October 30, 2023

Internal Revenue Service
CC:PA: LPD:PR (IRS and REG-100908-23)
Room 5203
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RE: Treasury Department and IRS Proposed Regulation on Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements

Submitted via Email: www.regulations.gov, **Docket ID No. REG-100908-23**

The American Clean Power Association[1] ("ACP") appreciates the opportunity to submit the following comments in response to the Treasury Department and Internal Revenue Service's ("IRS") request for comments on the Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements ("Proposed Regulations").[2] Treasury and IRS guidance will be crucial to ensuring that taxpayers, including the clean energy industry, can effectively navigate the labor requirements of the Inflation Reduction Act ("IRA") in order to receive the full value of the tax credits.

[1] The American Clean Power Association (ACP) is the national trade association representing the renewable energy industry in the United States, bringing together hundreds of member companies and a national workforce located across all fifty states with a common interest in encouraging the deployment and expansion of renewable energy resources in the United States. https://cleanpower.org/

[2] IRS, *Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements*, 88 FR 60018 (published Aug. 30, 2023), available at: https://www.federalregister.gov/documents/2023/08/30/2023-18514/increased-credit-or-deduction-amounts-for-satisfying-certain-prevailing-wage-and-registered.

ACP seeks further clarification and guidance on the following issues, which are detailed further in our comments below:

1. The Final Regulations Should Clarify That the Construction Period to Which the Prevailing Wage and Apprenticeship Requirements Begin to Apply at the Later of When Construction of the Facility Begins For Tax Purposes or January 29, 2023.
2. Clarity is Needed as to Wage Determination Requirements.
3. Treasury Should Clarify that the Initial Wage Determination Is Made When the Final Contract is Executed.
4. Treasury Should Clarify PWA Requirements for Onshore Activities Related to Offshore Wind.
5. Treasury 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.
6. Treasury Should Clarify PWA Requirements as They Apply to Contractor and Subcontractors.
7. Regulations Should Clarify the Taxpayer's Right to Appeal a Final Determination, and the Applicability of the Procedures to the Apprenticeship Requirements.
8. The Final Regulations Should Provide Consistency as to How Taxpayers Make Curative Payments for Laborers and Mechanics Who Cannot Be Located.
9. Treasury Should Clarify What Constitutes Alteration, Repair and Routine Maintenance in the Context of the Clean Energy Industry and Establish a Threshold Determination Test.
10. Treasury Should Clarify the Term "Site of Work."
11. Treasury Should Provide Clarity as to the "Site of Work" for the PWA Requirements.
12. Treasury Should Provide the Taxpayer Flexibility in the Recordkeeping Process.
13. Final regulations should clarify that the apprenticeship requirements do not apply for any period after a qualified facility or property is placed in service.
14. Treasury Should Revise the Language of the Labor Hour Requirement to Clarify that the Requirement Applies to Total Workhours for the Project.
15. Treasury Should Clarify the Apprenticeship Participation Requirement.
16. Treasury Should Remove the 120-Day Renewal Requirement.
17. Treasury Should Clarify Meaning of "Reasonably Expected" Geography.
18. Treasury Should Extend the Pre-hire Project Labor Agreement (PLA) Exception.

I. COMMENTS

1. Final Regulations Should Clarify That the Construction Period to Which the Prevailing Wage and Apprenticeship Requirements Begin to Apply at the Later Of When Construction Of The Facility Begins For Tax Purposes Or January 29, 2023.

Sections 45(b)(7) and (8) use the word "construction" several times and in different contexts. Confusion as to the precise scope of the prevailing wage and apprenticeship ("PWA") requirements arises because the word "construction" has different meanings under the Davis-Bacon Act ("DBA") rules and for tax purposes. As discussed further below, activities not considered to begin construction for tax purposes may be construction activities for DBA purposes. Likewise, a taxpayer may be considered as starting construction for tax purposes with respect to activities that are not construction activities for DBA purposes.[3] Final regulations should provide that the PWA requirements do not apply to work performed prior to the beginning of construction of an energy project for tax purposes or January 29, 2023.[4] Activities that constitute "construction" under the DBA rules on or after that date with respect to the facility or project would be subject to the PWA requirements.

The PWA requirements apply to facilities and property the construction of which begins on or after the date that is 60 days after Treasury published guidance with respect to the requirements (i.e., January 29, 2023, based on the publication of Notice 2022-61 on November 30, 2022). Notice 2022-61 and the preamble to the Proposed Regulations make it clear that the determination of when construction begins for this purpose is made pursuant to the significant amount of guidance provided in Notices issued by Treasury and the IRS since as early as 2013, which provide well-document tests and objective safe harbors.

What is less clear is whether the PWA requirements apply to activities that occur before the taxpayer has started construction pursuant to the various Notices. The Notices generally provide that preliminary activities conducted by a taxpayer do not trigger the start of construction under the Notices, but it is unclear whether exclusion of such activities from constituting the beginning

[3] For example, a taxpayer will have begun construction by incurring five percent of the cost of an energy project or by having an equipment supplier begin the manufacture of a component of the project pursuant to a binding contract.
[4] This Proposed Regulation does not override section 45(b)(6)(B)(ii) that provides that the PWA requirements are satisfied if construction began before January 29, 2023 (i.e., the start of physical work or meeting the five-percent safe harbor and satisfying the continuity requirement).

of construction also excludes them from being considered "construction" activities under sections 45(b)(7) and (8). For example, section 4.02(1) of Notice 2013-29 provides:

> Physical work of a significant nature does not include preliminary activities, even if the cost of those preliminary activities is properly included in the depreciable basis of the facility. Preliminary activities include planning or designing, securing financing, exploring, researching, obtaining permits, licensing, conducting surveys, environmental and engineering studies, clearing a site, test drilling of a geothermal deposit, test drilling to determine soil condition, or excavation to change the contour of the land (as distinguished from excavation for footings and foundations). Removal of existing turbines and towers is preliminary work and, therefore, does not constitute physical work of a significant nature with respect to the facility.

Some of the activities listed above may constitute "construction, alteration or repair" under the applicable DBA rules and thus could be subject to the PWA requirements.

The preamble to the Proposed Regulations appears to provide that the PWA requirements do not apply until a taxpayer has started construction for tax purposes under the Notices. In discussing the applicability of the DBA to the PWA requirements, the preamble provides:

> 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.[5]

To provide needed certainty, final regulations should incorporate the intent behind the second sentence cited above into the text of the regulations rather than the preamble and specifically provide that the PWA requirements begin to apply at the later of when construction of the facility begins for tax purposes under the Notices or January 29, 2023. We believe the statute supports this interpretation and it provides the clearest and most administrable rule for taxpayers and the IRS.

If Treasury and the IRS do not adopt our suggested rule, they need to consider appropriate transition rules. A taxpayer may have undertaken "construction" activities with

[5] Prop. Reg. Preamble (emphasis added).

respect to an energy project before the enactment of the IRA, before the issuance of Notice 2022-61, before January 29, 2023, or before the promulgation of the proposed or final regulations. Applying the PWA requirement to activities before there was any notice or clarity that the requirements applied or how they applied would be unfair and curing any PWA defects would seem impossible given the lack of appropriate records and the inability to identify workers who may have performed these activities, permanently disallowing the energy project from qualifying for the full PWA-compliant credit amount.[6]

For example, assume a taxpayer began certain preliminary activities before January 29, 2023. At the time, the taxpayer would not have known whether they will complete the project at all, whether they would start construction under the notices on or after the date the requirements would begin to apply, or whether the PWA requirements applied to preliminary activities. It would be inappropriate and administratively infeasible to retroactively apply the PWA requirements to the preliminary activities of the taxpayer.

As another example, assume a taxpayer began certain preliminary activities on or after January 29, 2023, but before the promulgation of the final PWA regulations. A reasonable reading of the Proposed Regulations, particularly the preamble language cited above, would lead the taxpayer to believe that the PWA requirements were not triggered until the taxpayer began construction pursuant to the IRS Notices. It would therefore be inappropriate and administratively infeasible to retroactively apply the PWA requirements to the preliminary activities of the taxpayer if the final regulations subsequently made it clear that the PWA requirements were applicable.

