis Alexander Barahona for conspiracy to commit wire fraud and tax fraud.[38] The U.S. Attorney's Office wrote in its press release:

> According to court documents, Fuentes-Zelaya and Barahona established shell companies that purported to be involved in the construction industry. They obtained workers' compensation insurance policies in the name of the shell companies to cover a minimal payroll for a few purported employees. They then "rented" the workers' compensation insurance to work crews who had obtained subcontracts with construction contractors on projects in various Florida counties. Fuentes-Zelaya and Barahona sent the contractors a certificate as "proof" that the work crews had workers' compensation insurance, as required by Florida law. By sending the certificate, the defendants falsely represented that the work crews worked for their companies. Over the course of the scheme, Fuentes-Zelaya and Barahona "rented" the certificates to hundreds of work crews.[39]

[30] *State of Minnesota v. Ricardo Ernesto Batres*, Court File No. 27-CR-18-24013, 3 (September 25, 2018).
[31] *Id.* at 3-5.
[32] *Id.* at 5.
[33] *Id.*
[34] *Id.* at 4.
[35] *Id.* at 6.
[36] *Id.*
[37] Press Release, Hennepin County Attorney, *Ricardo Batres pleads guilty to labor trafficking*, November 2019, available at, https://www.hennepinattorney.org/news/news/2019/November/batres-guilty-plea.
[38] *Two Men Plead Guilty*, *supra* note 15. Regrettably, there is no mention of any liability for the contractors that used the construction labor provided through this shell company, labor brokering scheme.
[39] *Id.*

The estimated wages that Fuentes-Zelaya and Barahona failed to report totaled $22,793,748, making the unpaid Medicare, Social Security and FUTA taxes $5,766,286.[40] Fuentes-Zelaya and Barahona told their workers' compensation carriers that their payroll ranged from $80,000 to $100,800. As a result, their premiums were far less than the estimated $3.6 million that should have been paid.[41]

In addition to the individual cases, research by economists and sociologists have demonstrated the severity of fraud in the construction industry. A recently completed study of construction-employer fraud nationally disclosed that up to 20.5 percent of construction workers who should be treated as employees are not.[42] Construction workers lose close to $1 billion of overtime and other premium pay annually.[43] Social Security and Medicare losses are $5.08 billion annually.[44] Approximately $717 million of unemployment contributions are not made, and workers' compensation carriers lose $2.03 billion in premiums. Federal income tax losses amount to $1.8 billion annually and state income tax losses are about $730 million.[45] Moreover, adding insult to injury, the scofflaws foist $3.48 billion of federal employment taxes they should pay onto the backs of workers and their families.[46]

The scope of the national losses is reflected in state studies as well. A report on the Tennessee construction industry found that up to 21 percent of the workforce was misclassified or paid off-the-books resulting in losses of $14 million to the state unemployment trust fund and $115.4 million in federal employment and income taxes.[47] Construction industry abuses in the upper Midwest cost the Wisconsin unemployment trust fund $5.7 million, Minnesota $12.8 million

[40] *Id.*
[41] *Id.*
[42] Russell Ormiston, Dale Belman and Mark Erlich, *An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry,* 3 (2020), available at https://stoptaxfraud.net/wp-content/uploads/2020/03/National-Carpenters-Study-Methodology-for-Wage-and-Tax-Fraud-Report-FINAL.pdf. This report is based upon 2017 data. A forthcoming report by The Century Foundation will update these numbers using 2021 data. An advance copy of the report shows that up to 19.3 percent of construction workers are paid off the books or misclassified as independent contractors. Lost federal and state taxes are up to $10 billion a year. Workers' compensation carriers lose $5 billion a year, and workers lose $1.9 billion in overtime pay. Law-breaking construction employers offload $5.1 billion of their employment tax obligations onto the backs of their workers' families. Throughout, the economists who wrote the report emphasize that their numbers are conservative and that the incidence of misclassification and off-the-books payments and its costs are likely higher.
[43] *Id* at 5.
[44] Ormiston, *supra* note 42 at 5, using mid-range numbers.
[45] *Id.*
[46] *Id.*
[47] William Canak and Randal Adams, *Misclassified Construction Employees in Tennessee*, Dr. William Canak and Dr. Randal Adams, pp. iv, v and vi (January 15, 2010), available at https://stoptaxfraud.net/wp-content/uploads/2018/11/TN-payroll-fraud-study-1-15-10.pdf.

and Illinois $23 million.[48] State income tax losses are, respectively, $8.3 million, $65 million and $59.9 million.[49] The unfairness of the injury is exacerbated by exploited construction workers in those states being paid 16 to 22 percent less than properly reported construction employees.[50] Researchers in California estimated the yearly losses from fraud in the construction industry to Social Security is $235 million, Medicare $55 million, federal unemployment contributions $12 million, state unemployment contributions $62 million, and $264 million in workers' compensation premiums.[51]

Law-abiding construction employers are not pleased with these circumstances. Because they follow the law, they and their employees are punished by losing work to the scofflaws. Matthew Townsend, a president of the Signatory Wall and Ceiling Contractors Alliance, testified in 2019 before the Workforce Protections Subcommittee of the House Education and Labor Committee:

> In my industry, misclassification is not about making tough calls applying complicated laws to ambiguous facts. Rather, it is a choice simply to disregard wage and hour laws, workers' compensation laws, unemployment insurance regulations, and other basic responsibilities of being an employer. This is done for the purpose of gaining an advantage against law-abiding competitors, realizing tremendous profits, and avoiding the financial risks that honest entrepreneurs must accept. Business owners using the misclassification model do not bear the risks of unanticipated overtime, bad planning, or poor execution. Instead, this racket transfers these risks onto workers and taxpayers.[52]

The harm from illegal and exploitative employment practices does not end there. It leads to poverty. This is vitally important given that a goal of the Biden administration through such laws

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[48]Nathaniel Goodell and Frank Manzo IV, The *Costs of Wage Theft and Payroll Fraud in the Construction Industries of Wisconsin, Minnesota, and Illinois: Impacts on Workers and Taxpayers*, p. i, 8,9, and 13-15. (January 14, 2021), available at https://midwestepi.files.wordpress.com/2020/10/mepi-ilepi-costs-of-payroll-fraud-in-wi-mn-il-final.pdf.

