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Submitted Electronically and by Email

Internal Revenue Service
CC:PA:LPD:PR (REG-101607-23)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, D.C. 20044

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, D.C. 20220

Mr. William M. Paul
Principal Deputy Chief Counsel and
Deputy Chief Counsel (Technical)
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C. 20224

RE: Request to Speak & Outline (REG-100908-23)

Dear Madam Secretary and Mr. Paul:

This letter is submitted in response to the notice of proposed rulemaking and notice of public hearing for the "Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements," 88 Fed. Reg. 60018 (August 30, 2023). I would be pleased to have the opporunity and request to speak at the public hearing on the proposed rulemaking scheduled for November 21, 2023. The topics on which I would like to be recognized to speak are set forth in the attached outline – as directed by the notice. I will be speaking on my own behalf as an experienced attorney who practices in the area of renewable energy tax credits.

Best Regards,

Timothy L. Jacobs

Prevailing Wage and Apprenticeship Requirements
Public Hearing – Outline

I. Scope of Apprenticeship Requirements Post-Construction.

A. Issue: With respect to the prevailing wage requirements, § 45(b)(7)(A)(i) and (ii) separate "construction" prior to the placed-in-service date of the qualified facility from "alteration or repair of such facility" during the 10-year PTC period. With respect to the apprenticeship requirements, § 45(b)(8) states that "[t]he requirements described in this paragraph with respect to the construction of any qualified facility are as follows ..." and repeats the same "with respect to the construction" language throughout the specific apprenticeship requirements and exceptions. The proposed regulations repeat the statutory language but fail to address whether the apprenticeship requirements apply to the 10-year PTC period, or are otherwise limited to "construction" through the placed-in-service date of the facility.

B. Requested Clarification: The Guidance should clarify that the apprenticeship requirement applies only "with respect to the construction" of the qualified facility and is not applicable after the qualified facility is placed in service. This is consistent with the statutory language in § 45(b)(8) and the corresponding prevailing wage and apprenticeship ("PWA") provisions with respect to other tax credits in the IRA.

II. Meaning of the Terms "Alteration" and "Repair".

A. Issue: Prop. Reg. § 1.45-7(d)(2)(ii) provides that the term "construction, alteration, or repair"

> does not include work that is ordinary and regular in nature that is designed to maintain and preserve existing functionalities of a facility after it is placed in service. Work designed to maintain and preserve functionality of a facility after it is placed in service includes basic maintenance such as regular inspections of the facility, regular cleaning and janitorial work, replacing materials with limited lifespans such as filters and light bulbs, and the calibration of any equipment. However, such work that occurs before the facility is placed in service may constitute construction for which prevailing wages must be paid in order to claim the increased credit. Maintenance does not include work that improves a facility, adapts it for a different use, or restores functionality as a result of inoperability.

An example accompanying this regulation provides an illustration of this rule with respect to a solar farm. It states that "[a]fter the solar farm is placed in

service, an inverter malfunctions and requires a replacement part. T employs laborers and mechanics to replace the malfunctioning part to restore the inverter's functionality. The replacement work is not considered ordinary maintenance," and thus the prevailing wage rules apply. Prop. Reg. § 1.45-7(d)(2)(iii), *Example*. The replacement of a part in an inverter may be viewed as a regular occurrence at a solar farm, and the Example may suggest a broader application of the alteration or repair rules than originally anticipated. In addition, the application of the apprenticeship requirements to alteration or repair work after the placed-in-service date could be problematic and overly burdensome. *See* Marie Sapirie, *Apprentices and Emergency Repairs*, Doc. 2023-27053, 180 Tax Notes Federal 2218, Sept. 25, 2023, at 2219.

B. Requested Clarification: The Guidance should recognize that basic maintenance, routine maintenance, and standard O&M work is outside of the coverage of the PWA requirements, and clarify that standard replacements of equipment and parts, and minor or incidental repair work, should not be treated as "construction, alteration, or repair" under the PWA requirements. Treasury and the IRS should provide additional examples of basic maintenance and limit the scope of repair work to extended work and major replacements that are not regular and customary at a wind and solar farm or other clean energy project.