Finally, consider a situation in which a taxpayer started construction under the physical work test or the five percent safe harbor before January 29, 2023, but did not meet the continuity requirement thereafter. Under the rules of Notices, it is not clear when, or paradoxically whether,

[6] Absent the ability to cure PWA defects, a taxpayer could potentially attempt to abandon non-compliant work by, for example, demolishing physical work that had been performed on the site of a project, but the effect of such efforts is not clear under the Notices, and would not be possible in the case of certain preliminary activities such as site clearing.

the taxpayer in such a situation began construction.[7] In such an instance, it would be appropriate to begin applying the PWA requirements on January 29, 2023.[8]

2. Clarity is Needed as to Wage Determination Requirements.

The wage determination regulations in the Proposed Regulation create ambiguity as to when and how the requirements apply. First, 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."[9] The Proposed Regulations further provide that "[a]ny supplemental wage determination or additional classification and wage rate issued … applies from the time the taxpayer begins the construction, alteration or repair of the *facility.*"[10] The use of the term "facility" in the Proposed Regulations implies that PWA requirements apply at the project (i.e., qualified facility) level.

However, other portions of the Proposed Regulations refer to a "contract" when referencing the timing of a DBA wage determination, rather than to a "facility." For example, the Proposed Regulation states "a new *contrac*t would be required to be used when work on a facility is changed . . . including where an option to extend the term of a *contract* for the construction, alteration, or repair is exercised."[11] Additionally, the preamble states "[h]owever, 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

[7] Given the continued reliance on start of construction concepts in the IRA, it would be appropriate for Treasury and IRS to clarify when construction starts in cases where a project does not meet the continuity requirement. We would be happy to discuss this issue further with you.
[8] Alternatively, Treasury and IRS could apply the start-of-construction rules under the PWA requirements without application of the continuity requirement. This would be simpler and provide greater clarity.
[9] Prop. Reg. §1.45-7(b)(5).
[10] *Id.* (emphasis added).
[11] *Id.* (emphasis added).

not originally obligated, including where an option to extend the term of *a contract* for the construction."[12]

Inconsistent proposed regulatory references to the "facility" (project) and to the "contract" create confusion as to whether PWA requirements apply at the project level or on a contract-by-contract (contract) basis. Treasury should clarify that PWA requirements, particularly the initial prevailing wage determination, apply at the project level. Requiring such a determination at the "contract" level would significantly increase project uncertainty, and further complicate the construction process for clean energy projects: wage determinations must be made early in the planning process for the purposes of financing a project. Requiring a wage determination on a "contract" level would impose onerous and almost unfeasible administrative burdens given the number of contractors or subcontractors that may be involved on any one project. Indeed, the Supreme Court has recognized that Congress amended the DBA in 1935 to provide for predetermination of DBA wages, in pertinent part, so "that the contractor may know definitively in advance of submitting his bid what his approximate labor costs will be."[13] Fair forewarning at the "construction, alteration or repair work" bid stage regarding which predetermined, minimum DBA prevailing rates apply and as to what is equally important to the sound administration of the IRA's renewable infrastructure program.

Finally, the Proposed Regulations state that 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."[14] The regulations do not clarify what level of additional work triggers a new wage determination. Because renewable energy contracts often undergo frequent, minor changes that do not materially change the scope of the work of the project, ACP recommends that Treasury establish a threshold with respect to the level of work that would require a new wage determination. Indeed, the language in the preamble itself states, "additional, *substantial* construction,

[12] Prop. Reg. at 60024 (emphasis added).
[13] *Univs. Research Ass'n v. Coutu*, 450 U.S. 754 (1981).
[14] *Id.* (emphasis added).

alteration, or repair work not within the scope of work of the original contract."[15] Consequently, Treasury should clarify that the new wage determination requirement is limited only to **substantial** additional work outside the scope of the original project,[14] and not when a contract is altered for other reasons.

Similarly, the term "additional time" in the Proposed Regulation should be clarified. The term is sufficiently ambiguous to suggest that a new wage determination is needed when there are circumstances of delay and extension that frequently occur in the clean energy industry. The Final Rule should include limiting language from DBA providing that a new wage determination is not required "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."[16]

3. Treasury Should Clarify that the Initial Wage Determination Is Made When the Final Contract is Executed.

The Proposed Regulations provide that a wage determination is made "at the time construction, alteration, or repair, of the facility begins." ACP is concerned that this wage determination timing may pose logistical and planning issues if a project requires DBA/IRA-cognizable, "alteration or repair work."[17] The proposed language instructs that the wage determination will be made when the "alteration or repair work" begins; however, this, from a planning and contractual standpoint, is too late in the process to be feasible for developers for the reasons readily articulated by Congress set forth above. Costs and wages are estimated and incorporated into contracts during the contract negotiation and signing phase—not when any alteration or repair work begins. Thus, ACP urges Treasury to amend this timing—or, at the very least, to clarify how such a determination would be made in the case of projects requiring wage determination earlier in the process.

Consequently, Treasury should clarify that prevailing wages are ordinarily fixed at the time that a project contract is signed, as this will provide ample forewarning of anticipated

[15] Prop. Reg. preamble (emphasis added).
[16] 29 C.F.R. § 1.6(c)(2)(iii)(A).
[17] *Supra* at 17-22.

project labor burdens for "laborers and mechanics"[18] and a clear and measurable metric for taxpayers. This proposed regulatory approach is consistent with the text of section 1 of the DBA and recently issued Department of Labor ("DOL") guidance. The former, as construed by the Supreme Court, "provides that every contract based upon these [bid] specifications shall contain a [DBA] stipulation that the contractor shall pay wages 'not less than those stated in the advertised specifications.'"[19] The latter instructs that "[a]s a general rule, the wage determination incorporated into a bid solicitation and related contract award establishes the minimum wage rates and fringe benefits which must be paid for the entire term of the contract."[20] Furthermore, such an interpretation provides a clear and administrable rule for taxpayers and the IRS.

4. Treasury Should Clarify PWA Requirements for Onshore Activities Related to Offshore Wind.

Treasury should provide clear guidelines on the methodology for taxpayers to determine the prevailing wage for the onshore activities related to offshore development. ACP appreciates that the Proposed Regulations contain some wage determination guidance for offshore wind facilities: "[i]f a general wage determination is not available, in lieu of requesting a supplemental wage determination for a *facility located in an offshore area within the outer continental shelf of the United States*, a taxpayer, contractor, or subcontractor may rely on the general wage determination for the relevant category of construction that is applicable in the geographic area closest to the area in which the qualified facility will be located."[21] However, this language does not address how to determine the prevailing wage for *onshore* activities related to offshore development (e.g., onshore power conditioning equipment). To the extent that PWA requirements apply to onshore activities related to an offshore wind facility, Treasury should clarify that the locality in which such onshore activity occurs, and not where the offshore wind facility is located, shall determine the PWA requirements for those activities.

5. Treasury Should Identify and Exclude Certain Specialized Employees Such as Engineers, Inspectors, and Wind Technicians and Should Identify and Exclude

[18] *Supra* at 10-13.
[19] *Univs. Research Ass'n*, 450 U.S. at 771.
[20] Dep't of Labor, *Davis-Bacon and Related Acts (DBRA) Frequently Asked Questions*, https://www.dol.gov/agencies/whd/government-contracts/construction/faq (last visited Oct. 24, 2023).
[21] Prop. Reg. § 1.45-7(d)(3)(iii) (emphasis added).

Certain Activities Such As Commissioning, Testing, and Troubleshooting from the PWA Requirements.

