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## IRS Proposed Regulations and DOL Guidance Clarify Certain Aspects of the Prevailing Wage and Apprenticeship Requirements

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The U.S. Department of Treasury (“Treasury”) and IRS issued proposed regulations (“Proposed Regulations”) on August 29, 2023, regarding increased credit or deduction amounts available under the Inflation Reduction Act of 2022 (“IRA”) for taxpayers satisfying the prevailing wage and apprenticeship requirements with respect to certain energy projects. The Proposed Regulations follow initial IRS guidance on the prevailing wage and apprenticeship requirements issued in November 2022 (Notice 2022-61) and the final rule, “Updating the Davis-Bacon and Related Acts Regulations,” issued by the U.S. Department of Labor (“DOL”) on August 8, 2023, which set forth rules for the administration and enforcement of the Davis-Bacon labor standards that apply to federal and federally assisted construction projects (“DOL Final Rule”).

Both the Proposed Regulations and the DOL Final Rule provide helpful guidance regarding the specific requirements to comply with the prevailing wage and apprenticeship requirements. Some of the key aspects of the guidance are discussed below.

### BACKGROUND

The IRA introduced a two-tier credit system under which certain investment and production tax credits are available in full amount to renewable energy projects only if certain prevailing wage and apprenticeship requirements are satisfied. Projects that do not satisfy these requirements are eligible only for a “base” amount equal to one fifth of the full credit amount. Credits that are subject to the prevailing wage and apprenticeship requirements include the following:



- Section 30C (Alternative Fuel Vehicle Refueling Property Credit);
- Section 45 (Production Tax Credit);
- 45Q (Carbon Oxide Sequestration Credit);
- 45V (Clean Hydrogen Production Tax Credit);
- 45Y (Clean Electricity Production Tax Credit);
- 48 (Investment Tax Credit); and
- 48E (Clean Electricity Investment Tax Credit).

To satisfy the prevailing wage requirement, a taxpayer must demonstrate two things:

- (1) The taxpayer satisfied the prevailing wage rate requirements with respect to any laborer or mechanic employed in the construction, alteration, or repair of a qualified project by the taxpayer or any contractor or subcontractor of the taxpayer; and
- (2) The taxpayer complied with the corresponding IRS recordkeeping requirements.

To satisfy the apprenticeship requirement, a taxpayer must demonstrate three things:

- (1) The taxpayer satisfied the apprenticeship labor hour requirement, subject to any applicable apprenticeship ratio requirement;
- (2) The taxpayer satisfied the apprenticeship participation requirement; and
- (3) The taxpayer complied with the recordkeeping requirements.

The apprenticeship labor hour requirement provides that taxpayers must ensure that at least the “applicable percentage” of the total labor hours of the construction, alteration, or repair work (including work performed by any contractor or subcontractor) on a qualified facility is performed by qualified apprentices. The applicable percentage is 12.5% for projects beginning construction during 2023 and 15% for projects beginning construction after 2023. In addition, the applicable requirements for apprentice-to-journeyworker ratios of the DOL or the applicable state apprenticeship agency must be met on each day that a qualified apprentice performed construction work on the facility for the taxpayer or its contractor or subcontractor. Under the apprenticeship participation requirement, at least one qualified apprentice must be used on any construction, alteration, or repair job that at least four individuals will perform. The required wages vary by job type and location and are published on the DOL website.<sup>1</sup>

### RECORDKEEPING REQUIREMENT

Taxpayers must maintain and preserve sufficient records, including books or account or record for work performed by contractors or subcontractors of the taxpayer, in order to establish that each element of the prevailing wage and apprenticeship requirement has been satisfied. In the initial guidance, the IRS provided several examples of the types of records that it would look at to determine whether a taxpayer complied with the recordkeeping requirement. Examples of such records include identifying the laborers and mechanics who performed construction, alteration, and/or repair work on the project, the classifications of work they performed, their hours worked in each classification, the applicable wage determination and the wage rates paid for the work.