[49] *Id.*

[50] *Id.*

[51] Yvonne Yen Liu, Daniel Flaming and Patrick Burns, *Sinking Underground; The Growing Informal Economy in California Construction*, Economic Roundtable, 31 (2014), available at, https://economicrt.org/publication/sinking-underground.

[52] *Hearing on Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy: Before the Workforce Protections Subcommittee, House Education and Labor Committee, 116th Congress* (2019) (Statement of Matt Townsend, President of the Signatory Wall and Ceiling Contractors Alliance), 1, available at, https://edlabor.house.gov/imo/media/doc/TownsendTestimony092619.pdf. *See also*, Doug Burton, op-ed, *To help NC businesses, end the misclassification fraud*, The News & Observer, June 3, 2015 ("This fraud is a growing problem that harms workers, puts a strain on government resources and provides an unfair advantage when these unscrupulous employers compete with law-abiding businesses."), available at https://www.newsobserver.com/opinion/op-ed/article23037534.html.

as the IRA is creating good, middle-class jobs. The University of California Berkeley Labor Center issued a report in January 2022 on the number of construction worker families in the United States enrolled in social safety net programs—adult Medicaid, children's Medicaid, the Earned Income Tax Credit, Temporary Assistance for Needy Families, and the Supplemental Nutrition Assistance Program.[53] Shockingly, 3 million families, or *39 percent* of construction worker families, are enrolled in at least one social safety net program, costing state and federal taxpayers *$28 billion* a year.[54] Additionally, 31 percent of construction workers do not have health insurance compared to 10 percent of all workers.[55] The authors of the report attributed the high degree of reliance on public assistance to a number of factors. Chief among those were low pay, wage theft, misclassification as independent contractors, off-the-books payments, and "payroll fraud".[56]

The above discussion recounts cases and reports of serious tax fraud, insurance fraud, money laundering and labor trafficking in the construction industry. Clearly, overwhelmed enforcement agencies are not deterring the scofflaws. Therefore, it is fantasy to believe that serious violations will not occur on IRA projects. However, the IRS is not helpless. Robust enforcement plans, additional reporting and making it abundantly clear that taxpayers will be held responsible for all subcontractors' violations of PWA standards can prevent the chagrin of giving five-fold tax breaks to taxpayers on projects where basic employment-tax and labor-standards laws are violated.

III. The NPRM Should be Revised to Better Assist in Preventing Tax Fraud and Other Illegal Employment Practices on IRA Projects.

Because market conditions favor illegal employment practices, the NPRM, in keeping with sound tax administration, must discourage taxpayers from selecting scofflaw contractors and subcontractors and encourage taxpayers to police those that are chosen.

A. Taxpayers Must be Held Accountable for All Contractors and Subcontractors at Any Tier

The NPRM requires contractors and subcontractors of the taxpayer to abide by PWA conditions for the taxpayer to be eligible for the five-fold tax credit. For instance, §1.45-7(c)(1) of the proposed rule provides:

[53] Ken Jacobs, Kuichih Huang, Jenifer MacGillvary and Enrique Lopezlira, *The Public Cost of Low-Wage Jobs in the US Construction Industry,* UC Berkeley Labor Center (January 2022) ("Public Cost"); available at, https://laborcenter.berkeley.edu/the-public-cost-of-low-wage-jobs-in-the-us-construction-industry/.
[54] *Id.* at 1.
[55] *Id.*
[56] *Id.* at 1, 2-3 and 6.

> In general. If a taxpayer fails to ensure that all laborers and mechanics employed by the taxpayer or *any contractor or subcontractor* in the construction, alteration, or repair of a qualified facility are paid wages at rates not less than those set forth in the applicable wage determination(s), such taxpayer will be deemed to have satisfied the Prevailing Wage Requirements with respect to such facility for any year if the taxpayer makes the correction and penalty payments provided in paragraphs (c)(1)(i) and (ii) of this section.[57] (Emphasis added.)

Subsection (c)(1)(i) and (ii) explain the correction and penalty payments:

> (i)Correction payment. The taxpayer must pay *any* laborer or mechanic who was paid wages at a rate below the rate described in paragraph (b) of this ….[58] (Emphasis added.)
>
> (ii) Penalty payment. The taxpayer must pay a penalty equal to $5,000 multiplied by the total number of laborers and mechanics who were paid wages at a rate below the rate described in paragraph (b)….[59]

The use of the word "any" in §§1.45(c)(1) and (c)(1)(i) can indicate that taxpayers are responsible for all contractors and subcontractors at any tier. But this must be explicitly stated. It is very important to be clear that contractors are responsible at every tier of the contracting and subcontracting chain because the industry relies on the violations of lower-tier subcontractors to illegally reduce labor costs and provide a shield against liability. The NPRM's definitions of "contractor" in §1.45-7(d)(3) and "subcontractor" in §1.45-7(d)(8) can also support liability flowing to every tier of contractors and subcontractors, but again, it needs to be explicit:

> (3) Contractor. The term contractor means any person that enters into a contract with the taxpayer for the construction, alteration, or repair of a qualified facility.[60]
> …
> (8) Subcontractor. The term subcontractor means any contractor that agrees to perform or be responsible for the performance of any part of a contract entered into with the taxpayer (or the taxpayer's contractor) with respect to the construction, alteration, or repair of a facility.[61]

[57] NPRM *supra* note 2 at 60043.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 60046.
[61] *Id.* at 60047.