The Proposed Regulations define 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.[22]

The preamble to the Proposed Regulation also requests comment 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.[23] This includes "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 an exemption under 29 CFR part 541" but does not include workers "whose duties are primarily administrative, executive, or clerical."[24]

In response, Treasury 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, and engineers.[25] Similarly, 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

[22] Prop. Reg. at 60025.
[23] *Id.*
[24] *Id.*
[25] 29 C.F.R. Part 541.

the contract or established standards and codes are not usually considered to be laborers or mechanics for purposes of [the DBA]."[26]

To be consistent with existing, and, indeed, longstanding DOL policy guidance amplifying which individuals directly employed on the site of a DBA "construction, alteration or repair" project site are entitled to prevailing rate protections as a DBA "laborer or mechanic," Treasury should clarify as follows: project engineers, factory-trained installed equipment and system inspectors, a manufacturer's technician(s) performing post-installation system programming, commissioning and performance testing, fall squarely outside the ambit of the regulated category of "laborers or mechanics" when it comes to implementing the IRA's DOL-imported PWA requirements. Required predictability and certainty for the clean energy industry could be fostered by Treasury adding to its final regulations an additional, third sentence to the end of Proposed Regulation § 1.45(d)(7) (proposed laborer and mechanic definition).[27]

This third sentence would serve to identify manufacturer/supplier activities that are common in the clean energy industry but do not rise to the level of DBA construction or construction-type activity.[28] By way of illustration, in the wind industry, a wind turbine manufacturer/supplier's, factory-trained technician(s) is responsible, after equipment installation and mechanical completion has been certified, for performing a comprehensive up tower commissioning process to verify and validate system functionality and enable the manufacturer's warranty 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:

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[26] *See* U.S. Department of Labor Field Operations Handbook ("FOH"), sec. 15e14. See, e.g., William J. Lang Land Clearing, Inc. v. Administrator, Wage & Hour Div., 520 F. Supp.2d 870, 879 (E.D. Mich 2007) (recognizing the FOH as a "body of experience and informed judgment to which the courts and litigants may properly resort for guidance.") See also FOH sec. 15e6 (exempting on-site, post-installation, functionality testing of installed heating and air conditioning systems due to tester's ordinarily not performing manual/mechanical functions of DBA-protected skilled construction trade installing these systems).

[27] The third sentence could provide: "A laborer or mechanic does not include a person who performs activities that do not involve actual construction on the project, such as a factory-trained technician whose primary function on the construction, alteration or repair job site is to . . . (e.g., take measurements and accumulate data to advise mechanical contractors to make required corrections, inspect mechanical and electronic equipment and systems after they have been installed, perform post-installation system verification and validation testing to support providing a warranty)."

[28] *See, e.g.*, United States v. Binghamton Const. Co., 347 U.S. 171, 178 (1954) ("On its face the [Davis-Bacon] Act is a minimum wage law designed for the benefit of construction workers.").

- Perform energization, operation, troubleshooting and repair of wind turbine systems necessary to support the installation and mechanical completion of the wind turbine generator ("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.

Commissioning, in the wind industry, does not encompass the mechanical assembly tasks related to wind turbine installation, which includes activities such as transportation, hoisting, rigging, fastening, torque application, welding, painting, and fabrication. This aspect of commissioning shares similarities with inspection work, which is explicitly excluded from the scope of covered tasks under the DBA, as indicated above. Similarly, testing, and technical assistants entails work similar to DBA excluded "inspections" and therefore should be excluded in the final guidance. Lastly, troubleshooting, which is a common practice in the wind industry, should not be subject to PWA requirements. Like commissioning and testing, troubleshooting does not involve the type of physical or manual labor typically associated with laborers or mechanics.

Additionally, the final regulations should define scenarios in which PWA requirements are applicable to equipment installation activities. It is important to note that, in general, the DBA does not cover installation work related to supply or service contracts, unless such installation substantially involves construction work that is distinct and separable from the non-construction aspects of the contract.[29] The determination of whether installation work qualifies as construction activity under the DBA depends on various factors, including the nature of the

[29] *See, e.g.*, FOH, sec. 15d13(a) (citing the Service Contract Act regulations at 29 CFR 4.116(c)(2)).

primary contract, the specific tasks carried out during equipment installation, any structural modifications required, and the cost of installation relative to the overall project. If construction work is intertwined with non-construction tasks to the point where it cannot be separately identified, the DBA does not apply.

For instance, in cases where the supply contract primarily involves equipment delivery and minimal installation tasks like equipment setup, calibration, testing, electrical connections, and equipment commissioning, with installation costs being significantly lower than the overall supply contract value, the DBA does not govern the installation services. Treasury should clarify that the PWA requirements align with this treatment of installation services under the DBA and do not extend to supply or service contracts in such situations.

To address this uncertainty the final regulations should identify and exclude specialized professional employees that are common in the clean energy industry such as engineers, inspectors, technical assistants, wind technicians, and similar employees. Treasury should also 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. These exclusions would be in line with the already established DBA and would help provide clarity in applying PWA requirements.

6. Treasury Should Clarify PWA Requirements as They Apply to Contractor and Subcontractors.

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."[30] 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 –

[30] Prop. Reg. § 1.45-7(d)(3).

because, in many cases, it is the sponsor/developer that assumes responsibility for construction prior to the placed-in-service date.

Similarly, the Proposed Regulations define 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."[31] The DBA regulations define the term "subcontractor" to include "subcontractors of any tier."[32] Similar tiering language was included in the DOL FAQs after publication of Notice 2022-61.[33]

Treasury and IRS should clarify whether the PWA requirements apply to contractor and/or lower-tier subcontractors that are not in privity of contract with either the taxpayer or the taxpayer's contractor. Without privity of contract, there is no way for a taxpayer or primary contractor to confirm that such contractors or lower-tier subcontractors have satisfied the PWA requirements for purposes of claiming the tax credit. As a result, such a broad definition will create significant administrative and logistical issues for clean energy projects. Consequently, Treasury should clarify that "contractor" and "subcontractor" includes *only* those contractors and subcontractors, respectively, with whom the taxpayer or primary contractor are in privity of contract.

7. Regulations Should Clarify the Taxpayer's Right to Appeal a Final Determination, and the Applicability of the Procedures to the Apprenticeship Requirements.

ACP requests further clarification on several aspects of the IRS final determination procedures. Treasury should clarify how the Section 45(b) deficiency procedures would apply to the prevailing wage requirements. It should also provide further guidance as to how a taxpayer may appeal an IRS final determination that the taxpayer failed to satisfy the prevailing wage requirements and an IRS decision disallowing a claim for the full-value credit under Section 45(b)(7). Additionally, Treasury should issue further guidance as to whether the 180-day

[31] Prop. Reg. § 1.45-7(d)(8).
[32] 29 C.F.R. 5.2.
[33] 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.

requirement and final determination procedure will be applied to the apprenticeship requirements.

For the prevailing wage requirements, the Proposed Regulations include a 180-day window to cure a failure by paying correction penalty payments.[34] This window begins on the date a "final determination" is made by the IRS. The regulations define "final determination" as the day that the IRS sends the taxpayer "a notice stating that the taxpayer has failed to satisfy the Prevailing Wage Requirements. . . ."[35] The regulations further provide 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. Any 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."[36] The IRA provides that the deficiency procedures "shall not apply with respect to the assessment or collection of any penalty imposed by this paragraph."[37]

The current language of the Proposed Regulations fails to address how the deficiency procedures would apply to the penalty correction payment and does not provide the taxpayer with an opportunity to challenge the correction payment after the IRS has made a final determination. Furthermore, under the current 180-day window for a taxpayer to make correction payments, it is unclear how the deficiency procedures would apply to these payments. The Proposed Regulations also do not provide any guidance regarding what circumstances, beyond a taxpayer's failure to make correction and penalty payments, would trigger a determination by IRS to disallow the increased tax credit.