### GOOD FAITH EFFORT EXCEPTION AND CURE PROVISION

Notwithstanding the foregoing requirements, the taxpayer will be considered to have satisfied the apprenticeship requirement if it, or its contractors or subcontractors, has requested qualified apprentices from a registered



apprenticeship program in accordance with usual and customary business practices for registered apprenticeship programs in a particular industry, and the program either (i) denied such request (except where the denial was due to the requesting entity's failure to comply with the standards and requirements of the registered apprenticeship program); or (ii) did not respond to such request within five business days after the requesting entity made the request. To avail themselves of this exception, taxpayers must maintain sufficient books and records of its request of qualified apprentices from a registered apprenticeship program and the program's denial of such request or non-response to such request. This is known as "the good faith effort exception". A taxpayer failing the good faith effort exception can still cure the failure by paying a penalty equal to \$50 per labor hour (\$500 in the case of intentional disregard) for the year in which the apprenticeship requirement was not satisfied. Similarly, the taxpayer is deemed to have satisfied the prevailing wage requirement if the taxpayer makes payment in the amount of the difference between the wages paid and the prevailing wages (increased by three-fold in the case of intentional disregard) and pay a penalty equal to \$5,000 (\$10,000 in the case of intentional disregard) multiplied by the total number of laborers and mechanics who were paid less than the prevailing wages.

### PROPOSED REGULATIONS AND DOL FINAL RULE

The Proposed Regulations incorporate Davis-Bacon Act statutory and regulatory guidance, including the DOL Final Rule, that is relevant for purposes of claiming the increased tax credit and consistent with sound tax administration.

### APPLICABLE TAXPAYER

The Proposed Regulations make the taxpayer solely responsible for satisfying the prevailing wage and apprenticeship requirements and the related recordkeeping requirements, regardless of whether the laborers or mechanics are employed by the taxpayer, contractor, or subcontractor. For this purpose, a partnership or "Subchapter S" corporation is a taxpayer even though tax credits flow through to its equity holders. The Proposed Regulations also provide that the taxpayer is solely responsible for the correction and penalty provisions under the prevailing wage requirement and the good faith effort exception and penalty provisions under the apprenticeship requirement. If the taxpayer elects to transfer an eligible credit (or portion thereof) to an unrelated transferee, the taxpayer transferring the credit is responsible for complying with these requirements.

### PREVAILING WAGE REQUIREMENT

For purposes of satisfying the prevailing wage requirement, all laborers and mechanics would need to be paid prevailing wages in the time and manner consistent with the regular payroll practices of the taxpayer, contractor, or subcontractor, as applicable. The Proposed Regulations, consistent with the DOL regulations, define the terms "laborer" and "mechanic" as individuals whose duties are manual or physical in nature and include apprentices, helpers, and certain working forepersons who devote more than 20 percent of their time during a workweek to laborer or mechanic duties.<sup>2</sup> The Proposed Regulations clarify that laborers and mechanics would not include individuals whose duties are primarily administrative, executive, or clerical, and persons employed in a bona fide executive, administrative, or professional capacity.

Similarly, the Proposed Regulations define "construction, alteration, or repair" by reference to the DOL regulations and includes all types of work done at a facility including, without limitation, (i) altering, remodeling, installing (where applicable) on the site of the work of items fabricated off-site; (ii) painting and decorating; (iii) manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work; (iv) transportation between the site of the work and a facility which is dedicated to the construction of the building or work; and (v) transportation of portion(s) of the building or work between a site where a significant portion of such building or work is constructed and the physical place or places where the building or work will remain. The Proposed Regulations clarify that



construction, alteration, or repair would not include maintenance work that occurs after the facility is placed in service.

Prevailing wage rates are determined by the DOL in accordance with the Davis-Bacon Act when they are issued and published by the DOL as a general wage determination or when issued to a taxpayer as part of a supplemental wage determination or pursuant to a request for a wage rate for an additional classification. The Proposed Regulations require a taxpayer to use the general wage determination in effect when the construction of the applicable facility begins, or, in the case of alteration or repair work that is undertaken after a facility has been placed in service, the date such work begins. The taxpayer can continue to use the prevailing wage rates even if a new general wage determination is published by the DOL after the construction, alteration, or repair, as the case may be, of the facility begins.

There are exceptions to this general rule. A new general wage determination must be used when a contract is changed to include additional, substantial construction, alteration, or repair work not within the scope of work of the original contract, or to require work to be performed for an additional time period not originally obligated, including where an option to extend the term of a contract for the construction, alteration, or repair is exercised. The general rule and the exceptions are consistent with the DOL Final Rule, which generally requires the contracting agency to incorporate the applicable wage determinations as part of the contract that is awarded to the contract with the application rates valid through the duration of the contract. These changes or modifications to the contract do not have to be substantial enough to constitute a “significant modification” of the contract under general federal income tax principles.

