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SUBMITTED ELECTRONICALLY AND VIA USPS

Internal Revenue Service
CC:PA:LPD:PR (REG-100908-23)
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: REG-100908-23

Dear Madame Secretary and Mr. Paul:

GE Vernova appreciates the opportunity to submit the following comments to the U.S. Department of Treasury (Treasury) and the Internal Revenue Service (IRS) on REG-100908-23, Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements.

As the nation's leading energy and technology innovation company, GE Vernova is committed to supporting the success of the implementation of the Inflation Reduction Act of 2022 (IRA). GE Vernova strongly supports clean energy tax credits because of the opportunity to reduce energy sector greenhouse gas emissions and to build a more expansive and resilient domestic energy supply chain, infrastructure, and grid that promote energy security. GE Vernova appreciates the opportunity to share these comments in support of pragmatic implementation of the IRA to succeed in these goals.

GE VERNOVA

We applaud the timely issuance of the proposed regulations by Treasury and the IRS, and appreciate the input and guidance provided by the various government stakeholders. However, the fundamental challenge with the prevailing wage and apprenticeship (PWA) proposed regulations relates to certain misalignment between the Davis Bacon Act (DBA) and existing tax provisions and regulations. Some of this stems from mistakenly treating privately financed clean energy projects the same as traditional government-financed infrastructure projects. We have, therefore, proposed revisions and clarifications to the proposed regulations and included several specific examples that together will ensure compliance with the PWA provisions while simultaneously supporting the growth of U.S. clean energy jobs.

The PWA provisions are some of the most important provisions in the IRA since they are required in order to receive the full base tax credit. Clarification of the various PWA provisions needs to be provided to ensure all energy stakeholders involved in project development and execution can comply. Below is a summary of a few key issues related to the PWA proposed regulations. A comprehensive explanation of these issues and the rest of our requests can be found in the attached briefing paper divided by topics.

- The IRA states that the apprenticeship requirement applies only "with respect to the construction of any qualified facility"; however, the proposed regulations fail to confirm that this means apprentices are required only during the construction phase of the project, as previously requested by a number of key stakeholders (including GE Vernova). The guidance should clearly state that the apprenticeship requirement applies only to the construction of the project and not to any period after the placed-in-service date. This clarification will allow taxpayers, contractors, and subcontractors to practicably administer this provision.

- As written in the IRA, certain of the PWA requirements apply during "construction, alteration or repair." While the construction phase of a project is clear, further clarification of "alteration" and "repair" is needed. 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."

- The proposed regulations require PWA recordkeeping that includes maintaining and preserving of records and places sole responsibility for compliance with this recordkeeping requirement on the taxpayer; however, the collection and retention of this information imposes a significant burden on the taxpayer, contractors, and subcontractors and raises several legal issues relating to privacy, personal identifying information, confidentiality, and anti-trust issues. For this reason, the guidance should clarify the PWA recordkeeping requirements and provide flexibility related to the maintenance and preservation of records.

- There are inconsistencies in the proposed regulations on the timing of the PWA requirements. The guidance should confirm that the PWA requirements do not apply to any work prior to January 29, 2023. The guidance also should clarify that the commencement of the PWA requirements occurs upon the beginning of construction—as determined under existing tax principles—and should exclude preliminary activities such as demolition, land clearing, grading, certain drilling, etc. Providing clear guidance on when the PWA requirements apply will ensure taxpayers better understand application of the provisions.

- The guidance should clarify that the application of wage determinations occurs at the project level and not the contract level, including any changes to the scope of work or extensions of contracts. Determining the prevailing wage rate at the project level will allow for greater consistency for all contractors and subcontractors, making these provisions more administrable and executable.

We appreciate the opportunity to submit comments. GE Vernova is prepared to make its subject matter experts and its outside counsel available to Treasury and the IRS to discuss and explain each or any of these issues in detail. We look forward to engaging in discussion and providing assistance.

Best regards,

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Comments in Response to Notice of Proposed Rulemaking
Increased Credit or Deduction Amounts for Satisfying Certain
Prevailing Wage and Registered Apprenticeship Requirements

October 30, 2023

The Inflation Reduction Act of 2022, Pub. L. No. 117-169 ("IRA"), extends the production tax credit ("PTC") for wind and other renewable energy projects under § 45 of the Internal Revenue Code ("Code"),[1] eliminates the phase-out of the PTC for qualified facilities producing electricity from wind placed in service after December 31, 2021, and provides an increased credit amount for satisfaction of certain prevailing wage and apprenticeship ("PWA") requirements. The IRA also extends the application of the PWA increased credit amount to a number of other energy tax credits, including the investment tax credit ("ITC") under § 48, the PTC for carbon oxide sequestration under § 45Q, the clean hydrogen production credit under § 45V, the clean electricity production credit under § 45Y, the clean electricity investment credit under § 48E, and the qualifying advanced energy project credit under § 48C.

On August 30, 2023, the U.S. Department of Treasury ("Treasury") and Internal Revenue Service ("IRS") issued a notice of proposed rulemaking and public hearing with respect to the PWA requirements and requested public comments on the accompanying proposed regulations ("Proposed Regulations"). Additional clarification and guidance is required on the application of the PWA requirements and the Proposed Regulations in any prospective revised rulemaking, final regulations, or other guidance, including: (i) application of the apprenticeship requirement beyond the construction phase of the project;[2] (ii) the meaning of "alteration" or "repair"; (iii) application of the PWA recordkeeping requirements; (iv) the timing of commencement of the PWA requirements to projects; (v) whether applicable wage determinations apply at the project or contract level; (vi) identifying and excluding certain employees as laborers and mechanics and excluding certain activities from PWA work; (vii) the "site of the work" definition and secondary construction sites; (viii) procedures for making curative payments with respect to employees who cannot be located; (ix) IRS final determinations relating to curative payments and penalties; (x) extension of the pre-hire project labor agreement exception; (xi) application of the good faith effort exception to the apprenticeship requirement, including the limitation to a 120-day period and the meaning of a failure to respond to a request for qualified apprentices; and (xii) additional comments and suggested corrections to the Proposed Regulations (together, the "Guidance"). Specific comments on those matters are offered below.

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[1] All Section (§) references to the Code are as amended by the Inflation Reduction Act of 2022, Pub. L. No. 117-169.

[2] The PWA requirements apply to the construction, installation, alteration, or repair of a qualified facility, qualified property, qualified project, or qualified equipment, or with respect to certain facilities. *See, e.g.*, 88 Fed. Reg. 60018, 60019 (Aug. 30, 2023). For convenience, we use the term "project" throughout these comments to refer to such facilities, projects, properties, or equipment. In addition, the Proposed Regulations focus on a § 45 "qualified facility" under Prop. Reg. §§ 1.45-6, -7, -8, and -12, which include the substantive requirements discussed in these comments, and, therefore, many of the comments below also refer interchangeably to a "qualified facility."

Comment 1: The Guidance should confirm that the apprenticeship requirement applies only with respect to the construction of the qualified facility and not to any period after the placed-in-service date of the qualified facility.

With respect to the apprenticeship requirement, § 45(b)(8) prefaces that "[t]he requirements described in this paragraph ***with respect to the construction of any qualified facility*** are as follows ...." (Emphasis added.) The labor hours requirement in § 45(b)(8)(A)(i) opens by stating that "[t]axpayers shall ensure that, ***with respect to the construction of any qualified facility*** …." (Emphasis added.) The participation requirement in § 45(b)(8)(C)(i) states that "[e]ach taxpayer, contractor, or subcontractor who employs 4 or more individuals to perform construction, alteration, or repair work ***with respect to the construction of a qualified facility*** shall employ 1 or more qualified apprentices to perform such work." (Emphasis added.) Congress appears to have inserted the specific phrase, "with respect to the construction of a qualified facility," throughout § 45(b)(8) in a deliberate manner. Read plainly, these provisions would indicate that the apprenticeship requirement applies only "with respect to the construction of any qualified facility," and not with respect to the 10-year credit period for the PTC under § 45 or otherwise to post-construction operations after the placed-in-service date of the qualified facility. A number of stakeholders, including GE Vernova,[3] offered comments in response to Notice 2022-51, 2022-43 I.R.B. 331, seeking confirmation that the apprenticeship requirements applied only to the construction phase of the qualified facility – consistent with the statutory language. The Preamble and Proposed Regulations are silent on this issue, creating considerable uncertainty in the application of the PWA requirements and consequent burdens that may be unnecessary and unintended.

It is noteworthy that, in addition to the specific terms "with respect to the construction" in § 45(b)(8), there is other clear evidence of Congressional intent to limit the application of the apprenticeship requirement to the construction period. In contrast to § 45(b)(8), the prevailing wage requirement in § 45(b)(7) does not include the language "with respect to the construction of a qualified facility," but sets apart the construction phase from the 10-year PTC credit period under § 45 as follows:

> (i) the construction of such facility, and
>
> (ii) with respect to any taxable year, for any portion of such taxable year which is within the [10-year credit] period described in subsection (a)(2)(A)(ii), the alteration or repair of such facility ...

§ 45(b)(7)(A). Thus, § 45(b)(7)(A) signals a difference between ***construction*** of the qualified facility and ***alteration or repair*** of the qualified facility during the 10-year credit period starting with the original placed-in-service date of the qualified facility. The § 45(b)(8) apprenticeship requirement does not provide a similar set apart for the 10-year credit period.[4] Read together, the § 45(b)(7) prevailing wage requirement expressly applies to both the construction period and to

[3] *Available at* https://www.regulations.gov/comment/IRS-2022-0025-0084.

[4] Section 48(a)(10)(A) includes similar statutory language in the context of the ITC, setting apart (i) the construction of the energy project and (ii) the 5-year period beginning on the date such project is originally placed in service, the alteration or repair of such project.

the post-construction PTC credit period, whereas the § 45(b)(8) apprenticeship requirement applies only "with respect to the construction of a qualified facility."

It also is noteworthy that § 45Q(h)(2) is more explicit with respect to Congress' intent in the case of the carbon sequestration credit. Section 45Q(h)(2)(A) sets apart the prevailing wage and apprenticeship requirements in a manner similar to § 45(b)(7)(A), but states with respect to the apprenticeship requirement that "the taxpayer satisfies the requirements under paragraph (4) [i.e., the apprenticeship requirement] ***with respect to the construction of such facility and equipment*** ..." (Emphasis added.) Likewise, § 45Q(h)(2)(B) sets apart the prevailing wage and apprenticeship requirements in a similar manner, and then states with respect to the apprenticeship requirement that "the taxpayer satisfies the requirements under paragraph (4) [i.e., the apprenticeship requirement] ***with respect to the construction of such equipment*** ...." (Emphasis added.)