Thus, to the extent that the taxpayer must make the correction payment within 180 days of the IRS's final determination, Treasury should clarify: (1) how the deficiency procedures referenced above would apply; (2) the taxpayer's right to appeal an IRS decision for failure to satisfy the PWA requirements; and (3) the taxpayer's right to appeal an IRS decision disallowing a claim for the increased credit. Additionally, as noted in our November 2022 comments,[38]

[34] Prop. Reg. § 1.45-7(c)(4)(i).
[35] Prop. Reg. § 1.45-7(c)(4)(ii).
[36] Prop. Reg. § 1.45-7.
[37] 26 U.S.C. § 45(b)(7)(B)(ii).
[38] Submitted Nov. 4, 2022, available at: https://www.regulations.gov/comment/IRS-2022-0025-0077.

Treasury should provide a forum to taxpayers to expeditiously resolve any disputes regarding disallowed credits and to allow the taxpayer to appeal an IRS determination before such decision becomes final. Finally, Treasury should provide guidance on if or how a taxpayer can cure a deficiency if the contractor is unable to provide, even with a good faith effort, the necessary information required to cure the deficiency.

For the apprenticeship requirements the Proposed Regulations provide that a taxpayer is required to pay the IRS the specific penalty if the taxpayer fails to satisfy the requirements outlined in Section 45(B)(8).[39] The regulations further provide that deficiency procedures apply to this penalty payment.[40] However, the relevant provision does not include the "final determination" language contained in the prevailing wage provisions or provide a timeline for when such a payment is required for a taxpayer to successfully cure the failure. Therefore, Treasury should issue guidance regarding the applicability of the time frame to the apprenticeship requirements (i.e., whether the 180-day timeline be applied) and confirm whether IRS will issue a "final determination" to the taxpayer.

8. The Final Regulations Should Provide Consistency as to How Taxpayers Make Curative Payments for Laborers and Mechanics Who Cannot Be Located.

The Proposed Regulations create undue complexity as to how taxpayers should make curative payments for laborers and mechanics who cannot be located. The Tax Code states that a taxpayer will be deemed to satisfy the prevailing wage requirement "if, with respect to any laborer or mechanic who was paid wages at a rate below the rate described in such subparagraph for any period during such year, such taxpayer—makes payment to such laborer or mechanic[.]"[41] However, 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.[42] The preamble of the Proposed Regulations instructs that a taxpayer who cannot

[39] Prop. Reg. § 1.45-8(e)(2)(i)
[40] Prop. Reg. § 1.45-8(e)(2)(iii).
[41] 26 U.S.C. at 45(b)(7)(B)(i).
[42] Prop. Reg. preamble (D)(2) at 60027-28 ("However, 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.").

locate a laborer or mechanic must defer to the rules of the particular state in which the project is located.

Requiring taxpayers to follow state laws will create an unneeded additional layer of complexity and uncertainty. First, under the Proposed Regulations, rather than following a uniform method for curing wages, taxpayers will have to comply with a multitude of different state reporting requirements. Second, even if the taxpayer does comply with said requirements, the Proposed Regulations do not contain any language stating that following these procedures will satisfy their Tax Code obligations.

To address this issue, Treasury should create a provision for a good faith effort or due diligence waiver concerning correction payments when former laborers and mechanics cannot be located. In these procedures, Treasury and IRS should clearly outline specific Federal procedures, including steps for a good faith waiver, in the final regulations for situations in which a laborer or mechanic cannot be located. ACP suggests that Treasury apply the process already outlined in the Fair Labor Standards Act (FLSA), which instructs: "The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title . . . Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts."[43] The FLSA provides an existing and tested approach and as such it will ensure that there are consistent and universal requirements for renewable energy projects to cure wage requirements, regardless of locality.

9. Treasury Should Clarify What Constitutes Alteration, Repair and Routine Maintenance in the Context of the Clean Energy Industry and Establish a Threshold Determination Test.

The Proposed Regulations instruct that the pivotal DBA-imported terms "construction, alteration, or repair":

> [D]oes 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

[43] 29 U.S.C. § 216(c).

> 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.[44]

An example accompanying this regulation provides an illustration of this rule with respect to a solar farm. It states: "After the solar farm is placed in service, an inverter malfunctions and requires a replacement part. The project 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.[45] However, Treasury fails to explain why recurring equipment replacement work performed once a facility is "in service" is not considered DBA-excluded "service and maintenance." Indeed, the replacement of a part in an inverter is a regular occurrence at a solar farm that does not appear tantamount to a DBA-cognizable "repair." As such, the single example advanced in the Proposed Regulation would appear to upend the longstanding regulatory delineation of the categories of work besides "construction" that is DBA work.[46] At a minimum Treasury should enable its final regulation by providing additional examples of what work satisfies the jurisdictional threshold of "alteration" and/or "repair work."

Turning to "repair work" specifically, the Proposed Regulations should clarify when PWA requirements will apply to "repair work" that occurs after the facility is placed-in-service. Specifically, the Proposed Regulations should provide additional examples and explanations of the categories of "repair work" that will be covered by the PWA requirements. Notably, the longstanding distinctions between the 1930-era DBA and the McNamara-O'Hara Service Contract Act[47]—the DBA's sister, federal prevailing rate law enacted in the 1960s to a fill a jurisdictional gap due to the construction-grounded DBA not applying to federal "service contracts"—should inform this analysis.

[44] Prop. Reg. at 1.45-7(d)(2)(ii).
[45] Prop. Reg. at 1.45-7(d)(2)(iii), ("Example").
[46] Prop. Reg. at 1.45-7(d)(2)(ii).
[47] 41 U.S.C. 351-358 ("SCA").

Even a cursory review of the SCA's implementing regulations underscore that consistent with avoiding overlapping coverage of the two federal prevailing wage acts, DBA "repair" is "construction" grounded, not service grounded.[48] Congress could have imported the SCA into the IRA, but it chose only to incorporate the DBA. Against this backdrop, Treasury should delineate activities that should be classified as routine maintenance and those that should be classified as "alteration or repair" for purposes of DBA.[49] Importantly, authorities on both the DBA and SCA have understood that activities such as routine and basic maintenance, standard operation and maintenance, minor repair, and simple and standard replacements of equipment and other property, are covered by the SCA and therefore are not "repair" work covered by the DBA.[50] For "repair," such activity is usually limited to "construction-like" activity within the context of the DBA.

Similarly, existing tax law distinguishes "incidental repairs" from capital improvements. As an example, taxpayers are permitted to claim a deduction for "repairs and maintenance to tangible property" if such amounts "are not required to be capitalized."[51] Traditionally, this deduction is applied only to "incidental repairs" that do not add to the value or prolong the life of a property.[52] Conversely, costs have been required to be capitalized where repairs either prevent the deterioration or prolong the life of the property.[53] Treasury guidance further instructs how to determine whether activities should be considered "routine maintenance" for purposes of the deduction.[54] The guidance instructs that "routine maintenance" includes activities "that a taxpayer expects to perform as a result of the taxpayer's use of the unit of property to keep the

[48] *See, e.g., Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1056 (D.C. Cir. 2008) ("Abhe & Svoboda is a construction company primarily engaged in the repair of large infrastructure, like bridges and dams.") (DBA-covered highway "bridge repainting projects"); 3 Emp. Coord. Compensation 15:13 ("CAUTION: Most types of contracts that principally involve repair or maintenance of equipment are subject to the Service Contract Act."). 29 C.F.R. 4.131 (Types of [SCA-]covered service contracts illustrated (33) (Maintenance and repair of all types of equipment, e.g., aircraft, engines, electrical motors, . . . electronic . . . and construction equipment."); 29 C.F.R. 4.117(b)(3) ("repair . . . of aerospace, air conditioning and refrigeration equipment, electric motors, . . . replacement of internal parts of equipment listed [above].").

[49] *See, e.g.*, 29 CFR 4.117(a) ("[P]eriodic and routine maintenance, preservation, care, adjustment, upkeep, or servicing of equipment to keep it in usable, serviceable, working order" is covered by the SCA).

[50] *See, e.g., ITT Base Services, Inc., et al.*, 1986 WL 64288 at *4 (Nov. 10, 1986). Such work includes "routine, day-to-day work to extend the life of an item, system, or component."