The need to be explicit is paramount, because the subcontractor definition in the NPRM comes from the definition of that term in the revised Davis-Bacon rule at §5.2 with one very important exception—the Davis-Bacon definition includes lower-tier subcontractors:

> Subcontractor. The term ''subcontractor'' means any contractor that agrees to perform or be responsible for the performance of any part of a contract that is subject wholly or in part to the labor standards provisions of any of the laws referenced in § 5.1. *The term subcontractor includes subcontractors of any tier*.[62] [Emphasis added.]

It must be noted that the definition in the revised Davis-Bacon rule includes "any," but the DOL still recognized the necessity of adding "subcontractors of any tier." Also notable is the responsibility of prime or upper-tier contractors in §5.5(a)(6) for the non-compliance of lower-tier subcontractors is clearly stated:

> The prime contractor is responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in this section. In the event of any violations of these clauses, the prime contractor and any subcontractor(s) responsible will be liable for any unpaid wages and monetary relief, including interest from the date of the underpayment or loss, *due to any workers of lower-tier subcontractors*, and may be subject to debarment, as appropriate.[63] [Emphasis added.]

Additionally, the term "contract" in §5.2 of the final Davis-Bacon rule specifically includes "any subcontract at any tier."[64] Indeed, a search of the word "tier" reveals that the word appears ninety-nine times in the final Davis-Bacon rule's preamble and text.

In contrast, the word "tier" is completely absent in the NPRM. Courts will notice this difference between the language in the final Davis-Bacon rule and the NPRM, and it is likely to result in interpretating the absence of any reference to lower-tier subcontractors as signifying an intent to relieve taxpayers from responsibility for the failures of those subcontractors. The risk of such an interpretation of the proposed rule is not merely speculative and it must be foreclosed.[65] Fortunately, it is not hard to address.

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[62] See, 88 Fed. Reg. 57734 (August 23, 2023).
[63] *Id.* at 57737-38.
[64] *Id.* at 57732.
[65] *See, e.g., Russello v. U.S.*, 464 U.S. 16, 23, 104 S.Ct. 296 (1983) (An issue in the case was the construction of the word "interest" in the RICO Act. '"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."' (Citations omitted.) "We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We should not presume to ascribe this difference to a simple mistake in draftsmanship.")

The UBC emphasizes the need to address the issue upfront by adopting the language in italics in §1.45-7(c)(1) of the NPRM:

> In general. If a taxpayer fails to ensure that all laborers and mechanics employed by the taxpayer or any contractor or subcontractor *at any tier* in the construction, alteration, or repair of a qualified facility are paid wages at rates not less than those set forth in the applicable wage determination(s), such taxpayer will be deemed to have satisfied the Prevailing Wage Requirements with respect to such facility for any year if the taxpayer makes the correction and penalty payments provided in paragraphs (c)(1)(i) and (ii) of this section.[66]

The definition of "subcontractor" in §1.45-7(d)(8) also needs to be amended by fully adopting the language in the Davis-Bacon rule as provided for in the italicized language below:

> Subcontractor. The term subcontractor means any contractor that agrees to perform or be responsible for the performance of any part of a contract entered into with the taxpayer (or the taxpayer's contractor) with respect to the construction, alteration, or repair of a facility. *The term subcontractor includes subcontractors of any tier.*

In addition, the NPRM should include an example that reaches down to lower tiers of subcontractors in the prevailing wage and apprentice standards sections of the NPRM. For instance, the proposed rule should include an example in which the taxpayer hires contractor A who subcontracts to B who subcontracts with C who, in turn, subcontracts with D and E to supply labor to subcontractor B. Such arrangements are not uncommon for contractors seeking to illegally lower labor costs by putting multiple layers of subcontractors between themselves and accountability.

An additional benefit of pinpointing the liability of taxpayers for the failures of lower-tier subcontractors by including clear definitions and examples is that taxpayers will be on notice simply by reading the rule. This will improve deterrence. Failure to make these changes means any final rule is validating and rewarding the labor-broker fraud model. This would be especially alarming and disappointing given the recent FinCEN/IRS Notice to U.S. financial institutions highlighting the threat this business model poses to the integrity of the U.S. financial system and the harm it is doing to the administration of federal, state, and local employment taxes, as well as workers' compensation systems.[67]

[66] NPRM *supra* note 2 at 60043.
[67] *See*, FinCEN/IRS Notice, *supra* note 6.

Making the UBC's suggested revisions to align any final rule with the recently revised Davis-Bacon regulations will make these regulations clearer and incentivize taxpayers to police every level of contractors and subcontractors to avoid the risk of losing the maximum tax credit if back wages and interest are not paid and the absurdity of giving a tax credit for an IRA project where federal and state tax laws were violated.[68]

B. The Elements of "Intentional Disregard" Should Include Additional Factors to Discourage Taxpayers from Selecting Scofflaws and Incentivize Proper Oversight

The NPRM imposes a correction payment of triple back wages and a $10,000 penalty per worker for intentional disregard of the prevailing wage requirements.[69] A non-exhaustive list of factors is provided for determining intentional disregard. The IRS seeks comment on those factors.[70] While factors are not limited to those enumerated, the explicit inclusion of additional factors will alert taxpayers, contractors and subcontractors, thus further encouraging the use of law-abiding contractors and policing.