The taxpayer or its contractor or subcontractor must request a supplemental wage determination or request a prevailing wage rate for an additional classification from the DOL if no prevailing wage determination has been issued for the geographic area or for the specified type of construction involved, or if one or more labor classifications is not listed in the general wage determination. Recognizing that taxpayers may not reasonably determine until after construction, alteration, or repair begins that a supplemental wage determination or request for a prevailing wage for an additional classification is necessary, the Proposed Regulations provide that in these instances, the taxpayer may make a request as soon as practicable after determining the need for such determination and must apply the applicable prevailing rates retroactively to the date the applicable construction, alteration, or repair work that is the subject of the request began.

In addition, the Proposed Regulations provide that if construction of a facility spans two or more adjacent geographic areas, and more than one general wage determination could apply to the facility, a taxpayer would be able to satisfy the prevailing wage requirement by paying laborers and mechanics wages at the highest rate for each classification provided under the general wage determinations or request a supplemental wage determination from the DOL.

The Proposed Regulations also provide that the prevailing wage requirement will apply to construction, alteration, or repair at the location of the facility and any secondary sites where a significant portion of the construction, alteration, or repair of the facility occurs. This includes sites established specifically for, or dedicated exclusively for a specified period of time to, the construction, alteration, or repair of the facility. This is consistent with the DOL Final Rules, which clarified that the Davis-Bacon labor standards will also cover a “secondary construction site.”<sup>3</sup>

If a taxpayer fails to satisfy the prevailing wage requirement, the taxpayer must make correction payments, plus interest, to workers that were not paid prevailing wages and penalty payments to the IRS in order to qualify for the full credit amount. Penalties may be waived if the taxpayer promptly makes correction payments by the earlier of (a) 30 days after the taxpayer becomes aware of the error or (b) the date on which the tax return claiming the increased credit is filed, and certain additional requirements are satisfied. If the IRS determines that a taxpayer has not



complied with the prevailing wage requirement, the taxpayer must make the correction payments and pay the penalty within 180 days of the final determination by the IRS.

Complying with the correction payment requirements can be a particular challenge for taxpayers whose projects have multiyear time frames. For these taxpayers, locating workers, including workers hired by contractors or subcontractors, who worked on the project years ago in order to make correction payments may not be possible. Under the Proposed Regulations, taxpayers that fail to track down past workers who were paid below the prevailing rates risk losing the increased credit even if they maintained proper documentation.

### APPRENTICESHIP REQUIREMENT

The Proposed Regulations clarify the interaction among the apprenticeship labor hour requirement, ratio requirement, and participation requirement. If a taxpayer satisfies the apprenticeship labor hour requirement but fails the participation requirement, then the taxpayer would not be eligible for the increased credit unless the taxpayer pays a penalty to the IRS or meets the good faith effort exception. The participation requirement is intended to require taxpayers to use apprentices across the full scope of work.<sup>4</sup>

Only work performed by “qualified apprentices” counts toward satisfying the apprenticeship requirement. For this purpose, a “qualified apprentice” is generally an apprentice who has entered into a written agreement and has been registered with the DOL’s office of Apprenticeship or an applicable state apprenticeship agency. The Proposed Regulations contain specific requirements for the form and content of a request for qualified apprentices. Under the Proposed Regulations, pre-apprenticeship programs would not qualify as registered apprenticeship programs and hours worked as part of a pre-apprenticeship program would not count towards the labor hour requirement. Failure to meet the apprenticeship ratio requirement means registered apprentices in excess of the applicable ratio need to be paid the full prevailing wage rate for their hours worked, and those hours worked by the apprentices would not be counted toward the overall apprenticeship labor hour requirement.

The participation requirement would be satisfied as long as the taxpayer, contractor, or subcontractor employs one or more apprentices to perform work on the facility. It is not a daily requirement. Under the Proposed Regulations the taxpayer bears responsibility to ensure that any contractor or subcontractor performing work on the facility with four or more employees who perform such work on the facility has hired one or more apprentices in accordance with the participation requirement.

The good faith exception for failure to meet the apprenticeship requirement differs from the prevailing wage good faith exception. This good faith exception applies where the taxpayer, contractor, or subcontractor makes a written request to at least one registered apprenticeship program in the geographic area of the facility, or that can reasonably be expected to provide apprentices to the location of the facility. A written request must contain information concerning the dates of employment, the occupation or classification needed, the location and type of work to be performed, the number of apprentices needed, the number of hours the apprentices will work, and the name and contract information of the person requesting the apprentices. The written request must also include a statement that the request for apprentices is made with an intent to employ apprentices in the occupation for which they are being training and in accordance with the requirements and standards of the registered apprenticeship program.