[51] Section 162 and Treas. Reg. § 1.162-4.

[52] Rev. Rul. 2001-4, 2001-1 C.B. 295, 297.

[53] *Id.*

[54] Treas. Reg. § 1.263(a)-3.

unit of property in its ordinarily efficient operating condition."[55] Such activities include "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."[56]

The Proposed Regulations correctly define basic maintenance as work that is "ordinary and regular in nature and designed to maintain existing functionality of a facility as opposed to an isolated or infrequent repair of a facility to restore specific functionality or adapt it for a different or improved use."[57] However, the Proposed Regulations fail to sufficiently address the range of common repair activities for clean energy projects. As a result, the Proposed Regulations improperly expand the application of the PWA requirements to activities that should be covered under the definition above.

For example, the Proposed Regulations state that an inverter "replacement part" would be covered under the DBA.[58]In reality, this replacement is standard and reoccurring and should therefore be classified instead as routine maintenance not subject to the PWA requirements. This inconsistency creates uncertainty for taxpayers regarding what types of repairs will be covered by the PWA requirements. Furthermore, the Proposed Regulations, without explanation, draw a distinction between "basic maintenance" that occurs before and after the placed-in-service date.[59] Indeed, the Proposed Regulations state "[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."[60] It is unclear, from the current language of the Proposed Regulations, why the time at which these "routine" activities take place should affect how they are classified and whether they are subject to the PWA requirements; in particular, DOL has determined that inspections generally do not all under covered DBA activities.[61]

[55] Treas. Reg. § 1.263(a)-3(i)(1)(ii).
[56] *Id.*
[57] Prop. Reg. at 60026.
[58] Prop. Reg. at 60046.
[59] Prop. Reg. at 60046 ("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.").
[60] *Id.*
[61] *See* U.S. Department of Labor ("DOL") Field Operations Handbook ("FOH"), sec. 15e14.

To address the concerns outlined above, the Proposed Regulations should firstly clarify that basic and routine maintenance (e.g., landscaping and vegetation management), replacement of equipment and parts, and minor repairs (e.g., planned work on capital assets to prevent failure or decline) should not be considered "alteration or repair" for the PWA requirements. To increase certainty, Treasury should also provide additional examples that appropriately cover the scope of activities that may be undertaken at clean energy facilities.[62] Additionally, Treasury should clarify that work performed under service and maintenance contracts will be considered routine maintenance.

In the same vein, Treasury should limit the scope of "alteration or repair" to only those activities which are not regular or customary at a clean energy project and which involve permanent and substantial work on the site of a qualified facility or energy property. Such activities would include, as an example, reconstruction or remodeling of existing facilities, buildings, or components by replacing parts or materials that have deteriorated to a substantial degree and have not been corrected through routine maintenance. This would also include unplanned maintenance that requires replacement or material alteration of the property, significant construction activity, or work that requires skilled labor to restore equipment.[63]

To provide a bright-line test to simplify these distinctions, ACP urges Treasury to limit "alteration" to repowering of facilities only,[64] as this work clearly falls outside the scope of "basic maintenance" as envisioned by the Proposed guidance.[65] With respect to "repair," Treasury should amend the Final Regulations to establish a "minimum hours" threshold, similar to what has been done in other industries with respect to the DBA determinations.[66] Before

[62] For example, troubleshooting should not be treated as "alteration or repair" work for purposes of the PWA requirements. The activity includes, among other things, analyzing data and taking system measurements sufficient to determine the cause of turbine faults and component failure, and taking steps to safely restore the system and turbine to service.
[63] For a more detailed explanation, see ACP's 2022 comments, *supra* note 30 at 5-6.
[64] For example: wind repowering—the combined activity of dismantling or refurbishing existing wind turbines and commissioning new ones. Department of Energy, Wind Repowering Helps Set the Stage for Energy Transition (June 2, 2021), available at: https://www.energy.gov/eere/wind/articles/wind-repowering-helps-set-stage-energy-transition.
[65] Prop. Reg. at 60046 ("Maintenance does not include work that improves a facility, adapts it for a different use, or restores functionality as a result of inoperability.").
[66] *See, e.g.*, Air Force, *Desktop Guide to Davis-Bacon* (Dec. 2014), https://ww3.safaq.hq.af.mil/Portals/63/documents/desktop_guides/AFD-150223-019.pdf?ver=2016-08-10-110415-

issuing the Final Regulations, Treasury should work with representatives from the clean energy industry to establish an appropriate hourly threshold for such projects.

In alternative, recognizing the unique nature of clean energy projects, Treasury should consider establishing a threshold under which any alteration or repair on a clean energy facility would be exempt from the PWA requirements. For this threshold, ACP has previously suggested the lesser of $1 million or 10% capital of the original capitalized cost of the qualified facility or energy project when it is originally placed in service. Specifically, the original capitalized cost is the cost of any qualified facility or energy property under section 1012, not including other adjustments, such as depreciation, under section 1016. This cost also includes all items that the taxpayer properly includes in the depreciable basis of such facility or project. We believe this threshold would strike the appropriate balance between creating certainty for developers and ensuring that appropriate activities remain covered under the DBA.

Turning to offshore wind specifically, the significant scale of such projects will necessarily require more significant expenditure than other clean energy projects. Consequently, alteration or repair conducted on an offshore wind facility should not be subjected to the PWA requirements unless such activity involves altering the form, fit, or function of a turbine. In the alternative, the *de minimis* threshold outlined above should be increased to 25% of the capitalized cost of the qualified energy facility or energy project at the time it is originally placed in service.

10. Treasury Should Clarify the Term "Site of Work."

The Proposed Regulations do not include a specific definition of the term "site of the work," even though its scope is key to applying the DBA prevailing wage rules. Treasury should provide additional clarification regarding the scope of the PWA requirements under the IRA. ACP requests that the PWA requirements be clarified to only apply to the qualified facility itself and do not extend to other areas of the project site such as the access roads, substations, buildings, and similar property. With respect to the investment tax credit (ITC), the PWA

393 at 7 ("DFARS guidance instructs the use of "a less than 32 work-hours (SCA)" vs. "32 or more workhours (DBA)" work hours test (200 or more SF for painting) only when it is unclear whether the work is SCA type maintenance or DBA repair.").

requirements were limited to the "energy project" as that term is defined in section 48 and should not extend beyond the energy properties included in the energy project.

To give an example, under existing IRS guidance, with a few exceptions, buildings are generally excluded from the definition of a "qualified facility" for purposes of both the production tax credit (PTC) and the ITC.[67] Contrary to these existing regulations, and the intent of the IRA, the Proposed Regulations seem to imply that buildings and other structures that would not qualify for the PTC or ITC would nevertheless be subject to the PWA requirements. For consistency and clarity, IRS should clarify that the PWA requirements do not apply to properties that are not part of the qualified facility (for the PTC) and are not classified as energy properties (for the ITC).

11. Treasury Should Provide Clarity as to the "Site of Work" for the PWA Requirements.

The Proposed Regulations create confusion around the PWA requirements related to secondary construction sites. While these sites are generally rare in the case of clean energy projects, the Proposed Regulations spend considerable time in discussing them, potentially implying a more expansive reading of the term than is justified.

The preamble, in referencing a recent DOL rulemaking, 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."[68] This appears to suggest that there could be considerable number of secondary construction sites implicated under the PWA requirements depending on broadly this interpreted, even though that is rarely the case for clean energy projects. The references in the preamble and the Proposed Regulations to prefabrication and manufacturing activities in the definition of "geographic area and locality" also raise

[67] IRS Notice 2013-29 ("Generally, buildings are not integral parts of the facility because they are not integral to the activity of the facility").
[68] Prop. Reg. at 60026.

significant concerns and uncertainty. It is not clear whether the PWA requirements might be applied to offsite manufacturing facilities located considerable distances from a facility.