Two other provisions under the IRA further support Congress' intent to limit the apprenticeship requirement to the construction period. First, § 45U provides a tax credit for the zero emission production of electricity using nuclear energy. This provision applies only to a qualified nuclear power facility placed in service before the enactment of the IRA – i.e., existing facilities. § 45U(b)(1). Like other IRA tax credits, the zero emission nuclear credit includes a prevailing wage requirement under § 45U(d)(2). However, this credit does not include any apprenticeship requirement, and the prevailing wage requirement applies only to the "alteration or repair" of the existing nuclear facility. Second, in the case of a qualified clean hydrogen production facility under § 45V, if construction of the facility began prior to January 29, 2023, then the PWA requirements do not apply to any of the construction work on the facility. While the prevailing wage requirement does apply in those circumstances to any "alteration or repair of such facility" after January 28, 2023, the apprenticeship requirement does not apply. § 45V(e)(2)(A). This likewise indicates Congress' intent to apply the apprenticeship requirement only to original construction of a facility and not to alteration or repair of the facility after its original placed-in-service date.

While Congress could have been explicit in stating its intent, the statutory language is clear enough for Treasury and the IRS to interpret the statute correctly and limit the apprenticeship requirement to the construction phase of a qualified facility. Statutory language must be given meaning. Here, it is unmistakable that Congress intended the words "with respect to the construction" to have meaning when it also included the terms "construction, alteration, or repair," which are based on the Davis-Bacon Act ("DBA") in the same statutory sections.[5] The statutory language indicates Congressional intent to limit the scope of the apprenticeship requirement only to the construction period before the placed-in-service date of the qualified facility. There are sound policy reasons why Congress intended to limit the apprenticeship requirement in this manner. A recent article in Tax Notes addresses the issue of requesting qualified apprentices during the operations period of a qualified facility – importantly, in the case of emergency repairs. Marie Sapirie, *Apprentices and Emergency Repairs*, Doc. 2023-27053, 180 Tax Notes Federal 2218, Sept. 25, 2023, at 2219: "In the context of prevailing wage rules, it

[5] While § 45(b)(8) repeats the term "construction, alteration, or repair," this language is a term of art under the DBA. In this light, we do not believe that the inclusion of the terms "alteration" and "repair" in § 45(b)(8) reflects an intent by Congress to apply the apprenticeship requirement to the 10-year credit period.

makes sense that when a mechanical failure puts a facility out of operation, the taxpayer needs to pay prevailing wages for that repair. The taxpayer can easily satisfy the requirement by paying the correct amounts to the mechanics and laborers making the repair. But the situation isn't so simple in the case of apprentices." The reality is that it is impractical – and perhaps impossible – to request qualified apprentices in these circumstances.

For example, in the context of a wind turbine, it is important to dispatch one or more wind technician(s) to the project site to assess any issue and to attempt to repair an issue as soon as possible – because of guaranteed availability damages and the potential loss of revenue and penalties (e.g., delay liquidated damages) that might be owed by the manufacturer to the owner. Apprentices generally are not feasible in these circumstances. In order to ascend a wind turbine, the apprentice must have completed the manufacturer's safety training program. This program involves a minimum of 2 weeks of training at GE's Renewable Energy Learning Center in New York, which is part of a certified program and is mandatory. While it is reasonable to require the use of qualified apprentices during construction of a new wind project – when timelines and labor needs are known 9-12 months in advance – it is not practical to request apprentices and conduct the required training for repairs occurring after the project is placed in service and during operations.

Requested Clarification to Proposed Regulations:

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 PWA provisions with respect to other tax credits in the IRA.

Comment 2: The Guidance should further clarify the meaning of "alteration" and "repair" in the context of the clean energy industry.

The Proposed Regulations define the term "construction, alteration, or repair" by reference to the definition of "construction, prosecution, completion, or repair," as defined in 29 C.F.R. 5.2. The Proposed Regulations provide that this term:

> 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.

Prop. Reg. § 1.45-7(d)(2)(i).

An Example accompanying this regulation illustrates 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)(ii), *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, as explained in Comment 1 above, the application of the apprenticeship requirement to repair work after the placed-in-service date could be problematic and overly burdensome. *See* Sapirie, *supra*, at 2218-2219 (describing this issue).

The Guidance should clarify the application of the PWA requirements with respect to repair work that occurs after the placed-in-service date. In particular, the Guidance should provide additional explanation of the types of repair work covered by the PWA requirements. As GE Vernova explained in its comments to Notice 2022-51, *supra*,[6] a number of authorities under the DBA and the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351-358 ("SCA") have developed a framework for determining whether "items of work involve basic maintenance within the coverage of the SCA [which is not covered by the PWA requirements], or are more in the nature of construction, alteration, or repair within the scope of [the DBA] ..." Comp. Gen. Opin., *Matter of Ameriko, Inc.*, 1996 WL 164510 (Mar. 18, 1996); *cf.* 29 C.F.R. 4.117(a) ("periodic and routine maintenance, preservation, care, adjustment, upkeep, or servicing of equipment to keep it in usable, serviceable, working order" is covered by the SCA).[7] A survey of authorities indicates that basic maintenance, routine maintenance, standard O&M, simple and standard replacements of equipment and other property, minor repair work, and similar work are covered by the SCA and are not repair work under the DBA. For example, "repair or replacement of portions of [a] utility system to accomplish routine, day-to-day service or maintenance work" may be covered by the SCA but is not DBA work. *K&M Maintenance Services, Inc.*, 1989 WL 241424 at *2 (Nov. 21, 1989). Repair activity that is more in the nature of "servicing and maintenance work," rather than "construction activity," is not considered DBA work. *See, e.g.*, *ITT Base Services, Inc., et al.*, 1986 WL 64288 at *4 (Nov. 10, 1986). This includes "routine, day-to-day work to extend the life of an item, system, or component," which is considered SCA work and not DBA work. *Id.* On the other hand, "major work involving modifications to upgrade a facility, use new technology, standardize components, or expand capacity" is considered DBA work. *Id.* Other DBA work may include such things as "installation of components not previously existing, relocation of facilities, and extension of utility systems," as well as repairing major damage or failure of property or equipment. *Id.* (internal quotations omitted). In general, repair work under the DBA refers to "construction-type" or "construction-like" activity.

The tax law applies similar definitions in the context of "incidental repairs" versus capital improvements. Under § 162 and Treas. Reg. § 1.162-4, taxpayers are allowed a deduction for ordinary and necessary trade or business expenses, including for "amounts paid for repairs and

[6] *Available at* https://www.regulations.gov/comment/IRS-2022-0025-0084.
[7] *See also Chicago Rigging Co. v. Uniroyal Chemical Co.*, 718 F. Supp. 696 (1989); Comp. Gen. Opins. *RG&B Contractors, Inc.*, 1987 WL 101560 (Mar. 10, 1987); *Dynalectron Corp.*, 1986 WL 60708 (Feb. 11, 1986); *Yamas Constr. Co.*, 1985 WL 52802 (May 24, 1985).

maintenance to tangible property if the amounts paid are not otherwise required to be capitalized." This regulation has traditionally applied to the cost of "incidental repairs that neither materially add to the value of the property nor appreciably prolong its useful life, but keep it in an ordinarily efficient operating condition." Rev. Rul. 2001-4, 2001-1 C.B. 295, 297. On the other hand, capitalization of costs has traditionally been required where repairs are "in the nature of replacements that arrest deterioration and appreciably prolong the life of the property." *Id.* Treas. Reg. § 1.263(a)-3 includes detailed rules to determine whether amounts are paid to improve tangible property and addresses "routine maintenance," which is deemed not to improve a unit of property (i.e., requiring capitalization). This regulation provides, in part:

> Routine maintenance for property other than buildings is the recurring activities that a taxpayer expects to perform as a result of the taxpayer's use of the unit of property to keep the unit of property in its ordinarily efficient operating condition. Routine maintenance activities include, for example, the inspection, cleaning, and testing of the unit of property, and the replacement of damaged or worn parts of the unit of property with comparable and commercially available replacement parts. ... Factors to be considered in determining whether maintenance is routine and whether the taxpayer's expectation is reasonable include the recurring nature of the activity, industry practice, manufacturers' recommendations, and the taxpayer's experience with similar or identical property.

Treas. Reg. § 1.263(a)-3(i)(1)(ii).

The Proposed Regulations correctly recognize that basic maintenance work that is ordinary and regular in nature is not construction, alteration, or repair work. The examples of basic and routine maintenance, however, are misleading and do not pick up the proper range of repairs that are common with a large clean energy project. For instance, the Example in Prop. Reg. § 1.45-7(d)(2)(ii) refers to a "replacement part" in an inverter as covered PWA work. This type of replacement is standard and recurring at a solar farm. Thus, the Proposed Regulations suggest a much broader range of repairs than should be covered by the PWA requirements. This example creates uncertainty with respect to the types of repairs covered by the PWA requirements. Rather than a broad application, as suggested by the Proposed Regulations, any repair work after the placed-in-service date should be relatively limited and a rare occurrence.

We also note that the Proposed Regulations state that "[h]owever, 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." Prop. Reg. § 1.45-7(d)(2)(i). This language follows the listing of examples of "basic maintenance," which includes 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. It is not clear why any of this basic maintenance work would constitute "construction" depending on whether it occurs *before* or *after* the placed-in-service date of the qualified facility. Indeed, as explained in Comment 6 below, inspections generally are not covered under the DBA and should not be covered under the PWA requirements. *See* U.S. Department of Labor ("DOL") Field Operations Handbook ("FOH"), sec. 15e14. None of the other items listed represent construction work. It is, therefore, unclear what work this sentence is referencing and why this distinction is being made based on

the placed-in-service date of the qualified facility. The Guidance should further explain the meaning of this sentence or omit it from the Guidance.

Requested Clarification to Proposed Regulations:

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, minor or incidental repair work, and service 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. For example, troubleshooting should not be treated as alteration or repair work under the PWA requirements. Troubleshooting involves the following activities in order to diagnose an outage, equipment failure, or other loss of function:

- Analyze data and take system measurements sufficient to determine the cause of turbine faults and component failure, and take steps to safely restore the system and wind turbine generator ("WTG") to service.
- Remove inspection covers and inspect the failed component of the WTG for evidence of the cause of failure.
- Review control system logs to identify patterns in operating conditions that may be influencing failure modes.
- Trace and inspect control signal wires and sensors to ensure proper connectivity.
- Test and install specialty tooling.