III. PWA Recordkeeping Requirements:

A. Issue: The PWA recordkeeping requirements provide that the taxpayer is solely responsible for ensuring that all of the PWA requirements are satisfied, including that the taxpayer maintain and preserve all relevant records. The Proposed Regulations continue that "[a]t a minimum, those records include 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. *Id.*

In addition to the aforementioned payroll records, the Proposed Regulations provide a list of other information that the taxpayer may need to maintain in order to demonstrate compliance, including (a) identifying information, including the name, social security or tax identification number, address, telephone number, and email address for each laborer and mechanic employed by the taxpayer, a contractor, or subcontractor, (b) hourly rate(s) of wages paid (including rates of contributions or costs for bona fide fringe benefits or cash equivalents thereof) for each applicable labor classification, and (c) fringe benefit contributions made on behalf of a laborer or mechanic. Prop. Reg. § 1.45-12(c).

Finally, in the case of an elective transfer, the eligible taxpayer must provide "minimum required documentation" to the transferee taxpayer, which is inclusive of "documentation substantiating that the eligible taxpayer has satisfied the requirements to include any bonus credit amounts," which includes the PWA

increased credit amounts." Prop. Reg. § 1.6418-2(b)(5)(ii)(F); Prop. Reg. § 1.6418-2(b)(5)(iv); Prop. Reg. § 1.6418-1(c)(3). The collection, retention, and transfer by the taxpayer, contractors, and subcontractors of this information not only imposes a significant burden on the taxpayer, contractors, and subcontractors but also raises a number of legal issues relating to privacy, personal identifying information, confidentiality, and antitrust issues.

B. Requested Clarifications: The Guidance should provide flexibility and alternatives to the PWA recordkeeping requirements, including:

- Allowing the direct employer of the laborer and mechanic to maintain the required payroll records and confidential employee information subject to contractual provisions requiring the maintenance and preservation of the records, and permitting access to such records by the IRS as part of a duly issued audit request. *Cf.* 29 C.F.R. 5.5(a)(3)(i)(A).

- Allowing the taxpayer to collect and maintain the payroll records and data specified in Prop. Reg. § 1.45-12 with a third-party vendor subject to similar contractual provisions and access to the IRS audit function.

- Allowing taxpayers, transferee taxpayers, and/or their agents to inspect payroll records and data under a nondisclosure arrangement as part of proper due diligence without taking physical custody or control of such payroll records or data.

- Allowing payroll records and data to be collected and maintained by the taxpayer in a manner that redacts certain sensitive information, including social security numbers, address information, telephone numbers, email addresses, and other PII; provided, this information is maintained by the direct employer of the laborer or mechanic pursuant to binding contractual arrangements. *Cf.* 29 C.F.R. 5.5(a)(3)(ii)(B).

- Allowing alternative forms of validation for hourly wage rates and other payroll data to avoid antitrust and confidentiality concerns among taxpayers, contractors, and subcontractors.

IV. Start Date of PWA Requirements/Wage Determinations:

A. Issues:

1. Start Date: The statute states that the PWA requirements apply to "construction, alteration, or repair" and/or variations of the three elements in this term. Those terms originate from the Davis-Bacon Act ("DBA"). Prop. Reg. § 1.45-7(d)(2) defines the term "construction, alteration, or repair" by reference to the term "construction, prosecution, completion, or

repair" as defined in 29 CFR 5.2. Prop. Reg. § 1.45-7(b)(2) provides that "[t]he applicable wage determination in effect for the specified type of construction in the geographic area when the construction, alteration, or repair of the facility begins." *See also* Prop. Reg. § 1.45-7(b)(5). However, at various places in the preamble to the proposed regulations, the reference is to the "beginning of construction," "when the construction ... begins," "the start date for the construction, alteration, or repair," and/or "beginning of the construction, alteration, or repair" of the qualified facility. *See* 88 Fed. Reg. at 60022, 60024, 60025, 60026. For tax purposes, the term "beginning of construction" does not include preliminary activities. However, for DBA purposes, certain preliminary activities may be treated as covered DBA work at the project site (e.g., grading, demolition, etc.). In some cases, preliminary activities may have commenced before August 16, 2022, the enactment date of the IRA, even though those preliminary activities may not satisfy the beginning of construction requirement for tax purposes.