ACP again repeats its request that clarification be provided that the PWA requirements generally do not extend beyond the immediate boundaries of the project construction site for the qualified facility or energy project and should apply only to laborers or mechanics employed directly at the work site. Secondary sites, for example, should typically be limited to only those sites that are adjacent to the project sites and should not extend to offsite areas and offsite work except in exceptional circumstances. In short, clarification should be provided that manufacturing activities and offsite locations are generally not to be covered by the PWA requirements.

It is also unclear whether offsite activities that service multiple projects but that may service a single large project for an extended period of time are considered secondary sites. 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."[69] This could be read to include 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.

To clear up the uncertainty created by the above, the final regulations should:

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

- Provide specific examples of the limited 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.

- Distinguish between genuine offsite manufacturing activities (not covered by PWA) and the types of construction activities that would normally occur on site but under the new DBA regulations are deemed to occur at a dedicated offsite location.

[69] *Id.*

- Clarify whether the secondary site rules apply only to domestically located facilities and does not include facilities outside of the United States, such as secondary sites located in Mexico or Canada.

- Clarify that PWA requirements do not apply to manufacturing facilities, dedicated production lines, prefabrication facilities, laydown yards, or "mod-yard" locations, which generally service multiple projects and customers.

12. Treasury Should Provide the Taxpayer Flexibility in the Recordkeeping Process.

The Proposed Regulations provide 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."[70] Accordingly, the Proposed Regulations 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.[71]

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."[72] 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."[73] In addition, the

[70] Prop. Reg. § 1.45-6(b) (emphasis added).
[71] Prop. Reg. at 60022-23 (emphasis added).
[72] Prop. Reg. § 1.45-12(b).
[73] *Id.*

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.[74]

ACP has several concerns with the proposed recordkeeping requirements as written. First, the regulations do not provide a clear timeline for how long a taxpayer will be required to retain records relating to the prevailing wage and apprenticeship requirements (e.g., how long the IRS would consider such records "material in the administration of Internal Code law"). The absence of this time frame puts an unnecessary burden on the taxpayer, who would consequently be faced with the undesirable choice of either retaining records for an indefinite period of time (increasing project cost and administrative burden) or choosing a reasonable cut-off date, potentially opening the project up to audit by the IRS. To address this administrative hurdle and increase clarity for taxpayers, Treasury should update the guidance to clarify that the taxpayer must keep records sufficient to show compliance with the PWA requirements for the duration of the 10 years for the PTC (i.e., from year 1) and for 5 years after the project is placed in service for the ITC.[75] Thereafter, the taxpayer should be required to retain PWA compliance records for 3 years from the date the final is return filed, in line with the Department of Labor's newly issued rule.[76]

Second, and perhaps more importantly, ACP and our members have serious concerns, from a confidentiality and anti-trust standpoint, regarding the feasibility of acquiring and maintaining the required prevailing wage and apprenticeship records. The Proposed Regulations place sole responsibility on the taxpayer to maintain and preserve this information, even though

[74] Prop. Reg. § 1.45-12(c).
[75] This is consistent with the language in 26 U.S.C. §45(b)(7)(A)(ii), which limits the scope of "alteration or repair" to the first 10 years for PTC and 5 years for the ITC. Furthermore, the DBA treats alteration and repair identically with construction when determining prevailing wages, even when activities differ. 29 C.F.R. § 5.2(j).
[76] Department of Labor, U*pdating the Davis-Bacon and Related Acts Regulations*, 88 Fed. Reg. 57526 (published Aug. 23, 2023), available at: https://www.govinfo.gov/content/pkg/FR-2023-08-23/pdf/2023-17221.pdf.

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 under Section 6418 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 employee privacy, personal identifying information ("PII"), confidentiality, and anti-trust issues. The Proposed Regulations essentially require contractors and subcontractors to share the PII of their employees with a private third party, the taxpayer. This is different than under traditional DBA compliance, where this information is shared with the federal government. For example, a subcontractor may be hired to work on a stage of a project, but in order for the taxpayer, a private third party, to maintain sufficient records to prove compliance and claim the full PTC or ITC, the subcontractor is required to provide the taxpayer with "[i]dentifying information, including the name, social security or tax identification number, address, telephone number, and email address" for each laborer, mechanic, and qualified apprentice with respect to each qualified facility.

Regarding antitrust concerns, the Proposed Regulations introduce potentially significant compliance issues. The requirements also obligate a taxpayer to retain and disclose, without consent, the salary paid to each covered worker under the DBA; consequently, this requirement again raises serious confidentiality implications as it would require projects to disclose when they paid their laborers and mechanics above the prevailing wage for the particular project and the specific wage paid. Additionally, the same party or parties may play different roles throughout the life of a particular project. This changing dynamic between taxpayer, contractor, and subcontractor raises legitimate anti-trust concerns and the dissemination of such wage information has recently been the focus of enforcement action by the Federal Trade Commission and Department of Justice. The clean energy industry is an area with considerable competition among its various participants. For example, many of our members' qualifying projects employ contractors and subcontractors to fulfill their commissioning/advisory support responsibilities during the wind farm construction. These same contractors and subcontractors may also provide

services directly to customers for transaction repair work/services after the wind farm is constructed. In this scenario, these contractors and subcontractors are offering their services and repairs to our members' customers, directly competing with our members. The proposed reporting and certification requirements in the Proposed Regulations would necessitate our members, their contractors, and subcontractors, in these situations, to exchange detailed, competitively sensitive information. This information includes hourly wage and other benefits organized by employee and job classification, employee names, employee social security numbers, and other sensitive PII. Furthermore, the parties may also need to share employee contractual terms. As illustrated above, there's substantial competition in these industries, and there's fierce competition for skilled labor. In essence, our members, their contractors, and subcontractors are all vying for the same technical service and repair experts. To avoid these issues, Treasury should provide flexibility and alternatives to the PWA recordkeeping requirements, including:

- Allowing for a taxpayer to show compliance with PWA requirements by permitting them to rely on a certification, under penalty of perjury, from contractors, subcontractors, developers, and OEMs that covered workers were paid in compliance with the PWA requirements.

- Allowing taxpayers to use third-party vendors, with similar contractual provisions and IRS audit access, to collect and maintain the payroll records and data specified in Prop. Reg. § 1.45-12.

- Allowing the laborer and mechanic's direct employer to keep the necessary payroll records and confidential employee information, subject to contractual provisions requiring record preservation, granting the IRS access for audits, and the ability to share records in the case of a credit transfer. [77]

- 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 the taxpayer to collect and maintain redacted payroll records and data which removes personally identifiable information (PII) and sensitive details, like social security numbers, addresses, phone numbers, email addresses, and wages under the

[77] *Cf.* 29 C.F.R. 5.5(a)(3)(i)(A).

condition that the laborer or mechanic's direct employer maintains this information through binding contractual arrangements.[78]

- Providing alternative methods to verify hourly wage rates and other payroll data to address antitrust and confidentiality concerns among taxpayers, contractors, and subcontractors.

13. Final Regulations Should Clarify that the Apprenticeship Requirements Do Not Apply for any Period After a Qualified Facility or Property is Placed in Service.

The IRA allows taxpayers to significantly increase the amount of certain tax credits if the taxpayer meets certain PWA requirements. The prevailing wage requirements in section 45(b)(7) generally apply during the construction of a qualified facility and for a prescribed period (ten years) after the facility is placed in service.[79] The apprenticeship requirements in section 45(b)(8) provide:

> (8) Apprenticeship requirements—The requirements described in this paragraph *with respect to the construction of any qualified facility* are as follows:
>
> (A) Labor hours
>
> (i) Percentage of total labor hours—Taxpayers shall ensure that, *with respect to the construction of any qualified facility*, not less than the applicable percentage of the total labor hours of the construction, alteration, or repair work (including such work performed by any contractor or subcontractor) with respect to such facility shall, subject to subparagraph (B), be performed by qualified apprentices.
>
> (ii) Applicable percentage—For purposes of clause (i), the applicable percentage shall be—
> (I) in the case of a qualified facility the construction of which begins before January 1, 2023, 10 percent,
>
> (II) in the case of a qualified facility the construction of which begins after December 31, 2022, and before January 1, 2024, 12.5 percent, and
>
> (III) in the case of a qualified facility the construction of which begins after December 31, 2023, 15 percent.