The Proposed Regulations provide that a taxpayer will be deemed to have satisfied the good faith effort exception requirements for 120 days after a request is made if the request is denied or not responded to. A taxpayer will not be deemed to have exercised good faith effort beyond 120 days of a previously denied request unless the taxpayer submits an additional request. A denial of a request means that the registered apprenticeship program denied the request in its entirety. The Proposed Regulations clarify that if a registered apprenticeship program responds



affirmatively but could only partially fulfill the request, the good faith effort exception would apply only to the portion of the request that was denied.

If a taxpayer fails to meet both the labor hour requirement and the participation requirement, the taxpayer can cure such failure by making a penalty payment to the IRS. The penalty is equal to the sum of the penalty for the failure to meet the labor hour requirement plus the penalty for failure to meet the participation, calculated at \$50 per labor hour (\$500 per labor hour if intentional disregard) shortfall for each requirement. The Proposed Regulations provide a rebuttable presumption against a finding of intentional disregard if the taxpayer makes the penalty payments before receiving a notice of an examination with respect to the claim for the increased credit. The Proposed Regulations provide that the penalty payment requirement, however, would not apply if there is in place a project labor agreement that meets certain requirements. Unlike in the case of the prevailing wage requirement, taxpayers do not have to locate past workers and make correction payments in order to cure the failure to meet the apprenticeship requirement, however, determining the penalty amount may still be difficult for taxpayers with multi-year projects.

The obligation to meet the apprenticeship requirement is not binding on the eligible taxpayer until the earlier of: (i) the filing of the eligible taxpayer's return for the taxable year for which the specified credit portion is determined with respect to the eligible taxpayer, or (ii) the filing of the return of the transferee taxpayer for the year in which the specified credit portion is taken into account. Hence, a penalty payment would remain the responsibility of the eligible taxpayer following a transfer of a specified credit portion pursuant to section 6418.

#### RECORDKEEPING REQUIREMENTS

The Proposed Regulations require a taxpayer to maintain records sufficient to establish compliance with the prevailing wage requirement. They include: (i) the location and type of qualified facility; (ii) the applicable wage determinations for the type and location of the facility, (iii) the wages paid (including any correction payments) and hours worked for each of the laborer and mechanic classifications engaged in the construction, alteration, or repair of the facility, (iv) the number of workers who received correction payments, (v) the wages paid and hours worked by qualified apprentices for each of the laborer or mechanic classifications engaged in the construction, alteration, or repair of the facility, (vi) the total labor hours for the construction, alteration, or repair of the facility by any laborer or mechanic employed by the taxpayer or any contractor or subcontractor; and (vii) the total credit claimed.

Sufficient records for purposes of establishing compliance with the apprenticeship requirement includes: (i) copies of any written requests for apprentices by the taxpayer, contractor, or subcontractor; (ii) any agreement entered by the taxpayer, contractor, or subcontractor with a registered apprenticeship program; (iii) documents reflecting any registered apprenticeship program sponsored by the taxpayer, contractor, or subcontractor; (iv) documents verifying participation in a registered apprenticeship program by each apprentice; (v) records reflecting the required ratio of apprentices to journeyworkers prescribed by each registered apprenticeship program from which qualified apprentices are employed; (vi) records reflecting the daily ratio of apprentices to journeyworkers; and (vii) the payroll records for any work performed by apprentices.





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<sup>1</sup> In the event that a job type or location is not available on the DOL website, the Notice provides that the taxpayer seeking to claim a credit should send an email requesting wage determinations to [IRAprevalingwage@dol.gov](mailto:IRAprevalingwage@dol.gov) describing certain information, including the facility, facility location, proposed labor classifications, proposed prevailing wage rates, job descriptions and duties, and any rationale for the proposed classifications.

<sup>2</sup> The DOL Final Rule clarifies that members of survey crews who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics, provided that they are not professional, executive, or administrative employees. The DOL Final Rule also clarifies that transportation by truck drivers is covered by the Davis-Bacon labor standards under certain specified circumstances.

<sup>3</sup> The DOL Final Rule defines a “secondary construction site” as a site away from the primary construction site where a significant portion of the building or work is constructed, provided that such construction is for specific use in that building or work and does not simply reflect the manufacture or construction of a product made available to the public. In addition, the site must either be established specifically for the performance of the contract or project, or be dedicated exclusively, or nearly so, to the performance of the contract or project for a specific period of time.

<sup>4</sup> The participation requirement generally requires at least one apprentice if there are four or more covered workers at a facility.