1. The Pattern-of-Conduct Factor Needs to Apply to Non-IRA Projects and Violations Other than Prevailing Wage

The pattern-of-conduct factor in §1.45-7(c)(3)(iii)(A) is described as follows:

> Whether the failure was part of a pattern of conduct that includes repeated or systemic failures to ensure that the laborers and mechanics were paid wages at or above the applicable prevailing wage rate….[71]

The factor lacks clarity and thus can be interpreted as only applying to taxpayers on IRA projects who on multiple occasions have not paid prevailing wages. Accordingly, a taxpayer can subcontract to a business that on non-IRA projects paid workers off-the-books and failed to pay overtime without that behavior counting as a "pattern of conduct" factor as long as that subcontractor had previously been paying workers on the IRA project at or above the prevailing wage. Also, the language needs to recognize that many scofflaws use shell identities or identities that they change, especially following an investigation by law-enforcement, labor agencies, or workers' compensation insurers. The UBC proposes that the language in §1.45-7(c)(3)(iii)(A) be replaced with the following:

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[68] NPRM *supra* note 2 60043.
[69] *Id.* at 60044.
[70] *Id.* at 60028.
[71] *Id.* at 60044.

Whether the failure was part of a pattern of conduct by the taxpayer, any contractor or subcontractor, or any principal or chief operating officer of any contractor or subcontractor, that includes repeated or systemic failures to ensure that the laborers and mechanics were paid wages at or above prevailing wages, properly classify workers as employees and abide by federal, state and tribal employment tax, antidiscrimination, safety, wage and hour, workers' compensation and premium payment and other workplace standard laws within the past three years.

2. The Collection of and Access to Certified Payrolls Should be an Additional Factor

The NPRM plainly states that it chose not to require the use of certified payrolls.[72] The UBC disagrees with this position. Consistent with the UBC's November 4, 2022, comments, we propose the IRS should require use of the DOL's WH-347 form or an equivalent certified payroll form developed by the IRS.[73] The collection of weekly certified payrolls can be used as a tool by taxpayers to police contractors and subcontractors. Moreover, access to certified payrolls by the public is justified given the extensive taxpayer-funded benefits that are provided, public interest in the IRA program, and the Presidential priority embodied in Executive Order 14052 "Implementation of the Infrastructure Investment and Jobs Act" (November 15, 2021) of ensuring that the IRA is implemented to "improv[e] job opportunities for millions of Americans by focusing on high labor standards for these jobs, including prevailing wages." Certified payrolls will facilitate discovery of violations of PWA standards consistent with the priority the President has placed on proper payment of prevailing wages on IRA projects.[74] Accordingly, the UBC recommends that the following additional factor be added to §1.45-7(c)(3)(iii):

Whether the taxpayer required and collected weekly certified payrolls from contractors and subcontractors and made the certified payrolls accessible for viewing and copying to the Internal Revenue Service other federal, state, local and tribal law enforcement agencies and the general public.

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[72] *Id.* at 60035.

[73] The UBC in its November 4, 2022, comments had explained that while a taxpayer need not be required to submit the equivalent of WH-347 forms with its returns, Treasury should require eligible taxpayers to submit some reasonable level of summary substantiation to the IRS attesting to and demonstrating compliance with these important requirements. As the UBC recommended in its prior comments, the Department of the Treasury should also impose a requirement that a taxpayer provide a supporting schedule with the return that claims the enhanced credit that summarizes the relevant wage and hour information. Douglas J. McCarron, *Internal Revenue Service Notice 2022-51*, 3 and 6 (November 4, 2022) ("2022 Comments").

[74] *Implementation of the Infrastructure Investment and Jobs Act*, 86 Fed. Reg. 64335 (November 18 2021) ("Executive Order 14052").

3. Adding Retaliation to the Factors Will Provide Workers with Additional Protection

Scofflaw employers commonly retaliate against workers for complaining about workplace conditions or assisting with investigations. Whether the taxpayer had in place a complaint procedure with anti-retaliation protections is a factor in §1.45-7(c)(3)(H) weighing against intentional disregard.[75] In an industry that is rife with abuse, pro-forma procedures must be discouraged. Also, surprisingly, this factor does not appear at all in the subsection on intentional disregard of IRA apprenticeship standards.[76] Nor does the language require complaint procedures for violations of employment tax and other workplace laws. As we have been discussing, it is difficult to accept that certain taxpayers can receive a substantial IRA tax break despite workers not being properly classified as employees and therefore not receiving overtime pay, protection against discrimination, workers' compensation and other benefits that come with employee status. Accordingly, the UBC recommends adding the following language in italics to §1.45-7(c)(3)(iii)(H):

> Whether the taxpayer had in place procedures whereby laborers and mechanics could report suspected failures to pay prevailing wages and/or suspected failures to classify workers in accordance with the wage determination of workers *or other employment tax or workplace standards laws* to appropriate personnel departments or managers without retaliation or adverse action, *and there has been no retaliation or adverse action*.

We also recommend that the following italicized text be added as a factor to the intentional disregard of apprenticeship standards in §1.45-8(e)(2)(ii):

> Whether the taxpayer had in place procedures whereby laborers and mechanics could report failures or suspected failures or apprenticeship standards *or other employment tax or workplace standards laws* to appropriate personnel departments or managers without retaliation or adverse action, *and there has been no retaliation or adverse action*.