All of these activities are conducted *before* any failed part is physically removed or repaired by any laborers or mechanics. Likewise, work performed by welders, winders, or machinists to address a customer service outage should not be treated as alteration or repair work under the PWA requirements.

Because of the uncertain application of "alteration or repair" work during the 10-year PTC or 5-year ITC period, the Guidance should provide a *de minimis* threshold under which any alteration or repair work on a qualified facility or energy project will not require prevailing wage rates to be paid if the total amount paid by the taxpayer for such work is less than the greater of (i) $1,000,000, or (ii) 10% of the original capitalized cost of the qualified facility or energy project at the time it is originally placed in service. For this purpose, the original capitalized cost means the cost basis of such qualified facility or energy project under § 1012, unreduced by any other adjustment to basis (e.g., depreciation) under § 1016, and includes all items properly included by the taxpayer in the depreciable basis of such facility or project. For offshore wind qualified facilities or energy projects, which by nature and scale require more significant expense, alteration or repair work on a qualified facility or energy project should not require prevailing wages to be paid if such work does not alter the form, fit, or function of the turbine. Alternatively, to address this more significant expense, the *de minimis* threshold above should be increased to 25% of the original capitalized cost of the qualified facility or energy project at the time it is originally placed in service.

Comment 3: The Guidance should clarify the PWA recordkeeping requirements and provide flexibility in maintaining and preserving records.

Prop. Reg. § 1.45-6(b) provides that a qualified facility satisfies the PWA requirements, as relevant here, if it is: "(3) A facility that meets the prevailing wage requirements of section 45(b)(7) and § 1.45-7, the apprenticeship requirements of section 45(b)(8) and § 1.45-8, and the recordkeeping and reporting requirements of § 1.45-12." In this vein, the Preamble states:

> The proposed regulations would provide that in order to earn the increased credit under section 45(b)(6) by satisfying the PWA requirements, ***the taxpayer would be solely responsible*** for: (i) ensuring that the relevant laborers and mechanics are paid wages not less than the prevailing rate whether employed directly by the taxpayer, or by a contractor, or a subcontractor, and (ii) ensuring that the Apprenticeship Requirements are satisfied. The proposed regulations would also provide that ***the taxpayer would be solely responsible*** for the PWA recordkeeping requirements, the correction and penalty provisions under the Prevailing Wage Requirements, and the Good Faith Effort Exception and penalty provisions under the Apprenticeship Requirements.

88 Fed. Reg. at 60022-23 (emphasis added). Under the PWA recordkeeping requirements, "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." Prop. Reg. § 1.45-12(b). 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.* (Emphasis added.)

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).

The Proposed Regulations provide, in the case of an elective transfer of eligible credits, that "the requirement to maintain and preserve sufficient records demonstrating compliance with the applicable prevailing wage and apprenticeship requirements remains with the eligible taxpayer that determined and transferred the credit." Prop. Reg. § 1.45-12(a). However, it is noteworthy that Prop. Reg. § 1.6418-2(b)(5)(ii)(F) requires the eligible taxpayer to make a statement or representation, in the transfer election statement, that the transferor has provided the "required minimum documentation" to the transferee taxpayer. Prop. Reg. § 1.6418-2(b)(5)(iv) provides that the "required minimum documentation" includes "documentation substantiating that the eligible taxpayer has satisfied the requirements to include any bonus credit amounts," which includes the PWA increased credit amounts, *see* Prop. Reg. § 1.6418-1(c)(3). Thus, it

appears that the required minimum documentation that must be provided to the transferee taxpayer would include the same payroll records and other employee information described in Prop. Reg. § 1.45-12.

The recordkeeping requirements under the Proposed Regulations raise a number of issues and impracticalities. In the first instance, the Proposed Regulations place sole responsibility on the taxpayer to maintain and preserve this information, even though the relevant laborers and mechanics may not be employed by the taxpayer and, indeed, the taxpayer may not even be a participant in the project at the time of their employment and work. Rather, the laborers and mechanics may more likely be employed by the various contractors and subcontractors on the project. Transferee taxpayers are even further removed from participation in the work and employment activity at the project site. The collection and retention by the taxpayer 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 ("PII"), confidentiality, and antitrust issues.

With respect to antitrust issues, the Proposed Regulations create potentially significant compliance concerns. The clean energy industry is an area that involves substantial co-opetition among its various participants. For many of GE Vernova's qualifying projects, GE Vernova will use contractors and subcontractors to provide its commissioning/advisory support obligations during construction of the wind farm. These same contractors and subcontractors may also provide services directly to our customers for transaction repair work/services after the wind farm is built. In this manner, those contractors and subcontractors are providing their services and repairs to GE Vernova's customers in direct competition with GE Vernova.

Another example is a project where there is a developer and owner of a wind farm. After construction of that wind farm, the developer will transfer ownership of the wind farm. This is referred to as a "build transfer agreement." In this scenario, the original owner/developer of the wind farm may be a large GE Vernova customer, but they will also provide service agreements to their build transfer customers. At times, GE Vernova and the original owner/developer will directly compete against each other for the same service and repair work.

The proposed reporting and certification obligations under the Proposed Regulations would require GE Vernova, its contractors, and its subcontractors – in these circumstances – to exchange detailed, competitively-sensitive information, including hourly wage and other benefits by employee and job classification, employee names, employee social security numbers, and other PII. The parties may also have to exchange employee contractual terms. As demonstrated above, there is significant co-opetition in these industries and there is significant competition for the skilled labor. That is, GE Vernova, its contractors, and its subcontractors all compete for the same technical service and repair experts.

In addition to concerns relating to the exchange of competitively-sensitive information between competitors and market participants, the reporting and certification obligations under the Proposed Regulations may require that large volumes of competitively-sensitive information be retained for extended periods of time (years) across multiple teams and multiple employees within each company. The retention of records that contain this type of sensitive information for

such extended periods of time would create significant burdens on contractors like GE Vernova and other contractors and subcontractors.

Requested Clarification to Proposed Regulations:

The Guidance should provide flexibility and alternatives to the PWA recordkeeping requirements, including:

- Allowing the direct employer of the laborer and mechanic or any contractor 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 or any contractor 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.

Comment 4: The Proposed Regulations fail to provide clear guidance regarding the point in time at which the PWA requirements apply. "Construction, alteration, or repair" is defined in accordance with the DBA regulations, which may include preliminary activities that do not count as beginning of construction under tax law.

Under § 45(b)(7)(A), the prevailing wage requirement applies to the "construction" of the qualified facility and to the "alteration or repair of such facility" during the 10-year credit period beginning on the date the facility was placed in service, *see* Prop. Reg. § 1.45-7(a). Section 45(b)(7) uses those terms variously and also sometimes in the sequence "construction, alteration, or repair" with respect to the prevailing wage requirement. The terms "construction, alteration, or repair" originate under the DBA, *see* 40 U.S.C. 3142(a), and those terms have a longstanding history under that enactment. In general, in order to satisfy the prevailing wage requirement, and therefore the PWA requirements, the taxpayer must ensure that all laborers and mechanics are

paid a prevailing wage with respect to any construction, alteration, or repair work on the qualified facility.

Section 45(b)(6)(B)(ii) provides, however, that the PWA requirements do not apply in the case of "[a] facility the construction of which begins prior to the date that is 60 days after the Secretary publishes guidance with respect to the [PWA] requirements ...." In Notice 2022-61, 2022-52 I.R.B. 560, sec. 2.02, the IRS correctly interpreted this language to refer to established beginning-of-construction rules applicable under the tax law, and specifically referenced the various IRS Notices establishing the beginning-of-construction rules under §§ 45, 45Q, and 48. The Preamble to the Proposed Regulations states that "taxpayers may continue to rely on the guidance provided in Notice 2022-61 and the IRS Notices." 88 Fed. Reg. 60018, 60021 (Aug. 30, 2023).[8] Under Notice 2022-61 and the designated IRS Notices, beginning of construction does not include preliminary activities. Under the IRS Notices, for purposes of the physical work test, preliminary activities include such things as drilling work, clearing a site, excavating to change the contour of the land at the site, and removal (demolition) of existing foundations, turbines, and towers, solar panels, or any components that will no longer be part of the energy property (including those on or attached to building structures). *See, e.g.,* Notice 2013-29, sec. 4.02(1); Notice 2016-31, sec. 5.03; Notice 2018-59, sec. 4.03; Notice 2020-12, sec. 5.03. Thus, if the taxpayer conducts only preliminary activities before January 29, 2023 – no matter how extensive those preliminary activities may be – the tax law provides that construction has not begun and, therefore, the taxpayer must satisfy the PWA requirements.

The two paragraphs above describe two rules – one tax and one labor – which are dependent on the meaning of the term "construction." As described below, the application of the timing of the PWA wage determinations and the scope of the PWA requirements are also dependent on the meaning of the term "construction" and when "construction" begins.

Under the Proposed Regulations, a taxpayer satisfies the prevailing wage requirement if the taxpayer ensures that laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction, alteration, or repair of a facility are paid wages at rates not less than those set forth in "the applicable wage determination" issued by the Secretary of the DOL. Prop. Reg. § 1.45-7(b)(1). In most cases, the applicable wage determination is described as "the applicable general wage determination(s)" published by DOL on its approved website. Prop. Reg. § 1.45-7(b)(2). The Proposed Regulations, however, also provide for a "supplemental wage determination" at the request of the taxpayer, contractor, or subcontractor. Prop. Reg. § 1.45-7(b)(3).

With respect to the timing of the applicable general wage determination, the Proposed Regulations provide: "The applicable prevailing wage rates on a general wage determination are those in effect at the time construction, alteration, or repair of the facility begins, and generally

[8] The Preamble states that taxpayers may rely on Notice 2022-61 and the IRS Notices "[u]ntil the Treasury Department and the IRS issue further guidance on determining when construction or installation begins ...." The import of this prefatory statement is not clear. The deadline of January 29, 2023, has now passed, and the beginning-of-construction requirements have either been satisfied or not. It would be highly inequitable for Treasury and/or the IRS to change the guidance on beginning of construction in Notice 2022-61, at some future date, after taxpayers have relied on that guidance with respect to the PWA requirements.

remain 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." Prop. Reg. § 1.45-7(b)(5). With respect to the timing of a supplemental wage determination, the Proposed Regulations provide that "[a]ny supplemental wage determination or additional classification and wage rate issued under paragraph (b)(3) of this section applies from the time the taxpayer begins the construction, alteration, or repair of the facility," but add that "[i]f a supplemental wage determination or additional classification and wage rate is issued after construction, alteration, or repair of the facility has begun, the applicable prevailing rates apply retroactively to the date construction began." *Id.*

Section 45(b)(7)(A) provides that the increased credit amount is available for a qualified facility if a taxpayer ensures that all laborers and mechanics are "paid wages at rates not less than the prevailing rates ... in accordance with [the DBA]." The Preamble to the Proposed Regulations then states with respect to this statutory reference to the DBA: "In interpreting the 'in accordance with' language [in § 45(b)(7)(A)], the Treasury Department and the IRS propose to incorporate in these regulations certain requirements of the DBA that are relevant for the purposes of section 45(b)(7)(A) and the intent of the IRA, and that are necessary for, and consistent with, sound tax administration." 88 Fed. Reg. at 60022. The Proposed Regulations do not wholly adopt the DBA regulations and authorities but do rely on DOL's wage determination process and incorporate some of the definitions from the DBA regulations.