[78] *Cf.* 29 C.F.R. 5.5(a)(3)(ii)(B).
[79] Section 45 provides production tax credits to produce electricity from renewable sources. The other tax credits with prevailing wage or apprenticeship requirements (sections 30C, 45Q, 45V, 45Y, 45Z, 48, 48C, and 48E) either contain a cross reference to section 45 or include language similar to that of section 45.

(B) Apprentice to journeyworker ratio. —The requirement under subparagraph (A)(i) shall be subject to any applicable requirements for apprentice-to-journeyworker ratios of the Department of Labor or the applicable State apprenticeship agency.

(C) Participation.—Each 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*).

The language emphasized above makes it clear that the apprenticeship requirements apply only during the construction of a qualified facility, unlike the prevailing wage requirements that apply during the construction period and for a prescribed period after the facility is placed in service.[80] The flush language at the beginning of section 45(b)(8) limits the application of the requirements in subparagraphs (A), (B), and (C) to the construction of a qualified facility. Further, but perhaps unnecessarily because of this flush language, the construction limitation is also specifically contained in the Labor Hours Requirement of section 45(b)(8)(A) and the Participation Requirement of section 45(b)(8)(C). A reference to the limitation is not necessary for the Ratio Requirement of section 45(b)(8)(B) because, by its terms, subparagraph (B) is a component of subparagraph (A) which contains the limitation.

The Congressional intent to only apply the apprenticeship requirements to the construction of facilities is clear from the statutory language of section 45. It also can be inferred from other IRA provisions. Section 45U, as added by the IRA, provides a production tax credit for nuclear power produced by existing facilities. Section 45U, which only applies to facilities placed in service before the enactment of the IRA, imposes a prevailing wage requirement during the nuclear production period. Section 45U does not impose any apprenticeship requirements. Similarly, Section 45V(e)(2)(A) provides that a taxpayer that began construction of a clean hydrogen production facilities before January 29, 2023, must meet the prevailing wage requirements for periods with respect to facility after it is placed in service. The apprenticeship requirements do not apply in such instances. These examples further demonstrate that Congress

[80] See section 45(b)(7)(A)(ii), which applies the prevailing wage requirements to alterations and repairs during the 10-year credit period. See also, section 45(b)(7)(B)(i), which provides rules relating to correction and penalty for failure to satisfy the prevailing wage requirements "with respect to the alteration or repair of a facility in any year during the [10-year credit period]."

did not intend the apprenticeship requirements to apply with respect to periods after a facility is placed in service.

There is a logical rationale for not applying the apprenticeship requirements after a facility is placed in service. Post-completion activity at a facility generally will involve repairs. When a clean energy component malfunctions, it generally must be repaired immediately and as quickly as possible. It would not be feasible to go through the processes of finding applicable apprentices for such a short-term project. Construction projects, on the other hand, generally are long-term and involve advance planning and thus are more accommodating to the use of apprentices.

The final regulations should specifically clarify that the apprenticeship rules do not apply after a facility or property is placed in service. Nothing in the Proposed Regulations Section 1.45-8 suggests that the apprenticeship requirements apply after a facility or property is placed in service. In fact, the Proposed Regulations seem to provide that the apprenticeship rules apply only during the construction period of a facility or property.

The preamble to the Proposed Regulations provides "(t)o satisfy the requirements of section 45(b)(8), taxpayers must ensure that, *with respect to the construction of any qualified facility*, the Labor Hours Requirement, Ratio Requirement, and Participation Requirement are satisfied" (*emphasis added).* However, the actual text of the Proposed Regulations is not as clear. Only the rules for the Participation Requirement in Treasury Proposed Regulation section 1.45-8(d) contain the clause "with respect to the construction of any qualified facility." The clause is missing in Treasury Proposed Regulations sections 1.45-8(b) and (c), relating to the Labor Hours Requirement and the Ratio Requirement, respectively. These omissions create a degree of uncertainty as to the scope of the apprenticeship requirements.

Thus, further clarification that the apprenticeship requirements only apply during the construction period is needed because of the significant economic ramifications of the requirements.

14. Treasury Should Revise the Language of the Labor Hour Requirement to Clarify that the Requirement Applies to Total Workhours for the Project.

As the Proposed Regulations outline, the Labor Hours Requirement obligates a taxpayer to "ensure that, with respect to construction of any qualified facility, not less than the applicable percentage of the *total labor hours* of the construction, alteration, or repair work (including such work performed by any contractor or subcontractor) with respect to such facility shall, subject to [section 45(b)(8)(B)] be performed by qualified apprentices."[81] Furthermore, in outlining the calculation to be used in determining whether a taxpayer met the Labor Hours Requirement, the proposed guidance states: "For failures to meet the participation requirement in paragraph (d) of this section, the total labor hours for which the requirement was not satisfied is calculated as the *total labor hours of construction, alteration, or repair worked by all individuals employed by the taxpayer, contractor, or subcontractor* who failed to meet the participation requirement of the qualified facility divided by the number of individuals employed by the taxpayer, contractor, or subcontractor who performed construction, alteration, or repair work on the facility."[82]

While the language cited above provides the calculation for the applicable labor hours and penalty calculation, ACP nonetheless has two concerns. First, based on the Proposed Regulation's language, it is unclear what time period Treasury envisions for this requirement. For example, Example 1 outlines: "At the time A claims the increased credit, a total of 50,000 labor hours were spent on the construction, alteration, or repair work. . .."[83] This example instructs that the labor hours are calculated across all laborers and mechanics employed by the taxpayer, each contractor, and each subcontractor when the tax credit is claimed on the taxpayer's tax return. The example makes it clear how to apply the Labor Hour Requirement to first taxable year; however, it does not provide guidance on how the calculation would be applied to subsequent tax years (e.g., would total labor hours include only alteration or repair work). To address this ambiguity, Treasury should include an example in the Final Regulations illustrating how to calculate the total labor hours for the life of the 10-year PTC period.

Additionally, and perhaps paradoxically, Example 4 of the Proposed Regulations seem to imply that the Labor Hour Requirements apply to *each* contractor and subcontractor involved in

[81] Section 45(b)(8)(A)(i) (emphasis added).
[82] Prop. Reg. at 60049 (emphasis added).
[83] Prop. Reg. § 1.45-8(e)(2)(i)(D)(1).

the construction, alteration, or repair of a covered facility, rather than the aggregate labor hours for the project.[84] The example outlines:

> D . . . hires contractors O, P, and Q. Contractor O employs 10 journeyworkers who work 10,000 hours and one qualified apprentice who works 400 hours. Contractor P employs four journeyworkers who work 4,000 hours and five qualified apprentices who work 2,000 hours. Contractor Q employs three journeyworkers who work 3,000 hours and one qualified apprentice who works 400 hours. The registered apprenticeship program for all of the apprentices has prescribed a 1:1 apprentice to journeyworker ratio. . . The total labor hours are 19,800 hours, and the total hours worked by qualified apprentices are 2,800. *However, Contractor P employed one apprentice in excess of the apprentice-to-journeyworker ratio (five qualified apprentices: four journeyworkers) that was prescribed by the apprenticeship program. Because Contractor P employed one apprentice in excess of the apprentice-to-journeyworker ratio, 400 of the apprentice hours worked by Contractor P do not count towards the labor hour requirement.* . .To cure D's failure to meet the Apprenticeship Requirements, D must pay a penalty of $3,750.[85]

The applicable IRA language clearly envisions that the Labor Hours Requirement would be calculated based on the total hours worked for a particular project. Conversely, Treasury's interpretation, outlined in Example 4 above, seems to break down this requirement to each subpart of the project. This interpretation will create an unworkable and logistically challenging requirement for taxpayers and runs contrary to the clear language of the IRA. Furthermore, such an interpretation results in penalizing a taxpayer both for employing too few apprentices/failing to meet the Labor Hour Requirements and for employing more than the required number of apprentices. This catch-22 outcome is contrary to the spirit of the apprenticeship requirements and will unduly and unfairly harm clean energy projects. Thus, for the sake of consistency and administrability, Treasury should amend its guidance in the Final regulations to make clear that the apprenticeship ratio and labor hour requirements will be calculated on a total project basis, rather than on a taxpayer, contractor, and subcontractor basis. Thus, for the sake of clarity, and to appropriately follow the spirit of the IRA, Treasury should clarify that the Labor Hour Requirement applies to the total workhours for a project, and not to each sub-part of a project.