4. The Use of Debarred Contractors Needs to be Discouraged

The DOL, states, and some municipalities debar contractors from working on publicly funded projects for serious violations of prevailing-wage requirements.[77] It should be anticipated that such debarred contractors will also violate prevailing-wage standards on IRA projects. Accordingly, the following language should be added to §1.45-7(c)(3)(iii):

[75] NPRM *supra* note 2 at 60044.
[76] *Id.* at 60047.
[77] *See,* 29 C.F.R §5.12 regarding debarment for violations of the Davis-Bacon Act.

Whether the laborers or mechanics paid less than the required prevailing wages worked for a contractor or subcontractor that at the time the work was performed was debarred by a municipality, state, or the U.S. Department of Labor for violations related to non-payment of local, state, or federal prevailing wages.

5. The Use of Subcontract Labor Providers Also Needs to be Explicitly Discouraged

As described above and in FinCEN/IRS Notice, labor brokers and shell companies are an integral element of the successful fraud scheme used by contractors and subcontractors to underbid law abiding competitors and protect themselves against accountability for violations of our most basic labor standards, employment-tax, and workers compensation laws. It is no longer credible for a taxpayer to claim ignorance of the harms caused by this business model. We therefore suggest including the following additional factor:

Whether the laborers or mechanics were paid less than the required prevailing wages worked for a subcontracted labor provider.

C. Weekly Certified Payrolls and Records of Complaints Need to be Required to Ensure Timely Compliance with PWA Standards

Section 1.45-12 (b), (c) and (d) contain the record keeping requirements to demonstrate compliance with PWA standards. As discussed above, weekly certified payroll forms are not required by the NPRM. The UBC believes that requiring weekly certified payrolls and making them available to the public can deter violations and assist investigations. This is a process that is familiar to contractors and subcontractors who work on federal and state projects where prevailing wages are required. Additionally, records on correction payments are required but there is no requirement for revealing complaints prompting correction payments. There may very well be complaints from workers that were conveniently ignored. Revealing such complaints is important because under the IRA taxpayers can request the five-fold credit long after the workers and contractors finish a project. Accordingly, the UBC recommends adding the language in italics to §1.45-12(b):

(i) Recordkeeping for prevailing wage and apprenticeship requirements. With respect to each qualified facility for which a taxpayer is claiming or transferring (under section 6418) an increased credit under section 45(b)(6)(A), unless section 45(b)(6)(B)(i) or 45(b) (6)(B)(ii) applies, the taxpayer must maintain and preserve records sufficient to demonstrate compliance with the applicable prevailing wage and apprenticeship

requirements in §§ 1.45–7 and 1.45–8, respectively. At a minimum, those records include *weekly certified payrolls (on a form required by the Internal Revenue Service)*, payroll records for each laborer and mechanic (including each qualified apprentice) employed by the taxpayer, contractor, or subcontractor in the construction, alteration, or repair of the qualified facility.

(ii) Certified payroll forms submitted by the taxpayer, contractor, or subcontractor shall be made available to the Internal Revenue Service and other federal, state, local and tribal agencies and the general public for viewing and copying within ten business days of a request with only Social Security numbers redacted from the forms made available to the general public.

(iii) Complaints from workers or third parties alleging violations of PWA standards, and the outcome of investigations must be retained.

D. The Rebuttable Presumption of No Intentional Disregard Needs a Time Limit

Section §1.45-7(c)(3)(iv) provides:

> Rebuttable presumption of no intentional disregard. If a taxpayer makes the correction and penalty payments required by paragraphs (c) (1)(i) and (ii) of this section *before receiving notice of an examination from the IRS* with respect to a claim for the increased credit under section 45(b)(6), the taxpayer will be presumed not to have intentionally disregarded the Prevailing Wage Requirements in paragraph (a) of this section.[78] [Emphasis added.]

An intent of the rebuttable presumption is to encourage timely back pay to workers.[79] But the intent of the language is undermined by the nature of the industry and IRS procedures. A notice of examination can come years after a contractor or subcontractor and their workers have moved along to the next project or employers. Meanwhile, the taxpayer will be enjoying the benefits of the five-fold tax credit while workers have been short-changed. Moreover, the rebuttable presumption language as currently crafted conflicts with and discourages the prompt correction of underpayments that is emphasized by §1.45-7(c)(3)(iii)(D):

> Whether the taxpayer promptly cured any failures to ensure that laborers and mechanics were paid wages not less than the applicable prevailing rates….[80]

[78] NPRM *supra* note 2 at 60044.
[79] *Id.* at 60028.
[80] *Id.* at 60044.

To cure the conflict and support timely payment of back wages, the UBC recommends adding the following language in italics to §1.45-7(c)(3)(iv):

> Rebuttable presumption of no intentional disregard. If a taxpayer makes the correction and penalty payments required by paragraphs (c) (1)(i) and (ii) of this section *within one year of the date of the beginning of the failure to pay prevailing wages to an affected laborer or mechanic or* before receiving notice of an examination from the IRS*, whichever comes sooner*, with respect to a claim for the increased credit under section 45(b)(6), the taxpayer will be presumed not to have intentionally disregarded the Prevailing Wage Requirements in paragraph (a) of this section.