Importantly, the Proposed Regulations provide that "[t]he term *construction, alteration, or repair* generally means construction, prosecution, completion, or repair as defined in 29 CFR 5.2." Prop. Reg. § 1.45-7(b)(7)(d)(2). Under 29 C.F.R. 5.2, this term is defined expansively to include "all types of work done ... [o]n a particular building or work at the site of the work, as defined in this section, by laborers and mechanics employed by a contractor or subcontractor ...." DOL, in regulations and sub-regulatory guidance, has defined the work covered by the DBA to include preliminary activities. For example, the definition of "work" in 29 C.F.R. 5.2 specifically includes "drilling, ... excavating, clearing, and landscaping"[9] and the DBA regulations were recently amended (prior to the issuance of the Proposed Regulations) to include certain demolition or removal work. *See also* All Agency Memorandum ("AAM") No. 187 (Nov. 18, 1996) (hazardous waste removal, earth moving, reclamation, and rearrangement of the terrain); AAM No. 155 (Mar. 25, 1991) (same); FOH, sec. 15d03(b) (same). Those items – demolition, removal, site clearing, excavation, certain drilling, and similar activities – generally would be treated as preliminary activities for beginning-of-construction purposes under the tax rules.

There is confusion and inconsistency in the Proposed Regulations in the use of the term "beginning of construction" for federal tax purposes and for purposes of incorporating the DBA

[9] Although "drilling" is described as "work" and is generally treated as construction under the DBA regulations, exploratory drilling generally is not subject to the DBA prevailing wage rules because this drilling relates to an activity as distinguished from a project or improvement. FOH, sec. 15d05(b). "Also, the holes themselves, which are opened to obtain cores and which are subsequently to be filled in or abandoned, would not be 'works' because they are not improvements. The products sought by the digging are the cores of the earth and not the holes themselves." *Id.* Thus, based on this language, "geotech" work that occurs during the initial development phase of a project generally would not be treated as covered work under the DBA or as "construction, alteration, or repair" work under the PWA requirements of the IRA.

definition of "construction" for purposes of the PWA requirements. In several places, the Preamble to the Proposed Regulations uses the term "beginning of construction" to describe the DBA requirements. For example, the Preamble states with respect to the general timing of prevailing wage payments as follows:

> Under the DBA, a contractor must agree to pay prevailing wages at the commencement of the project as a condition of a Federal contract award. Conversely, under section 45, ***the requirements related to payment of prevailing wages are generally triggered at the beginning of construction*** and continue during the entire course of a project, but the requirement becomes binding only when a tax return claiming the increased credit is filed.

88 Fed. Reg. at 60022 (emphasis added). Again, the Preamble states with respect to the timing of supplemental wage determinations as follows:

> In this circumstance, the proposed regulations would provide that the taxpayer would not be considered to have failed to meet the Prevailing Wage Requirements with respect to any mechanics or laborers whose wage rate was subject to the request and who were paid below the prevailing wage rate before the determination by the DOL if the taxpayer requests the supplemental wage determination or prevailing wage rate for an additional classification ***before the beginning of construction (or as soon as practicable after the start of construction)*** and makes a correction payment within 30 days of the determination to each laborer or mechanic equal to the difference between the amount of wages paid to such laborer or mechanic before the determination and the amount of wages required by the Prevailing Wage Requirements to be paid to such laborer or mechanic during such period.

88 Fed. Reg. at 60028 (emphasis added). Further, the Preamble refers to the timing of the prevailing wage requirement in the context of the recordkeeping rules as follows:

> In contrast, under section 45(b)(7)(A), although the requirement to pay prevailing wages is triggered by ***the beginning of construction*** and continues over the entire course of a project, the requirement to pay prevailing wages becomes binding only when a tax return claiming the increased credit is filed.

88 Fed. Reg. at 60041 (emphasis added). These references are not clear as to what is meant by the term "beginning of construction" and, importantly, whether tax terminology is intended as the start-date for PWA compliance.

The Guidance should clarify the timing of the commencement of the PWA requirements with respect to the beginning of construction, as well as the scope of the PWA requirements with respect to preliminary activities that are normally excluded from beginning of construction for federal tax purposes. In many cases, preliminary activities may have commenced before the January 29, 2023 date for beginning of construction set forth in Notice 2022-61, before the August 16, 2022 enactment date of the IRA, and, in some cases, perhaps well before (even years

before) the beginning-of-construction date for federal tax purposes (which, indeed, is why the IRS likely excludes those activities). However, the incorporation of the DBA definition of "construction, prosecution, completion, or repair" might result in those same preliminary activities – no matter how far back they commenced – to be covered work.

It is noteworthy that in recent comments at an ABA Tax Section virtual conference, a Treasury official reported on the timing of the application of the PWA requirements. In response to a question involving whether preliminary activities prior to January 29, 2023 might trigger the PWA requirements, the official said, "I think the guidance states that the prevailing wage and apprenticeship provisions take effect Jan. 29, so it's going forward" and that there is no need to "look back." Erin Slowey, *Treasury Reiterates Guidance When Pressed on Energy Labor Rules*, Daily Tax Report, Oct. 16, 2023 (comments of Kimberly Wojcik, Treasury). Thus, it appears that Treasury recognizes that the PWA requirements should not apply to any work that occurs prior to January 29, 2023. The Guidance should confirm that the PWA requirements do not apply to work occurring prior to January 29, 2023.

In addition, while it may be appropriate to include preliminary activities under the DBA, where there is a public building or work and a clear point of delineation of the start of a project with a contracting agency of the government, extending the DBA definition to such preliminary activities in the tax context creates a disparate and inconsistent result with the beginning-of-construction requirement under the tax law. The Guidance should promote consistency in application by not including preliminary activities within the coverage of the PWA requirements regardless of whether that work occurs before or after January 29, 2023, and regardless of whether those preliminary activities would be treated as covered work under the DBA or subject to the PWA requirements otherwise.

Requested Clarification to Proposed Regulations:

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.[10] In particular, Notice 2022-61 and the IRS Notices providing guidance on the beginning of construction (which are incorporated by Notice 2022-61 in the context of the PWA requirements under § 45(b)(6)(B)(ii)), do not include preliminary activities such as demolition, land clearing, grading, excavation, certain drilling, and similar activities. Similarly, the Preamble to the Proposed Regulations appears to recognize that the PWA requirements start consistently at the time of beginning of construction for federal tax purposes. However, the Proposed Regulations also incorporate the DBA definition of "construction, prosecution, completion, or repair," as defined in 29 C.F.R. 5.2, which creates a potential inconsistency. The Guidance should clarify

[10] Notice 2022-61, 2022-52 I.R.B. 560, sec. 2.02, provides two methods for meeting the beginning-of-construction requirement – the Physical Work Test and the Five Percent Safe Harbor – both of which may include offsite activities. For example, the manufacturing of equipment (such as custom-built transformers) offsite may satisfy the beginning-of-construction requirements. However, this offsite work generally would not be covered by the PWA requirements because those PWA requirements generally are limited to work done at the project site.

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).

Comment 5: The Proposed Regulations should provide Guidance regarding the application of wage determinations at the project or contract level, and with respect to changes to the scope of work or extensions.

The Proposed Regulations provide that "[t]he applicable prevailing wage rates on a general wage determination are those in effect at the time construction, alteration, or repair of the facility begins, and generally remain 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." Prop. Reg. § 1.45-7(b)(5). With respect to the timing of a supplemental wage determination, the Proposed Regulations provide that "[a]ny supplemental wage determination or additional classification and wage rate issued under paragraph (b)(3) of this section applies from the time the taxpayer begins the construction, alteration, or repair of the facility." *Id.* Thus, these portions of the Proposed Regulations indicate that the PWA requirements would apply at the project (qualified facility) level and that one general or supplemental wage determination would govern with respect to the work done on the project.

Other portions of the Proposed Regulations, however, reference a "contract" and create confusion as to whether wage determinations must be administered at the project level or at the contract level (i.e., with respect to each individual contractor or subcontractor contract). For example, certain portions of the Proposed Regulations describe circumstances in which the wage determinations must be updated and refer to "a contract." Prop. Reg. § 1.45-7(b)(5) provides:

> A new wage determination would be required to be used 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 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. [Emphasis added.]

The Preamble to the Proposed Regulations likewise includes multiple references to a contract, stating as follows:

> However, a new general wage determination would be required to be used when ***a contract*** is changed to include additional, substantial construction, alteration, or repair work not within the scope of work of ***the original contract***, or 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. This is consistent with DOL guidance under the DBA, which generally requires the ***contracting agency*** to incorporate the

> applicable wage determinations as part of ***the contract*** that is awarded to the contractor with the applicable rates valid through the duration of ***the contract***.

88 Fed. Reg. at 60024 (emphasis added).

The language in the Proposed Regulations and the Preamble is confusing because of the inconsistent references to the original project and contract. The reference in the Preamble to the DOL guidance highlights, and is perhaps the source of, this confusion. Under the DBA, there is one contracting agency and a prime contract with the applicable wage determination originating under the prime contract. *See, e.g.*, 29 C.F.R. 5.2 (definitions of "contract" and "prime contractor"); 29 C.F.R. 5.5 (incorporation of standard contract provisions); FOH, sec. 15b00(d) ("The $2,000.00 threshold for coverage pertains to the amount of the prime contract, not to the amount of individual subcontracts. If the prime contract exceeds $2,000.00, all work on the project is covered."); FOH, sec. 15f00(b) ("The labor standards clauses in 29 CFR 5.5 included in a prime contract are by their terms required to be included as well in any subcontract or any lower tier subcontract made thereunder."). Under the DBA, the prime contractor must include the applicable wage determination in any subcontract, or the prime contractor will be responsible for any failure of the subcontractor to pay prevailing wage rates. *See* FOH, sec. 15f00(c).