2. Wage Determinations: The proposed regulations provide that the general wage determination in effect when construction, alteration, or repair of the facility begins generally remains valid for the duration of the work performed with respect to the construction, alteration, or repair of the facility by the taxpayer, contractor, or subcontractor. However, a new determination is required (i) "when work on a facility is changed to include additional construction, alteration, or repair work not within the scope of work of the original project," or (ii) "to require work to be performed for an additional time period not originally obligated, including where an option to extend the term of a contract for the construction, alteration, or repair is exercised." Prop. Reg. § 1.45-7(b)(5). The preamble, likewise, refers to "the original contract" and "the term of a contract" with respect to this rule. 88 Fed. Reg. at 60024. In general, it appears that there is one point in time during the construction phase wherein one general wage determination applies to the project. However, the reference to a specific contract creates confusion and may suggest a contract-by-contract determination.

B. Recommended Clarifications: The Guidance should provide the following clarifications to the start date of the PWA requirements and wage determinations:

1. Start Date: The Guidance should clarify the timing of the commencement of the PWA requirements, and confirm that the PWA requirements apply only to work occurring on or after January 29, 2023, and do not apply to any work that occurred prior to that date. In addition, for work occurring on or after January 29, 2023, the Guidance should confirm that the PWA requirements apply in a consistent manner with the "beginning of construction" for federal tax purposes.

2. Preliminary Activities: The Guidance should clarify that the commencement of the PWA requirements occurs upon the beginning of construction, as defined in Notice 2022-61 and the IRS Notices for federal income tax purposes, and exclude preliminary activities as defined in those IRS Notices. This interpretation would create consistency in the application of the beginning-of-construction requirements in § 45(b)(6)(B)(ii) and the PWA requirements applicable to construction, alteration, or repair in § 45(b)(7) and (8).

3. Wage Determinations: The Guidance should clarify that the PWA requirements apply at the project level with respect to the applicable wage determination – i.e., that a single wage determination would govern the work during the construction of the project. The applicable wage determination for the project would apply from the beginning of construction (described above) of the project and remain valid through the end of the construction of the project. The Guidance should confirm that the taxpayer, each contractor, and each subcontractor would be subject to the same applicable wage determination. The Guidance should clarify that wage determinations would not apply at the contract level, i.e, to each individual contract. The Guidance should clarify the two circumstances in the Proposed Regulations in which a new wage determination for a project may be required – and include a substantiality requirement.

V. Disallowance of Increased Credit Amount:

A. Issues:

1. Circumstances of Disallowance: The Proposed Regulations allude to the possibility that the increased credit amount may be disallowed, but do not clearly describe in what circumstances that may occur. In general, the 5-times multiplier applicable to the increased credit amount is an order of magnitude many times greater than any expected curative payment amount would be. Thus, the loss of the increased credit amount is a severe remedy – in many cases, the curative payment and/or penalties may be insignificant (e.g., thousands of dollars in wages) compared to the loss of potentially many millions of dollars in tax credits if the increased credit amount is disallowed.

2. Employees Cannot Be Located: The Preamble states that "[t]he Treasury Department and the IRS are aware that the construction of a qualified facility may occur over the course of several years and some taxpayers who fail to meet the Prevailing Wage Requirements may be unable to locate all laborers and mechanics to which the correction payment must be made." 88 Fed. Reg. at 60027. The Preamble also states that "section 45(b)(7)(B)(i) does not excuse taxpayers from the requirement to make the

correction payment, even if the taxpayer is unable to locate the laborer or mechanic. The Proposed Regulations would not provide for an exception to the statutory requirement." *Id.* In the Preamble, Treasury and the IRS offer that there are State unclaimed property laws that might provide a solution, but those laws are not referenced and this issue is not otherwise addressed in the Proposed Regulations.