IV. The NPRM Lacks Sufficient Information on Enforcement Procedures

There is no procedure in the NPRM outlining how or to whom at the IRS workers or other stakeholders can direct complaints of violations of PWA standards or employment tax laws on IRA projects. Hints can be gathered from the rebuttable presumption and anti-retaliation language. A taxpayer that makes correction and penalty payments "before notice of an examination from the IRS" is presumed to not have acted with intentional disregard.[81] As described earlier, taxpayers can avoid a finding of intentional disregard if they have put into place complaint procedures, presumably with the taxpayer, that protect workers from "retaliation or adverse action."[82] These look a lot like what exists now and is failing to roll back the industry's flagrant violations of basic employment-tax and labor-standards laws that are embedded in the labor-broker fraud scheme. Currently, the scofflaws in the industry have little fear of IRS scrutiny and sanctions because they believe that they have constructed a model that successfully insulates them from any meaningful accountability. As we have detailed above, without changes, the NPRM fails to create strong incentives to abide by the law and creates the very real possibility that taxpayers will get the maximum tax credits even if their contractors and subcontractors violate the law and PWA standards using the fraud schemes outlined in these comments and FinCEN/IRS Notice.

The UBC urges the IRS to develop and inform stakeholders and the public on complaint and enforcement procedures. The IRS will need to have in place within its examination division sufficient staff that is properly trained on employment-tax fraud schemes in the construction industry. Staff will also need to be familiar with the availability of Q and T visas and the Department of Homeland Security's deferred action program for undocumented immigrant workers who have complaints or can assist investigations. Such staff should also be prepared to make criminal referrals to the IRS Criminal Investigation Division as well as other federal and

[81] *Id*.
[82] *Id.*

state criminal and civil enforcement agencies as appropriate. Such other enforcement agencies should include the DOL's Wage and Hour Division, Employment and Training Administration, and Occupational Safety and Health Administration, and state workers' compensation, employment standards, revenue and employment security divisions. Contact information for the IRS office that will accept and investigate complaints should also be made available to the general public on an IRS website as well as a form on the website for complaints.

Additionally, the IRS should develop a notice for posting on IRA construction sites, in English and Spanish, summarizing PWA standards, the right to be properly classified as an employee and the availability of protection for workers who come forward with complaints, including immigrant workers, from adverse actions by their employer, or the Department of Homeland Security and contact information for filing complaints. The NPRM should be amended by adding the following language to is intentional-disregard factors in §1.45-7(c)(3)(iii):

> Whether the taxpayer posted in a prominent place at the facility or otherwise provided the notice to laborers and mechanics during the construction, the notice developed by the Internal Revenue Service summarizing PWA standards, the right to be properly classified as an employee, the availability of protection for workers filing complaints and for immigrant workers to be free from retaliation related to their immigration status, and contact information of the office within the IRS to file a complaint.

This proposed amendment will provide workers with needed information to file and give notice to taxpayers, contractors, and subcontractors that there is going to be timely investigations of complaints during construction and not until some undetermined point in the future after a tax credit is claimed on a return.

V. A Detailed Schedule Needs to be Filed by Taxpayers to Secure the Tax Credit

In our 2022 Comments we recommended that the IRS require a taxpayer to file a schedule with its tax return seeking an enhanced credit.[83] For its part, §1.45-12 (a) of the proposed rule does require the IRS to develop a schedule and instructions for claiming the enhanced tax credit.[84] Such a schedule should be sufficiently detailed to have enforcement utility. The completion and filing of a detailed schedule will further deter violations of PWA standards and supply relevant information for IRS examiners.

[83] 2022 Comments, *supra* note 73.
[84] NPRM *supra* note 2 at 60051.

VI. The Good Faith Effort Exception for Requesting Apprentices Needs to Reflect How Employers Signatory to Collective Bargaining Agreements Request Apprentices

The NPRM in §1.45-8(e)(1)(i)(A) and (B) provide that taxpayers who have not hired apprentices but have made a good faith effort to do so will not be penalized for failing to abide by IRA apprenticeship requirements:

> (1) Good Faith Effort Exception—(i) In general. A taxpayer is deemed to have satisfied the Apprenticeship Requirements of this section with respect to a request for qualified apprentices if the taxpayer meets the following requirements:
>
> (A) Request for apprentices. The taxpayer, contractor, or subcontractor *must submit a written request for qualified apprentices to at least one registered apprenticeship program*…. (Emphasis added.)
>
> (B)Denial of request. If a taxpayer, contractor, or subcontractor submits a request in accordance with paragraph (e)(1)(i)(A) of this section and the request is denied, the taxpayer will be deemed to satisfy the requirements of section 45(b)(8)(A) through (C), *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.*[85] (Emphasis added.)

The UBC supports this qualified exception. We must, however, note that the above language requires the request to be made to a "registered apprenticeship program." Many employers signatory to collective-bargaining agreements with building trades labor unions request apprentices from the labor union and not the apprenticeship program. The labor union will have an "out-of-work" list that will contain registered apprentices who will then be dispatched to the employer's job site. This procedure has been in place for decades. To align with and recognize this well-established practice, the UBC recommends amending §1.45-8(e)(1)(i)(A) by adding the following language in italics:

> Request for apprentices. The taxpayer, contractor, or subcontractor must submit a written request for qualified apprentices to at least one registered apprenticeship program *or a labor organization with which it has a collective-bargaining agreement and dispatches apprentices enrolled in a registered apprenticeship program*….

[85] *Id.* at 60048.

Any additional amendments in NPRM should be made that are needed to conform with the UBC's proposed amendment.

VII. The UBC Supports Provisions of the NPRM that Buttress Compliance with PWA Standards

The NPRM smartly recognizes and forestalls many of the means deceitful taxpayers may employ to evade PWA requirements.