The use and effectiveness of wage determinations are addressed in the DBA regulations at 29 C.F.R. 1.6. Those regulations provide that "[o]nce a wage determination is incorporated into a contract (or once construction has started when there is no contract award), the wage determination generally applies for the duration of the contract or project, except as specified in this section." 29 C.F.R. 1.6(a). A later section provides rules similar to the exceptions included in the Proposed Regulations above, namely:

> Where a contract or order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order, or to require the contractor to perform work for an additional time period not originally obligated, including where an option to extend the term of a contract is exercised, the contracting agency must include the most recent revision of any wage determination(s) at the time the contract is changed or the option is exercised. This does not apply where the contractor is simply given additional time to complete its original commitment or where the additional construction, alteration, and/or repair work in the modification is merely incidental.

29 C.F.R. 1.6(c)(2)(iii)(A).

It is apparent that the provisions described above in the Proposed Regulations were derived from 29 C.F.R. 1.6(c)(2)(iii)(A) and the DBA. However, the DBA applies in the context of a prime contract and uses a top-down approach, with the same wage determination for the prime contract also applying to the subcontractors under the prime contract. Thus, even though 29 C.F.R. 1.6(c)(2)(iii)(A) refers to "the original contract" and "a contract," this reference is to the prime contract and not the lower-tier subcontracts. The two exceptions in the Proposed Regulations for "additional construction, alteration, or repair work not within the scope of work

of the original project, or to require work to be performed for an additional time period not originally obligated" may make sense when considered in this light. However, the Proposed Regulations do not adopt any notion of a prime contract, there is no "contracting agency," and Treasury and the IRS have decided not to require the inclusion of the specified provisions that are included in covered contracts, *see* 88 Fed. Reg. at 60022. Thus, the Proposed Regulations have created confusion by importing these exceptions from the DBA regulations and suggesting a contract-by-contract analysis.

If the PWA requirements mandate that the applicable wage determination is determined at the contract level for each individual contractor and subcontractor, the administrative burden on the taxpayer and on the contractors and subcontractors would be significant. For example, a typical onshore wind project may involve upwards of 25 or more contractors and subcontractors. Administering the PWA requirements with respect to each individual contract would not only be burdensome but could result in different wage determinations (and wage rates) applying to laborers and mechanics working at the same project site where one of the circumstances identified in the Proposed Regulations for using an updated wage determination applies to one or more of the contracts with a contractor or subcontractor. The taxpayer would have to monitor the wage determinations for each separate contract – compounding the compliance concerns that already exist with the PWA requirements generally.

The Guidance should clarify that the PWA requirements apply at the project level with respect to the applicable wage determination. The applicable wage determination generally should apply from the beginning of construction (described above in Comment 4) of the project through the end of the construction of the project except in circumstances where there is additional, substantial construction, alteration, or repair work that was not part of the original project design at the beginning of construction.

In addition, the Proposed Regulations provide no threshold with respect to the level of additional work that may require a new wage determination. The Proposed Regulations could be read to include each change order under a master contract or changes in a single subcontract in a large project. In those circumstances, a new wage determination might be required even though the scope of work for the project has not materially changed. In the context of a clean energy project, it is not uncommon for numerous change orders to be issued under an Engineering, Procurement, and Construction ("EPC") contract and subcontracts or supply agreements under the EPC contract or otherwise. Change orders should not result in a new wage determination – either at the project or contract level. Thus, even if the Guidance concludes that changes must be evaluated at the contract level, the Proposed Regulations should include a substantiality threshold. As the language in the Preamble to the Proposed Regulations itself states, it is "additional, ***substantial*** construction, alteration, or repair work not within the scope of work of the original contract ...." (Emphasis added.) This language is consistent with the DBA rules in 29 C.F.R. 1.6(c)(2)(iii)(A). The language of the actual Proposed Regulations, however, curiously omits the "substantial" reference, suggesting a broader reach than the Preamble and the DBA reflect.

Likewise, the language relating to "an additional time period" in the Preamble and Proposed Regulations is ambiguous, and could be read to pick up circumstances of delay and

extension that are common in the clean energy industry. Insofar as the Proposed Regulations appear to have derived this exception to the general rule from the DBA regulations and authorities, the Proposed Regulations omit key limiting language from those regulations and authorities. Specifically, 29 C.F.R. 1.6(c)(2)(iii)(A) provides that a new wage determination is not required where additional time is given to complete the original commitment or where the additional construction, alteration, and/or repair work in the modification is merely incidental. The Guidance should acknowledge that the applicable wage determination with respect to a contract should not change except in rare circumstances.

Requested Clarification to Proposed Regulations:

- 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 in Comment 4 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.

    - The Guidance should incorporate a substantiality threshold – at the project level – based on any "additional, ***substantial*** construction, alteration and/or repair work" that is not within the original scope of work of the project. The Guidance should provide examples of the types of substantial changes that might require a new wage determination and recognize that a new wage determination generally would not be required in the case of standard change orders.

    - The Guidance should recognize that delays and extensions are normal in a clean energy project and, consistent with the language in 29 C.F.R. 1.6(c)(2)(iii)(A), that a new wage determination is not required where additional time is required to complete the original commitment or where the additional construction, alteration, and/or repair work in the modification is merely incidental.

Comment 6: The Guidance should identify and exclude certain specialized employees such as engineers, inspectors, and wind technicians and should identify and exclude certain activities such as commissioning, testing, and troubleshooting from the PWA requirements.

The Guidance should identify and exclude certain employees that are standard in the clean energy industry and that are recognized professionals. Prop. Reg. § 1.45-7(d)(7) defines the terms "laborer and mechanic," in a manner consistent with the DBA regulations and authorities, as follows:

(7) *Laborer and mechanic*. The terms *laborer* and *mechanic* mean those individuals whose duties are manual or physical in nature (including those individuals who use tools or who are performing the work of a trade). The terms laborer and mechanic include apprentices and helpers. The terms do not apply to individuals whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR part 541 are not deemed to be laborers or mechanics. Working forepersons who devote more than 20 percent of their time during a workweek to laborer or mechanic duties, and who do not meet the criteria for exemption of 29 CFR part 541, are considered laborers and mechanics for the time spent conducting laborer and mechanic duties.

The Preamble to the Proposed Regulations requests comments on the treatment of working forepersons or owners performing the duties of laborers and mechanics under certain circumstances, and other executive or administrative personnel who also perform duties of a manual or physical nature, in the construction, alteration, or repair of a qualified facility. *See* 88 Fed. Reg. at 60025. In response to those comments, the Guidance should identify and exclude employees that are commonly viewed as professional employees in the industry. For example, among other job functions, the part 541 rules exclude management employees, foremen, supervisors, architects, ***engineers***, and ***technicians***. *See, e.g.,* FOH, sec. 15e07: "Architects, engineers, technicians, and draftspersons are not covered by the [DBA], unless they perform duties as laborers and mechanics and do not meet the tests of 29 CFR 541." Specific to the wind industry, wind technicians not only perform activities that should be excluded from the PWA requirements, such as commissioning and troubleshooting (see discussion below), but wind technicians receive specialized, certified training to perform those activities and to undertake this work up-tower inside the WTG (including Environmental, Health, and Safety (EHS) and high-elevation rescue training). Likewise, the DBA authorities generally exclude ***inspectors***: "Employees who make inspections at a covered construction site to see that the work meets the specifications and requirements of the contract or established standards and codes are not usually considered to be laborers or mechanics for purposes of [the DBA]." FOH, sec. 15e14. The Guidance should confirm that engineers, inspectors, wind technicians, and similar professional employees are not laborers or mechanics for purposes of the PWA requirements.

In addition, the Guidance should identify certain activities that are common in the clean energy industry but should not be treated as work performed by laborers or mechanics for purposes of the PWA requirements. For example, the Guidance should clarify that activities such as commissioning, testing, and troubleshooting are not considered to be covered work under the PWA requirements. For example, in the wind industry, wind turbine commissioners are responsible for testing and verification of wind turbines as part of the final commissioning process prior to acceptance of the wind turbines by the owner. Commissioning involves the following activities to make sure that the wind turbines are operational in accordance with contractual and industry specifications and compliant with safety guidelines:

- Perform energization, operation, troubleshooting and repair of wind turbine systems necessary to support the installation and mechanical completion of the WTG, including temporary generator hookup for temporary power.

- After mechanical completion (performed by others), perform initial energization and testing of all WTG electrical, mechanical and hydraulic systems in accordance with approved procedures.
- Perform initial synchronization and connection of the WTG to the grid, and supervise power production sufficient for the WTG to be accepted and delivered.
- Perform troubleshooting, repair and testing of systems sufficient for the WTG to be accepted and delivered.
- Inspecting the WTG during and after it is assembled by laborers and mechanics to ensure work was properly performed.
- Perform electrical and control loop tests to ensure all control signals and instrumentation are properly sending/receiving signals.
- Loading the final control software codes into the WTG controller and SCADA system, observing the initial run testing of each WTG for several days to ensure all control parameters and sensor/instrumentation are functioning properly, and confirming the WTG is receiving and responding to the control signals from the grid operator to ensure safe injection of electricity into the power grid.

Commissioning excludes the mechanical assembly work of the wind turbine (e.g., transporting, lifting, rigging, bolting, torquing, welding, painting, and fabricating). This type of commissioning activity is similar to the type of inspection activity that is not included as covered work under the DBA (see authorities above). Likewise, testing involves similar work as inspections and should be similarly excluded by the Guidance. Finally, troubleshooting (described in Comment 2 above) is common in the wind industry and should be recognized by the Guidance as not covered by the PWA requirements. Troubleshooting, like commissioning and testing, does not involve the type of physical or manual labor indicative of laborers and mechanics.