15. Treasury Should Clarify the Apprenticeship Participation Requirement.

[84] *Id.* at 60050.
[85] *Id.* at 60050 (emphasis added).

The Proposed Regulation states that "[e]ach taxpayer, contractor, or subcontractor who employs four or more individuals to perform construction, alteration, or repair work with respect to the construction of a qualified facility must employ one or more qualified apprentices to perform work with respect to the construction, alteration, or repair of the facility."[86] The Proposed Regulation does not, however, provide any guidance as to how this numerosity threshold of "four or more individuals" is met. For example, if a subcontractor were to employ one individual to perform discreet construction work of a qualified facility, but due to scheduling conflicts or illness, the subcontractor had to replace this individual three times with three different individuals for a total of four individuals on the site during the length of the construction, but working only one at a time, would the subcontractor under the "Participation Requirement" be required to employ a qualified apprentice to perform work on a one-to-one basis with the journey-level mechanic at the end of the construction project? If so, this would be extremely difficult for the subcontractor to administer and would perversely incentivize the contractors/subcontractors to not relieve their employees as necessary for health or other scheduling reasons. Given this, we propose that Treasury clarify that the Participation Requirement in the final regulation prescribe that "[e]ach taxpayer, contractor, or subcontractor who employs four or more individuals *at one time* to perform construction, alteration, or repair work with respect to the construction of a qualified facility must employ one or more qualified apprentices to perform work with respect to the construction, alteration, or repair of the facility."

16. Treasury Should Remove the 120-Day Renewal Requirement.

Treasury should remove the 120-day renewal condition from the Good Faith Effort exemption for the apprenticeship requirements. IRA 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."[87] In either case, the statute provides that the taxpayer is deemed to satisfy the apprenticeship requirement without any further effort. The Proposed Regulations, however,

[86] Prop. Reg. 145-8(d).
[87] *Id.* at 45(b)(8)(D)(ii).

interpret the good faith effort exception in a manner that is not consistent with the statutory language.

Frist, the Proposed Regulations provide that a denial of a request for a qualified apprentice is valid only for a period of 120 days – i.e., the taxpayer must submit an additional request for any period beyond this 120-day period.[88] 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, this requirement is not in line with the IRA's intent and the perpetual renewal aspect imposes an added burden on the taxpayer, contractors, and subcontractors. Given the inconsistency with the IRA and added responsibility on the taxpayer, ACP recommends Treasury remove this requirement as it is not required by the statute.

Second, the Proposed Regulations provide 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).[89] The Proposed Regulations appear to treat a 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, ACP recommends Treasury remove this provision and require a meaningful response from the registered program.

Third, the Proposed Regulations provides that in the case of a failure to respond the "request is deemed to be denied."[90] Thus, it appears that the failure to respond by the program would be deemed to satisfy the apprenticeship requirements 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). Once again, this provision extends beyond the statutory language and contradicts the concept of a taxpayer making a good faith effort. These combined provisions introduce significant uncertainty regarding the apprenticeship requirement for taxpayers, imposing burdens that surpass what the Statute originally intended. In fact, these provisions render the good faith effort exception seemingly irrelevant and unworkable.

[88] Prop. Reg. § 1.45-8(e)(1)(i)(A)(2).
[89] Prop. Reg. § 1.45-8(e)(1)(i)(C).
[90] *Id.*

As such, ACP recommends Treasury remove the Proposed Regulations requirement for the taxpayer to renew a request for a qualified apprentice and the 120-day period. To be consistent with the Statute, Treasury should also explicitly state that a taxpayer fulfills the good faith exception regarding the apprenticeship requirements if they submit a valid request for a qualified apprentice and do not receive a substantive response from the registered program within 5 business days after the request is received. A mere acknowledgment from the registered program that they received the taxpayer's request should not suffice as a response for the purposes of the good faith exception.

17. Treasury Should Clarify Meaning of "Reasonably Expected" Geography.

Treasury should clarify the meaning of "reasonably expected" as it applies to the geographic area. The Proposed Regulations would require the taxpayer, contractor, or subcontractor to submit a written request for qualified apprentices to at least one registered apprenticeship program, which has a geographic area of operation that includes the location of the facility, or to a registered apprenticeship program that can *reasonably* be expected to provide apprentices to the location of the facility.[91] The Proposed Regulations define geographic area and locality to mean the county, independent city, or other civil subdivision of the State in which the facility is located.[92] If construction, alteration, or repair work is performed in multiple counties, independent cities, or other civil subdivisions, the geographic area may include all counties, independent cities, or other civil subdivisions in which the work will be performed.

Given the vague nature of the phrase "reasonably be expected" ACP recommends Treasury clarify what "reasonably" means in this context; for example, is the good faith exception satisfied if a registered apprentice program does not exist in one of those geographic areas for a project in a single county. Additionally, Treasury should clarify what steps a taxpayer needs to take if there is not a registered apprenticeship program within a "reasonable" distance.

18. Treasury Should Extend the Pre-hire Project Labor Agreement (PLA) Exception.

[91] Prop. Reg. § 1.45-8(e)(1)(A).
[92] Prop. Reg. at 60026.

Treasury should clarify the PLA exemption. The Proposed Regulations provide that "[t]he penalty payment required by paragraph (c)(1)(ii) of this section to cure a failure to satisfy the Prevailing Wage Requirements in paragraph (a) of this section shall not apply with respect to a laborer or mechanic employed in the construction, alteration, or repair work of a qualified facility if the work is done pursuant to a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project (Qualifying Project Labor Agreement) and any correction payment owed to any laborer or mechanic is paid on or before the date on which the increased credit is claimed under section 45(b)(6)."[93] A similar exemption exists for the apprenticeship requirement.[94] The Regulations provide six minimum criteria for the PLA to qualify. Included in these minimum criteria are the requirements that the PLA "contain provisions to pay prevailing wages" and "contain provisions for referring and using qualified apprentices consistent with section 45(b)(8)(A) through (C) and the guidance issued thereunder."[95] These two provisions render an exemption for a PLA meaningless- as they simply impose PWA requirements on the PLA.

First, under a PLA a taxpayer is required to negotiate with the union and pay agreed upon rates. These rates are often higher than prevailing wage determinations established by DOL, but, regardless, taxpayers have no choice but to pay the rate negotiated by the Union. As such- they cannot be held to prevailing wage requirements. Second, requiring a PLA to include IRA apprenticeship requirements undermines any exemption from such requirements in the first place. ACP recommends that Treasury clarify that wages determined under the PLA will be considered prevailing wages for PWA purposes. ACP further recommends that the Final Rule clarify that a PLA includes a preference, but not a requirement to use qualified apprentices. Overall, Treasury should clarify that a taxpayer is deemed to have satisfied the PWA requirements if the taxpayer can provide proof of a valid PLA. Such proof should exempt the taxpayer from any further record keeping requirements under the IRA.

II. CONCLUSION

[93] Prop. Reg. § 1.45-7(c)(6)(ii).
[94] Prop.Reg. § 1.45-8(e)(2)(v).
[95] Prop. Reg. § 1.45-7(c)(6)(ii)(D)(E).

ACP appreciates the opportunity to respond to this request for comment on the guidance for the labor requirements in the IRA and we look forward to continuing our engagement with Treasury on this issue.

Sincerely,

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