A. The UBC Supports the NPRM's Language Encouraging Project Labor Agreements

The NPRM requires taxpayers to pay penalties when correcting failures to abide by PWA standards.[86] The penalty is waived where the worker is employed under the terms of a project labor agreement "with one or more labor organizations."[87] Such a waiver is justified, because there will be fewer failures to abide by PWA standards because of labor organization oversight, and if there are failures, timely corrections will be realized through grievance and other dispute resolution procedures. Moreover, no strike clauses and access to a skilled and trained local workforce will lead to labor stability and more efficient construction.

Project labor agreements also support the use of apprentices. The UBC and other building trades unions have been at the forefront of training the construction workforce and administering, with signatory employers, registered apprenticeship programs.[88]

The UBC supports the waiving of the correction penalty where a project labor agreement is in place.

B. The NPRM is Correct Not to Require Employment Status for Payment of Prevailing Wages

As discussed in the opening sections of this comment, a common illegal practice in the construction industry is denying employees wage and other employment protections by misclassifying them as independent contractors or paying them off-the-books. The NPRM meets this issue head-on in its definition of "employed:"

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[86] *Id.* at 60043 and 60049.
[87] *Id.* at 60045 and 60050.
[88] *See*, Maria Figueroa, Jeff Grabelsky and Ryan Lamare, *Community Workforce Provisions in Project Labor Agreements: A Tool for Building Middle-Class Careers*, Cornell University ILR School (2011), available at https://ecommons.cornell.edu/server/api/core/bitstreams/1a101122-d936-4450-8e98-5174f2678616/content.

> The term *employed* means performing the duties of a laborer or mechanic for the taxpayer, contractor, or subcontractors (as applicable), regardless of whether the individual would be characterized as an employee or an independent contractor for other Federal tax purposes.[89]

The application of prevailing wages in the NPRM to all workers, even if they are non-employees, aligns with the Davis-Bacon Act.[90] This is consistent with sound tax administration, because it will remove an incentive to evade IRA prevailing wage standards by misclassifying employees as independent contractors or paying them off-the-books. Accordingly, the UBC supports the definition of "employed" in the NPRM.

C. The NPRM Correctly Requires Taxpayers to Have an Agreement with a Registered Apprenticeship Program Where the Program Requires One

As discussed above, the NPRM will excuse a taxpayer's failure to hire apprentices if its request is denied.[91] A duplicitous taxpayer can attempt to benefit from this exception by simply contacting an apprenticeship program with whom it has no relationship. The NPRM wisely blocks such cynical attempts by discounting requests to registered apprenticeship programs when the taxpayer has no contractual relationship and where having a contract is required by the program.[92] Indeed, the NPRM reinforces this in an example:

> *Example 3.* Contractor D submits a request to a registered apprenticeship program. The registered apprenticeship program requires contractors to enter into an agreement to partner with that registered apprenticeship program. Contractor D refuses to enter into the agreement and as a result, the registered apprenticeship program denies the Contractor D's request. Contractor D's request would not qualify for the Good Faith Effort Exception of this section because Contractor D refused to comply with the established standards of the registered apprenticeship program.[93]

The UBC supports the NPRM's recognition and support of registered apprenticeship programs that require agreements with employers. We do, though, want to alert the IRS that not all employers who are signatory to collective-bargaining agreements with labor organizations, and hire apprentices, directly contract with an apprenticeship program. Agreements with programs may be effectuated through clauses in collective-bargaining agreements. An example is this provision in the carpenters' agreement covering the forty-six counties of northern California:

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[89] NPRM *supra* note 2 at 60046.
[90] *Id.* at 60023.
[91] *Id.*
[92] *Id.* at 60030-31 and 60048.
[93] *Id.* at 60048.

> Each individual employer covered by this Agreement shall contribute to the Carpenters Training Trust for Northern California the amount listed in Section 39 (Wage Rates) for each hour worked by each employee covered by this Agreement for the purpose of providing training and education benefits for such employees.
>
> *Such contributing individual employer agrees to be bound by that certain Trust Agreement* establishing the Fund dated March 4, 1963, as such has been or may from time to time be amended or supplemented.[94] (Emphasis added.)

The UBC interprets the NPRM's language as encompassing this common practice. If our understanding is incorrect, we urge that the NPRM be appropriately amended.

D. The Requirement to Collect Detailed Worker Contact Information is Necessary

Recordkeeping requirements in the NPRM include retaining identifying information:

> for each laborer and mechanic (including each qualified apprentice) employed by the taxpayer, a contractor or subcontractor…including the name, social security or tax identification number, address, telephone number, and email address…."[95]

Construction jobs end, and contractors and workers move on to the next project. Given that the payment of prevailing wages under the proposed rule is not binding until the taxpayer files to claim the credit,[96] compliance examinations may not occur until long after the work is completed and the contractors and workers have moved on, making investigations and payment of owed wages more difficult. Thus, the UBC supports this recordkeeping requirement because having this detailed information will facilitate worker contact for compliance investigations and distribution of back wages.

E. Eligible Taxpayers Who Determine the Credit, and Not Transferee Taxpayers, Should be Responsible for Cures and Penalties for Failing to Abide by PWA Standards

[94] *Carpenters Master Agreement for Northern California between Construction Employers' Association of California (CEA), NC Contractors Association (NCCA), Millwright Employers Association (MEA), Associated Cabinet Manufacturers (ACM) and Carpenters 46 Northern California Counties Conference Board of the United Brotherhood of Carpenters and Joiners of America*, 29 (July 1, 2022).
[95] NPRM *supra* note 2 at 60051.
[96] *Id.* at 60022 and 60043.