B. Recommended Clarifications:

1. Circumstances of Disallowance: The Guidance also should clarify the circumstances in which the IRS might disallow the increased credit amount because of a failure to satisfy the PWA requirements.

2. Curative Payments Permitted in All Instances: The Guidance should provide additional certainty with respect to the taxpayer's ability to cure a PWA failure in all circumstances. *See, e.g.*, Erin Slowey, *Treasury Reiterates Guidance When Pressed on Energy Labor Rules*, Daily Tax Report, Oct. 16, 2023 ("'I think that the statute is fairly clear that there is a cure provision,' Wojcik said, adding that if the taxpayer doesn't make a correction, the tax credit would be recaptured.") (comments of Kimberly Wojcik, Treasury).

3. Employees Cannot Be Located: The Guidance should provide specific procedures for making curative payments in the case of laborers and mechanics that cannot be located in order to make the curative payments of prevailing wage rates. The Guidance should consider alternative mechanisms for making curative payments such as making curative payments into an escrow or lockbox account, making payments to a qualified settlement fund, or making deposits of the curative payments to the IRS (similar to deposits made to the IRS for the suspension of interest on tax underpayments, *see* Rev. Proc. 2005-18, 2005-1 C.B. 798). The Guidance should confirm that if the taxpayer undertakes any of the accepted methods described in the Preamble or in the Guidance that the taxpayer will be deemed to have complied with the curative payment rules, and the increased credit amount will be allowed (assuming all other requirements are satisfied). The Guidance should not rely on State unclaimed property laws.

VI. Other Issues and Recommended Clarifications:

A. Identify and Exclude Certain Employees and Activities: The Guidance should identify and exclude certain specialized employees such as architects, engineers, inspectors, and technicians consistent with DBA authorities. The Guidance should identify and exclude certain activities such as commissioning, testing, troubleshooting, and installation consistent with DBA authorities.

B. Secondary Construction Sites: The new final rule under the DBA has expanded the definition of the "site of the work" to include "secondary construction sites." The Guidance should clarify that this new rule does not apply to manufacturing facilities, dedicated production lines, prefabrication facilities, laydown yards, or "mod-yard" locations that generally service multiple projects and customers.

C. Final Determination: The Proposed Regulations are insufficient and inconsistent with respect to the "final determination" by the IRS of a failure to meet prevailing wage requirements and do not include any "final determination" concept in the apprenticeship requirements. The Guidance should clarify the procedures that apply to a final determination, including with respect to the apprenticeship requirement, and offer the taxpayer the right to challenge and appeal any determination made by the IRS.

D. Apprenticeship Requests: The Guidance should eliminate the 120-day renewal period for requesting apprentices after an actual or deemed denial and require a meaningful response from the registered apprenticeship program in order not to be treated as a deemed denial (i.e., an automated response should not be sufficient to avoid the good faith effort exception).

E. Pre-Hire Project Labor Agreemen (PLA): The Proposed Regulations provide an exception to the penalty payments for any failure under either the prevailing wage or apprenticeship requirement, *see* Prop. Reg. § 1.45-7(c)(6)(ii) and Prop. Reg. § 1.45-8(e)(2)(v). This exception, however, does not appear to apply to the correction payment itself under the prevailing wage requirement. Treasury and the IRS should clarify that the agreed-upon wages under a PLA will be deemed to be a prevailing wage for PWA purposes and/or that no correction payment will be required in those circumstances. Likewise, the taxpayer's recordkeeping requirements should be limited to producing a valid PLA that covers all laborers and mechanics at the site of the work

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Timothy L. Jacobs
David S. Lowman, Jr.