Finally, the Guidance should clarify the circumstances in which the PWA requirements apply to installation activities with respect to the supply and servicing of equipment. It is noteworthy that the DBA generally does ***not*** apply to installation work that is performed in conjunction with a supply or service contract – except where the installation involves more than an incidental amount of construction activity and such work is physically or functionally separate from, and may be performed on a segregated basis from, the other non-construction work called for by the supply or service contract. *See, e.g.*, FOH, sec. 15d13(a) (citing the SCA regulations at 29 C.F.R. 4.116(c)(2)). Under the DBA, whether installation work involves more than an incidental amount of construction activity depends upon the specific circumstances of each case. FOH, sec. 15d13(b). Factors under the DBA requiring consideration include the nature of the prime contract work, the type of work performed by the employees installing the equipment on the project site (i.e., the techniques, materials, and equipment used and the skills called for in its performance), the extent to which structural modifications to buildings are needed to accommodate the equipment (i.e., widening entrances, relocating walls, or installing wiring), and the cost of the installation work, either in terms of absolute amount or in relation to the cost of the equipment and the total project cost. *Id.* The DBA does not apply to construction work which is incidental to the furnishing of supplies or equipment if the construction work is so merged with non-construction work or so fragmented in terms of the locations or time spans of its performance that the construction work is not capable of being segregated as a separate

contractual requirement. FOH, sec. 15d13(c). For example, the DBA would ***not*** apply to a supply contract under which the scope of work is limited to supplying equipment to a project and performing installation services at the project site, the value of which are minimal compared to the overall value of the supply contract. A supply contract of this nature includes such services as unloading the equipment, setting the equipment in place, performing calibration of the equipment, testing of the equipment, connecting the equipment to the electrical system, and putting the equipment in service. The Guidance should clarify that the PWA requirements do ***not*** apply to supply or service contracts in these circumstances – consistent with the treatment of installation services under the DBA.

Requested Clarification to Proposed Regulations:

The Guidance should identify and exclude specialized professional employees that are common in the clean energy industry such as engineers, inspectors, wind technicians, and similar employees. The Guidance also should identify certain activities such as commissioning, testing, and troubleshooting and exclude employees for any work performed in those activities – for example, wind turbine commissioners who are common in the industry should not be classified as laborers or mechanics with respect to any commissioning work they may perform at a project site. The Guidance should further clarify that the PWA requirements generally do not apply to installation services under a supply or service contract.

Comment 7: The Guidance should clarify the definition of the "site of the work" by defining the boundaries and relevant scope of work and limit the scope of adjacent locations and secondary construction sites.

The Proposed Regulations adopt a number of definitions from the DBA regulations; however, they do not include the specific definition of the term "site of the work," even though that term and definition are central to the application of the DBA prevailing wage rules. Rather, the major aspects of the definition are included in the definition of the term "geographic area and locality" in the Proposed Regulations. Specifically, the definition of "geographic area and locality" in the Proposed Regulations provides:

> The locality in which a facility is located is the primary construction site of the facility, defined as the physical place or places where the facility will be placed in service and remain. The locality of the facility also includes secondary construction site(s), where a significant portion of the facility is constructed, altered, or repaired provided that such construction is for specific use at that facility and does not simply reflect the manufacture or construction of a product made available to the general public, and provided further that the site is either established specifically for, or dedicated exclusively for a specific period of time to, the construction, alteration, or repair of the facility. A significant portion means one or more entire portion(s) or module(s) of the facility, such as a completed room or structure, with minimal construction work remaining other than the installation and/or final assembly of the portions or modules at the place where the facility will be placed in service and remain. A significant portion does not include materials or prefabricated component parts. A specific period of time

> means a period of weeks, months, or more, and does not include circumstances where a site at which multiple facilities are in progress is shifted exclusively so to a single facility for a few hours or days in order to meet a deadline. The locality of the facility also includes any adjacent or virtually adjacent dedicated support sites, including job headquarters, tool yards, batch plants, borrow pits, and similar facilities of a taxpayer, contractor, or subcontractor that are established specifically for or dedicated exclusively to the construction, alteration, or repair of the facility, and adjacent or virtually adjacent to either a primary construction site or a secondary construction site.

Prop. Reg. § 1.45-7(d)(6).

GE Vernova, in its comments submitted in response to Notice 2022-51, *supra*,[11] requested guidance on the scope of the PWA requirements in the context of the PTC and the application of the DBA definition of the term "site of the work." GE Vernova requested confirmation whether the PWA requirements apply only to the qualified facility itself or extend to other areas of the project site such as the access roads, substations, buildings, and similar property. Guidance was also requested with respect to the ITC and whether the PWA requirements were limited to the "energy project" as that term is defined in § 48 and not beyond the energy properties included in the energy project. In either case, GE Vernova (like other stakeholders) advanced that the PWA requirements should not extend beyond the immediate boundaries of the project construction site for the qualified facility or energy project, as the case may be, and should apply generally only to laborers or mechanics employed directly upon this project construction site except in exceptional circumstances. That is, GE Vernova and other stakeholders requested guidance confirming that the PWA requirements apply only to laborers or mechanics employed directly upon the work site. Secondary sites, in the case of a qualified wind facility, for example, should be limited to only those sites that are adjacent to the wind turbine locations and should not extend to offsite areas and offsite work except in exceptional circumstances.

The Proposed Regulations, however, focus heavily on so-called secondary construction sites, even though those sites should be rare in the case of clean energy projects. As the Preamble confirms, this focus appears to be the result of recent changes to the DBA regulations and the issuance of a final rule by the DOL on August 23, 2023, after the request for comments on the PWA requirements in Notice 2022-51, *supra*. Specifically, the Preamble references this more recent DOL rulemaking and states that "[a]s with certain construction subject to the DBA, the Treasury Department and the IRS expect that taxpayers similarly may use multiple construction sites in the construction, alteration, or repair of a facility and in certain cases prefabricate large portions of the facility offsite for later installation at the facility's location. Some of these secondary sites will be dedicated solely to the construction of a facility while others may service multiple clients and facilities." 88 Fed. Reg. at 60026. Thus, the Preamble appears to envision that there will be secondary construction sites implicated under the PWA requirements.

[11] *Available at* https://www.regulations.gov/comment/IRS-2022-0025-0084.

Importantly, the references to prefabrication and manufacturing activities in the definition of "geographic area and locality" (excerpted above) raise significant concerns and uncertainty. It is not clear from the Preamble and the Proposed Regulations whether this definition might be applied to offsite manufacturing facilities, dedicated production lines, or modular facilities that service multiple projects but that may service a single large project for an extended period of time – which is not uncommon in the clean energy industry. The Proposed Regulations note that this definition does "not simply reflect the manufacture or construction of a product made available to the general public," is limited in application only to sites "dedicated exclusively for a specific period of time to, the construction, alteration, or repair of the facility," and "[a] significant portion does not include materials or prefabricated component parts." Prop. Reg. § 1.45-7(d)(6). In general, this language would correctly indicate that manufacturing activities and offsite locations such as laydown yards would ***not*** be covered by the PWA requirements. The Proposed Regulations, however, fail to specifically exclude offsite manufacturing and prefabrication facilities from "secondary construction sites." Moreover, the Proposed Regulations provide that "[a] specific period of time means a period of weeks, months, or more, and does not include circumstances where a site at which multiple facilities are in progress is shifted exclusively so to a single facility for a few hours or days in order to meet a deadline." *Id*. The Proposed Regulations do not provide a specific exception for manufacturing and prefabrication activities, and it is possible that some offsite manufacturing and prefabrication facilities that service multiple customers and projects could be dedicated for a period of time to a specific project given the size of some clean energy projects. Those offsite facilities should not be covered by the PWA requirements. They are not construction sites. It would be problematic if work at those facilities were covered by the PWA requirements. The Guidance should confirm that these facilities are excluded from the PWA requirements.

In addition, prior to the recent issuance of DOL's final rule and DBA regulations, a number of court decisions have held that the DBA extends only to work done by laborers and mechanics directly at the site of the work. *See, e.g.*, *L.P. Cavett Co. v. U.S. DOL*, 101 F.3d 1111 (6th Cir. 1996); *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994); *Building and Construction Trades Department, AFL-CIO v. U.S. DOL Wage Appeals Board (Midway Excavators, Inc.)*, 932 F.2d 985 (D.C. Cir. 1991). Those court decisions do not contemplate secondary construction sites that are located outside of the project site (or adjacent location). Therefore, the new final rule on secondary construction sites may invite a legal challenge. There is uncertainty whether this expansion of the site of the work definition by DOL will be accepted by the courts. The adoption of secondary construction sites in the Proposed Regulations compounds this uncertainty and fails to address the specific nature of clean energy projects which often involve offsite manufacturing and prefabrication facilities that should not be covered by the PWA requirements. The Guidance should clarify the circumstances in which the rule relating to secondary construction sites applies in the context of the PWA requirements and, in particular, clarify that it does not apply to manufacturing facilities, dedicated production lines, prefabrication facilities, laydown yards, or "mod-yard" locations that generally service multiple projects and customers.

Further, the Guidance should provide specific examples of the types of secondary construction sites that are alluded to in the Preamble that Treasury and the IRS believe must be covered by the PWA requirements. The Guidance should distinguish between genuine offsite

manufacturing activities (not subject to the PWA requirements) and construction activities that occur at a dedicated offsite location and are covered by the PWA requirements. For example, the Guidance should exclude from the PWA requirements the following types of locations that are not specifically constructed to support a particular project:

- Existing field repair shops (not constructed specifically for a single project) that may be used to refurbish/repair WTG components (e.g., gearboxes, generators, etc.) and return them to the project site. These remote shops are not part of the original manufacturing factory but support multiple projects located in multiple counties and States across the United States.

- Storage/laydown yards that are located in a centralized location in the United States that are routinely used to temporarily hold components prior to delivery to a project. These yards are not the original manufacturing factories but support multiple projects located in multiple counties and States across the United States. For example, newly manufactured components are sent from the factory to a central rail yard in Kansas to temporarily hold those components until the project sites are ready to receive them. From this yard, components can be delivered to wind projects located in Colorado, Illinois, Indiana, Montana, Oklahoma, Texas, and other States. These storage/laydown yards already exist and were not established to support any specific, single project.

The Proposed Regulations also provide in the definition of "geographic area or locality" that "[t]he locality of the facility also includes any adjacent or virtually adjacent dedicated support sites, including job headquarters, tool yards, batch plants, borrow pits, and similar facilities of a taxpayer, contractor, or subcontractor that are established specifically for or dedicated exclusively to the construction, alteration, or repair of the facility, and adjacent or virtually adjacent to either a primary construction site or a secondary construction site." Prop. Reg. § 1.45-7(d)(6). This definition appears to be derived from the "site of the work" definition in the current DBA regulations in 29 C.F.R. 5.2, and is similar to the definition included in the prior rule at 29 C.F.R. 5.2(l)(2) (in effect prior to October 23, 2023), except for the inclusion of secondary construction sites. However, neither the Preamble nor the Proposed Regulations provide any further explanation of this definition. Case law under the DBA has indicated that, in the case of a fixed project site (and not a moving site like a highway project), a location two or more miles from the project site would ***not*** be adjacent or virtually adjacent. *See, e.g., Ball, Ball & Brosamer, Inc.*, *supra* (workers in borrow pits and batch plants located two miles from construction site not covered by DBA); *L.P. Cavett Co.*, supra at 1115 ("In our view it is not unreasonable to conclude that while a facility in virtual adjacency to a public work site might be considered part of that site, a facility located two (or in this case three) miles away from the site would not.").[12] The Guidance should confirm the application of this case law with respect to adjacent or virtually adjacent locations, and provide specific examples relevant to clean energy projects. The Guidance should confirm that laydown yards and similar offsite locations normally

[12] Likewise, in *Wicke*, ARB Case No. 06-124, 2008 WL 4462982 (Sept. 30, 2008), the DOL Administrative Review Board ("ARB") held that borrow pits located three or five miles from the various stream crossing rehabilitation project sites were not covered by the DBA – relying upon the trio of appellate decisions (*Midway*, *Ball*, and *Cavett*) described earlier addressing the "site of the work" definition under the DBA and the prior ARB rulings in *Bechtel Constructors Corp.*, ARB No. 95-045A (July 15, 1996) and *Bechtel Constructors Corp.*, ARB No. 97-149 (Mar. 25, 1998).

would not be covered by the PWA requirements if they are located two or more miles from the project construction site for the qualified facility or energy project.