As set forth in proposed §§ 1.45-7(c)(1)(iv) and 1.45-8(e)(2)(iv), the IRA's correction and penalty obligations remain with the eligible taxpayer that determined the credit, and not extend to the transferee taxpayer. The IRS requests comments on the application of the prevailing wage penalty and cure provisions in the context of transferred credits.[97]

The UBC is in favor of the curing provisions and penalties remaining with the original, eligible taxpayer and not flowing to the transferee taxpayer. The eligible taxpayer is the entity that is best situated to ensure that IRA prevailing wage and apprenticeship standards are fulfilled on its project. The correction and penalty provisions provide a strong incentive for the eligible taxpayer to comply with these important IRA requirements. Further, the transferee taxpayer is in a comparatively poor position to ensure the eligible taxpayer's compliance. Additionally, if the penalty and cure provisions were transferred by regulation to the transferee taxpayer, the transferee taxpayer would be assuming a significant financial liability in the event the eligible taxpayer were to fail to comply, without any readily available way to ensure the eligible taxpayer's compliance. This risk would unduly chill the market for transfer of the credits, defeating the IRA's intent that eligible taxpayers receive a benefit from the IRA's incentive provisions, even if the eligible taxpayer is not able to itself derive any direct benefit from an enhanced tax credit.

VIII. Other Provisions of the NPRM Supported by the UBC

A. There Should be no TVA or Tribal Exceptions

The NPRM does not include an exception for Tennessee Valley Authority (TVA) or tribal projects, because the IRA statute "does not reflect any intent to include exception from the PWA requirements, other than the One Megawatt Exception and the BOC Exception"[98] Comment is requested on this decision.

The UBC supports the NPRM not including a TVA or tribal exception. Not having such an exception supports the goal of the IRA to encourage the development of clean energy facilities while creating good jobs and ensuring the payment of prevailing wages as outline in Executive Order 14052. Having an exception will deny citizens who are supplied electricity from the TVA or facilities on tribal land the employment and equity benefits the IRA is supposed to ensure in the creation and distribution of clean energy.[99]

B. The Apprenticeship Ratio Requirement Aligns with Industry Custom

[97] *Id.* at 60023.
[98] *Id.* at 60022.
[99] Additionally, for its part, the TVA has a long and successful partnership with America's building and construction trade unions. *TVA Announces Historic Extension of Labor Agreement*, Tenn. Valley Authority, available at https://www.tva.com/newsroom/press-releases/tva-announces-historic-extension-of-labor-agreement.

For purposes of the ratio requirement, the proposed regulations would adopt the DOL definition of journeyworker in 29 C.F.R. §29.2, which defines a journeyworker as a laborer or mechanic who has attained a level of skill, abilities and competencies recognized within an industry required for the occupation.[100] A mentor, technician, specialist, or other skilled individual who has documented sufficient skills and knowledge of an occupation, either through formal apprenticeship, training or through practical on-the-job experience may also be a journeyworker. The IRS requests comments on the application of the ratio requirement for purposes of satisfying the apprenticeship requirement.

UBC supports the proposed rule's implementation of the ratio requirement, including the daily evaluation requirement, because it is consistent with industry custom.

C. The Supplemental Wage Determination Process Correctly Recognizes the Possibility for Needing Additional Determinations After Construction Begins

The NPRM recognizes in §1.45-7(b)(3)(ii) that taxpayers may not reasonably discover until after construction, alteration, or repair begins that a supplemental wage determination or request for a prevailing wage rate for an additional classification is necessary.[101] Together, §1.45-7(b)(3)(ii) and (5) provide that when a supplemental wage determination or a prevailing wage rate for an additional classification is issued by the DOL after construction, alteration, or repair of the facility has begun, the rate would apply retroactively to the date that the work began that is the subject of the request.

UBC supports the supplemental wage determination process proposed in §1.45-7(b)(3) because it reflects the reality that employers may not know of the need for an additional determination until after work has begun, and it is therefore proper for the supplemental determination to apply retroactively.

IX. Conclusion: The Proposed Rule Needs to do More to Prevent Employment-Tax Fraud and Worker Abuse

The UBC supports the goals of the IRA to incentivize the construction of renewable energy facilities through an enhanced tax credit that supports good-paying, jobs and the payment of prevailing wages and the utilization of apprentices to advance equity, as set forth in Executive Order 14052. But this effort must be recognized as occurring in the context of a construction industry that has adopted a lucrative and successful labor-broker fraud scheme that, to date, law

[100] NPRM *supra* note 2 at 60030.
[101] *Id* at 60025 and 60041.

enforcement has not been able to curtail and that FinCEN and the IRS have acknowledged poses a material threat to the nation's employment tax and workers compensations systems.[102]

We opened these comments with a description of a labor broker offering to work with an affiliated union by referring from its stable of 6,000 construction workers individuals to be employed as "independent contractors" by employers building a battery manufacturing facility. The union declined the offer, but it is likely that the labor broker has moved on, making similar offers to contractors and will eventually find a willing partner. Regrettably, this incident demonstrates that it is an exercise in self-deception to believe IRA projects will be an exception to the alarming trend of abuse in our industry.

The NPRM has many favorable provisions that the UBC supports as noted herein, but we respectfully urge the adoption of our recommended revisions to the NPRM to prevent the absurdity of five-fold tax credits being granted for the construction of qualified clean-energy facilities rife with worker abuse and employment-tax fraud. Sound tax administration, Administration policy, as embodied in Executive Order 14052, and regard for the integrity of the nation's employment tax and workers compensation systems, as outlined in the FinCEN/IRS Notice, compel the IRS to prevent this from occurring.

Respectfully submitted,

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[102] FinCEN/IRS Notice, *supra* note 6.