Requested Clarification to Proposed Regulations:

- The Guidance should confirm that the "site of the work" for purposes of a qualified facility and energy project is limited generally to the immediate boundaries of the project construction site and does not extend to offsite work except in limited circumstances.

- The Guidance should clarify the meaning of adjacent or virtually adjacent locations with respect to clean energy projects and specifically recognize the geographic limits placed on offsite work adopted in case law under the DBA.

- The Guidance should clarify the circumstances in which the rule relating to secondary construction sites applies in the context of the PWA requirements and, in particular, clarify that it does not apply to manufacturing facilities, dedicated production lines, prefabrication facilities, laydown yards, or "mod-yard" locations that generally service multiple projects and customers. The Guidance should provide specific examples where the PWA requirements apply to secondary construction sites in the context of clean energy projects.

Comment 8: The Guidance should clarify how taxpayers may make curative payments of prevailing wages to laborers and mechanics that 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. In addition, it is clear that an IRS audit of the prevailing wage requirement may not occur for some time after completion of construction of the qualified facility – perhaps years after the contractors and subcontractors, as well as the relevant laborers and mechanics, have left the site. Those circumstances differ significantly from the public buildings and work covered by the DBA, where there are ongoing compliance obligations with the DOL and the contracting agency. The Preamble continues, however, 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.* This statement and the circumstances of unlocatable laborers and mechanics is a significant issue in the industry and has created considerable uncertainty. The Preamble proposes, nonetheless, that:

> The Treasury Department and the IRS expect that taxpayers will be able to establish correction payments even when a former laborer or mechanic cannot be located. In general, States have developed specific rules for the payment of wages to former laborers and mechanics who cannot be located. These rules can include diligence requirements to locate the laborer or mechanic, information reporting obligations to relevant State agencies on the amount of unclaimed

> wages, and requirements to remit any unclaimed wage amounts to State control as unclaimed property after defined holding periods. Taxpayers may also be able to establish correction payments were made by demonstrating compliance with any withholding and information reporting requirements with respect to the payments.

88 Fed. Reg. at 60028. Although the Preamble does not provide specific references to the State rules described above, it appears that they relate to State unclaimed property laws for wages or salaries that have remained unclaimed by an employee for a period of time after the time in which the wages were payable. *See, e.g.*, Cal. Civ. Proc. Code § 1513(a)(7); Tex. Prop. Code Ann. § 74.001 et. seq. Among other things, the various State unclaimed property laws require notifications to the employee's last known address, reports to the States, and an escheat of the wages to the States after a designated period.

It is not clear that State unclaimed property laws provide certainty to taxpayers who are unable to locate employees in order to make curative payments of prevailing wages. Indeed, the invocation of State unclaimed property laws would appear to impose additional burdens and complexities on taxpayers – including additional reporting requirements involving State actors – above and beyond those imposed by the PWA requirements. Further, although the Preamble suggests that the State unclaimed property laws may provide a method to make curative payments to unlocatable employees, the Proposed Regulations do not address whether the use of the State unclaimed property laws may be relied upon as reasonable cause or that those laws will be deemed to satisfy the curative payment provisions. Rather, Treasury and the IRS merely invite comments on this issue. In general, we believe that this additional layer of complexity is unnecessary and that the Guidance should provide a uniform method or methods for satisfying the curative payment provisions in the context of unlocatable employees.

Requested Clarification to Proposed Regulations:

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,[13] 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).

[13] *See* U.S. Department of Housing and Urban Development, Handbook 1344.1 Rev 2, at sec. 5.10(I), 5-17 (Feb. 2012) (notion of a "labor standards escrow account" for unfound or unpaid employees).

Comment 9: The Guidance should clarify the procedures applicable to a "final determination" by the IRS and whether the taxpayer has the right to appeal or challenge a final determination.

Prop. Reg. § 1.45-7(c)(4)(i) provides for a 180-day limit to cure a failure to meet the prevailing wage requirement by paying the curative and penalty payments. The 180-day period runs from the date of a "final determination" by the IRS with respect to any failure. Prop. Reg. § 1.45-7(c)(4)(ii) provides that the final determination occurs on the date that the IRS sends to the taxpayer "a notice stating that the taxpayer has failed to satisfy the Prevailing Wage Requirements ...." Section 45(b)(7)(B)(ii) provides that deficiency procedures "shall not apply with respect to the assessment or collection of any penalty imposed by this paragraph." Prop. Reg. § 1.45-7(c)(2) also provides consistently that "[t]he penalty payment ... may be assessed and collected without regard to the deficiency procedures provided by subchapter B of chapter 63 of the Code." Prop. Reg. § 1.45-7(c)(2) also provides, however, that "[a]ny determination by the IRS disallowing a claim for the increased credit under section 45(b)(6) will be subject to the deficiency procedures of subchapter B of chapter 63."

The Proposed Regulations do not appear to address the application of the deficiency procedures to the curative payment itself, or otherwise provide an opportunity to challenge the curative payment as determined by the IRS. To the extent that the taxpayer must make the correction payment within 180 days of the IRS's final determination, it is not clear how the deficiency procedures (including U.S. Tax Court prepayment rights) would apply. Also, other than a failure to make the required correction and penalty payments, the Proposed Regulations do not specify under what circumstances there would be a final determination by the IRS disallowing a claim for the increased credit. Finally, it is not clear that a "notice" from the IRS and a "final determination," which triggers the 180-day period to make a curative payment, are the same thing. One would expect that the IRS may send an initial notice to the taxpayer regarding a failure to satisfy the prevailing wage requirement. These matters should be clarified in the Guidance.

It is also noteworthy that the apprenticeship requirement does not include any provision for a "final determination," but is instead silent on this issue. Specifically, Prop. Reg. § 1.45-8(e)(2)(i) provides that in order to cure a failure of the apprenticeship requirement the taxpayer must pay the IRS the specified penalty. This provision does not include any reference to an IRS final determination or the timing of this payment in order to cure the failure. Prop. Reg. § 1.45-8(e)(2)(iii) provides that deficiency procedures apply to this penalty payment.

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. Specifically, the statute provides the taxpayer with an opportunity to cure a failure to meet the PWA requirements (i) by paying the curative payment, interest, and the related penalty in the case of the prevailing wage requirement and/or (ii) by satisfying the good faith effort exception or paying the related penalty in the case of the apprenticeship requirement. In general, taxpayers should be permitted to make a curative payment in all cases where there has been a failure to meet any of the PWA requirements and avoid the loss of the increased credit amount. 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. For this reason, the Guidance should provide additional certainty with respect to the taxpayer's ability to cure a PWA failure in all circumstances. *See, e.g.*, Slowey, *supra* ("'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).

In this respect, certain market participants have raised concerns that a failure to maintain records by one or more subcontractors or a subsequent determination by the IRS that additional work, additional laborers or mechanics, or secondary construction sites are covered by the PWA requirements may create a circumstance in which the curative payment cannot be calculated because of the absence of records. The Guidance should confirm that the taxpayer should not be precluded from making a curative payment in these circumstances – i.e., that the IRS cannot disallow the increased credit amount if the taxpayer is willing to make a curative payment based on a reasonable calculation even if that calculation requires some level of estimation. The Guidance should provide taxpayers with certainty on this issue and provide the IRS and taxpayers with flexibility given the difficult and complex compliance burdens that the PWA requirements may involve with multiple contractors and subcontractors on large-scale clean energy projects. In addition, as discussed in Comment 8 above, it is important that the Guidance address employees who cannot be located and to specify procedures that taxpayers may follow in order to satisfy the curative payment rules in these circumstances – without facing the prospect of a disallowance of the increased credit amount for PWA.

Requested Clarification to Proposed Regulations:

- Although the statute and Proposed Regulations provide that deficiency procedures do not apply to a final determination by the IRS of a penalty for a failure to satisfy the prevailing wage requirement, the Guidance should afford the taxpayer an opportunity to administratively appeal or challenge any penalty determination by the IRS.

- The Guidance should clarify the circumstances in which the IRS can make a determination disallowing a claim for an increased credit under § 45(b)(6).

- The Guidance should confirm that deficiency procedures apply to a final determination by the IRS of a curative payment and further describe the procedures that apply in these circumstances, including how a curative payment is made within the designated 180-day period – consistent with deficiency procedures (including U.S. Tax Court jurisdictional issues).

- The Guidance should clarify the procedures applicable to making a penalty payment under the apprenticeship requirement and the application of deficiency procedures. Specifically, the Guidance should confirm whether the IRS will issue a "final determination" consistent with the prevailing wage requirement or issue a statutory notice of deficiency or other notice. The Guidance should clarify the timing of the penalty payment under the apprenticeship requirement.

- The Guidance should confirm that taxpayers have the opportunity in all cases to make a curative payment for any failure to satisfy any of the PWA requirements. The Guidance should clarify the circumstances in which the increased credit amount may be subject to disallowance. Assuming the basic requirements of the underlying credit have been satisfied, the Guidance should limit disallowance to the taxpayer's unwillingness to make a curative payment. The Guidance should provide flexibility to the IRS and to the taxpayer in the case of a subsequent determination by the IRS that any of the PWA requirements have not been satisfied and, in particular, allow the curative payment to be reasonably estimated in circumstances where it cannot be precisely calculated because of a failure in recordkeeping by contractors or subcontractors or a subsequent IRS determination that additional work, laborers or mechanics, or sites of work are covered by the PWA requirements.

Comment 10: The Guidance should extend the pre-hire project labor agreement ("PLA") exception and deem any qualifying PLA to satisfy the PWA requirements.

The Proposed Regulations provide an exception to the penalty payments for any failure to pay prevailing wages to covered laborers and mechanics under the prevailing wage requirement, *see* Prop. Reg. § 1.45-7(c)(6)(ii), or to satisfy the apprenticeship requirement, *see* Prop. Reg. § 1.45-8(e)(2)(v). However, this exception applies only to the penalty payments. It does not apply to the curative payment or the interest payment required under § 45(b)(7)(B)(i)(I)(aa) and (bb). In addition, the PLA exception requires a "Qualifying Project Labor Agreement," which incorporates six separate minimum criteria. Two of the criteria are effectively circular in nature – the PLA must "(D) Contain provisions to pay prevailing wages" and "(E) Contain provisions for referring and using qualified apprentices consistent with section 45(b)(8)(A) through (C) and guidance issued thereunder ...." Prop. Reg. § 1.45-7(c)(6)(ii). The circular nature of these two items may render the PLA exception meaningless. Importantly, it is not clear that these provisions have any relevance under a PLA. Generally, under a PLA, the taxpayer must pay the wage rates negotiated with the union – which are often higher than the prevailing wage rates set forth in DOL wage determinations. Taxpayers have no choice to pay a different rate than the one negotiated with the union. Moreover, the requirement that the PLA incorporate the IRA apprenticeship requirement undercuts the PLA exception for the apprenticeship requirement and makes it superfluous.

Requested Clarification to Proposed Regulations:

- The Guidance should clarify that the agreed-upon wages under a PLA will be deemed to be prevailing wages for PWA purposes.

- The Guidance should clarify that the apprenticeship requirement will be deemed to be satisfied in the case of a PLA that includes a preference to use qualified apprentices; however, the PLA is not required to include the same requirements under § 45(b)(8) in order to be a Qualifying Project Labor Agreement.

- The Guidance should exempt any qualified facility from the PWA requirements if the laborers and mechanics at the project construction site are covered by a PLA. In particular, a taxpayer should be deemed to satisfy the PWA requirements if the taxpayer

produces a valid PLA for the qualified facility and shall not be required to satisfy the recordkeeping and reporting requirements described in Prop. Reg. § 1.45-12.

Comment 11: The Guidance should clarify the good faith effort exception with respect to the apprenticeship requirement by (i) not requiring a renewal of a valid request for qualified apprentices and (ii) confirming that an acknowledgment alone is not a sufficient response.

Section 45(b)(8)(D)(ii) provides that the taxpayer shall be deemed to have satisfied the apprenticeship requirements if the taxpayer has requested qualified apprentices from a registered apprenticeship program and (a) such request has been denied, or (b) the registered apprenticeship program fails to respond to such request within 5 business days after the date on which such registered apprenticeship program received such request. In either case, the statute provides that the taxpayer is deemed to satisfy the apprenticeship requirement without any further effort. The Proposed Regulations, however, interpret the good faith effort exception in a manner that is not consistent with the statutory language.

First, Prop. Reg. § 1.45-8(e)(1)(i)(A)(*2*) provides that a denial of a request for a qualified apprentice is valid only for a period of 120 days. After the expiration of the 120-day period, the taxpayer must submit an additional request in order to continue to satisfy the apprenticeship requirement. It appears that the taxpayer must continue to renew its request for a qualified apprentice every 120 days in order to satisfy this requirement. However, the statute does not prescribe or mention any 120-day period and does not require any renewal by the taxpayer of its request for a qualified apprentice in order to be deemed to satisfy the apprenticeship requirement. Thus, the Proposed Regulations go beyond what the statute requires and imposes a requirement that is contrary to the statute. Moreover, once the construction work has started, it may not be practical or logical to bring a qualified apprentice into the project at its middle or end (or, indeed, after the construction work has ended). The Guidance should remove this renewal requirement.

Second, Prop. Reg. § 1.45-8(e)(1)(i)(C) provides that a simple "[a]cknowledgement, whether in writing or otherwise," by the program would be sufficient to constitute a response for purposes of the second part of the good faith effort exception in § 45(b)(8)(D)(ii). The Proposed Regulations appear to treat this mere acknowledgement as sufficient – even if there is no meaningful response from the program regarding a qualified apprentice. This severely undercuts the good faith effort exception. Again, the Guidance should remove this provision and require a meaningful response from the registered program.

Third, Prop. Reg. § 1.45-8(e)(1)(i)(C) provides that in the case of a failure to respond the "request is deemed to be denied," and, thus, it appears that the failure to respond by the program would be deemed to satisfy the apprenticeship requirement for only a 120-day period, with the same renewal required every 120 days under Prop. Reg. § 1.45-8(e)(1)(i)(A)(2). Again, this provision goes beyond the statutory language and is inconsistent with a good faith effort by the taxpayer. The combination of these provisions creates substantial uncertainty for taxpayers with respect to the apprenticeship requirement and creates burdens that go far beyond what the statute contemplates. Indeed, these provisions make the good faith effort exception seemingly irrelevant and unworkable.

Requested Clarification to Proposed Regulations:

The Guidance should remove the requirement for the taxpayer to renew a request for a qualified apprentice and the 120-day period. The Guidance likewise should confirm that the taxpayer satisfies the good faith effort exception under the apprenticeship requirement if it makes a valid request for a qualified apprentice but fails to receive a meaningful response from the registered program within 5 business days of receipt of the request. A mere acknowledgement by the registered program that it has received the taxpayer's request should not be treated as a response for purposes of the good faith exception.

Comment 12: GE Vernova notes the following additional comments and suggested corrections to the Guidance.

1. Labor hours. For purposes of the apprenticeship requirement, Prop. Reg. § 1.45-8(e)(2)(i) explains the calculation of the penalty for the labor hours requirement. However, it is unclear across what period of time the total labor hours are measured. For example, Prop. Reg. § 1.45-8(e)(2)(i)(D)(*1*), *Example 1*, provides: "At the time A claims the increased credit, a total of 50,000 labor hours were spent on the construction, alteration, or repair work...." This Example indicates that the total labor hours are aggregated across all the laborers and mechanics employed by the taxpayer, each contractor, and each subcontractor – at the time the tax credit is claimed on the tax return. This Example, as well as each of the three other Examples in this section of the Proposed Regulations, explains how the labor hours requirement is calculated in the first taxable year in which the increased credit amount becomes available, when the construction of the qualified facility has been completed and placed in service. None of the Examples address a taxable year other than this initial taxable year – e.g., alteration or repair work in a subsequent taxable year during PTC period – and the Proposed Regulations otherwise do not explain how the labor hours requirement might be calculated in the second or subsequent taxable year in which a PTC is claimed (for example, whether the total labor hours continue to be aggregated in that subsequent taxable year or whether the total labor hours for that subsequent taxable year include only the labor hours for alteration or repair work occurring during that taxable year). As explained in Comment 1 above, the Guidance should confirm (consistent with the four Examples in Prop. Reg. § 1.45-8(e)(2)(i)(D)) that the apprenticeship requirement does not apply after the placed-in-service date of the qualified facility. This calculation issue further illustrates the potential complexities involved if the apprenticeship requirement were to apply to subsequent taxable years. On the other hand, if the Guidance determines that the apprenticeship requirement does apply to the PTC period, then the Guidance should include additional guidance on the calculation of the labor hours requirement in such circumstances and include an example to illustrate the proper calculation during construction and for the PTC period.

2. Definitions. For purposes of the prevailing wage requirement (e.g., § 45(b)(7)), the Proposed Regulations list a set of definitions – many of which are derived from the DBA and/or specifically incorporate definitions from the DBA regulations. Prop. Reg. § 1.45-7(d) provides: "Solely for purposes of this section, the following definitions apply ...." *See also* Prop. Reg. § 1.45-7(a) ("See paragraph (d) of this section for definitions of terms used

in this section."). Similarly, for purposes of the apprenticeship requirement (e.g., § 45(b)(8)), the Proposed Regulations list a set of definitions in Prop. Reg. § 1.45-8(f), which provides: "Solely for purposes of this section, the following definitions apply ...." *See also* Prop. Reg. § 1.45-8(f) ("See paragraph (f) of this section for definitions of terms used in this section."). Prop. Reg. § 1.45-8(f), however, does not incorporate by reference or otherwise set out relevant definitions from Prop. Reg. § 1.45-7(d) to the apprenticeship requirement. *See* Sapirie, *supra*, at 2219 (describing this same issue). The Guidance should clarify whether those same definitions apply, as relevant, and any different scope of those definitions with respect to the apprenticeship requirement.

3. Contractors. The Proposed Regulations define the term "contractor" as "any person that enters into a contract with the taxpayer for the construction, alteration, or repair of a qualified facility." Prop. Reg. § 1.45-7(d)(3). The term "taxpayer" is defined by reference to § 7701(a)(14), and also means the eligible taxpayer for § 6418 purposes. However, the taxpayer claiming the credit may not always be in privity of contract with contractors during the construction phase, and may change during the relevant credit period. Indeed, the taxpayer may have no role in the construction of the qualified facility – because, in many cases, it is the sponsor/developer that assumes responsibility for construction prior to the placed-in-service date. The Guidance should clarify this issue.

4. Subcontractors. Prop. Reg. § 1.45-7(d)(8) defines the term "subcontractor" as "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 DBA regulations (29 C.F.R. 5.2) define the term "subcontractor" to include "subcontractors of any tier." Similar tiering language was included in the DOL FAQs after publication of Notice 2022-61.[14] Treasury and the IRS should clarify whether the PWA requirements apply to lower-tier subcontractors that are not in privity of contract with either the taxpayer or the taxpayer's contractor.

5. Supplemental wage determinations. Prop. Reg. § 1.45-7(b)(3)(ii)(A) provides that "[a] taxpayer, contractor, or subcontractor request[s] a supplemental wage determination or additional classification and wage rate" and "[a]fter review, the Wage and Hour Division will notify the taxpayer, contractor, or subcontractor as to the supplemental wage determination or the labor classifications and wage rates to be used for the type of work in question in the geographic area in which the facility is located." However, Prop. Reg. § 1.45-7(b)(4) provides that, in connection with seeking a reconsideration of a wage determination, "[a] taxpayer may seek reconsideration and review by the Administrator of the Wage and Hour Division of a general wage determination, or a determination issued with respect to a request for a supplemental wage determination or additional classification and wage rate…." The Guidance should be consistent regarding who can request supplemental wage determinations and who can seek reconsiderations of wage determinations.

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[14] It appears that the original FAQs were removed by DOL and replaced with new FAQs following the issuance of the Proposed Regulations. *See* https://www.dol.gov/agencies/whd/IRA.