Treasury Department/IRS Final Rule Regarding Increased Amounts of Credit or Deduction for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements

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Overview

The Treasury Department and the Internal Revenue Service (IRS) (collectively, the Agencies) have published final regulations regarding the prevailing wage and registered apprenticeship (PWA) requirements that taxpayers must satisfy to receive five times the base tax credit or deduction amounts with respect to certain clean energy facilities, properties, projects, technologies, or equipment under the Internal Revenue Code (the Code), as amended by the Inflation Reduction Act of 2022 (IRA). This overview seeks to explain the portions of this lengthy final rule that we felt would be of most interest to MCAA. There are aspects of the rule that are not addressed in this document, and the MCAA public policy team is happy to answer questions about aspects of these lengthy regulations not addressed in this overview.

In conjunction with the release of the final rule, Treasury, the IRS, and the Department of Labor (DOL) also released additional resources, including: (1) a frequently asked questions document from the IRS; (2) frequently asked questions regarding the IRA prevailing wage requirements on the DOL website; and (3) a dedicated IRA apprenticeship page on the DOL website.

The increased credit and deduction amounts included in this final rule are available for taxpayers satisfying ***both*** the prevailing wage and apprenticeship (PWA) requirements for the following Code sections:

- Section 30C alternative fuel vehicle refueling property credit;
- Section 45 renewable electricity production credit;
- Section 45Q credit for carbon oxide sequestration;
- Section 45V credit for production of clean hydrogen;
- Section 45Y clean electricity production credit;
- Section 45Z clean fuel production credit;
- Section 48 energy credit;
- Section 48C qualifying advanced energy project credit;
- Section 48E clean electricity investment credit;
- Section 179D energy efficient commercial buildings deduction;

The increased credit amounts are available for taxpayers satisfying ***just*** the prevailing wage requirements of this final rule under the following Code sections:

- Section 45L new energy efficient home credit; and
- Section 45U zero-emission nuclear power production credit.

In light of the coming November elections, be aware that this final rule is classified as a "major rule" subject to the Resolution of Disapproval procedures in the *Congressional Review Act* (CRA). Therefore, if Republicans sweep the November elections, they may be able to offer a resolution to rescind this final rule under the CRA—depending on how many additional legislative session days remain in the 118th Congress.

Also note that the White House press release on these final regulations states:

> *The IRS and Department of Labor (DOL)…are working on an MOU, to be signed by the end of the year, that will harness DOL's extensive prevailing wage and registered apprenticeship expertise, to facilitate joint education and public outreach, develop training content for IRS examiners, and formalize a process for DOL to share with IRS, any credible tips or information about potential noncompliance with the prevailing wage and registered apprenticeship requirements.*

I. Transition Rule for Applicability of PWA Requirements in the Final Rule

Under the final regulations' transition and applicability language, in general, any construction, alteration or repair work performed before January 29, 2023, is not subject to the final rule's PWA requirements. This is so regardless of whether it qualifies for the Beginning of Construction (BOC) exception discussed below. Also note that the Section 45U credit regarding alterations or repairs to a qualified nuclear power facility has a separate December 31, 2023 applicability date for the final rule's PWA requirements.

II. Exceptions to the IRA PWA Requirements for Work After January 29, 2023

There are two exceptions that allow taxpayers to claim the increased credit or deduction amounts without otherwise complying with applicable PWA requirements. They are the "Beginning of Construction (BOC)" exception and the "One Megawatt" exception.

A. Beginning of Construction (BOC) Exception

For work occurring after January 29, 2023, the PWA requirements do not apply if a taxpayer began construction or installation of a facility pursuant to sections 30C, 45, 45Q, 45V, 45Y, and 179D before January 29, 2023—provided the taxpayer is otherwise eligible for the credit or deduction. For purposes of determining the "beginning of construction" or installation, the final rule adopts the two standards set forth in IRS Notice 2022-61, which incorporates by reference the notices issued under sections 45, 45Q, and 48 (collectively, IRS Notices) describing a "Physical Work Test" and "Five Percent Safe Harbor" for establishing that construction of a facility began by January 29, 2023. The "Physical Work Test" requires the taxpayer to have started physical work of a significant nature by January 29, 2023. The "Five Percent Safe Harbor" requires a taxpayer to have paid or incurred 5% or more of the total cost of the facility by January 29, 2023.

The Agencies acknowledge that taxpayers "can generally choose to structure their business affairs to meet either the Physical Work Test or the Five Percent Safe Harbor. They stress, however, that "once a taxpayer meets either method, beginning of construction is established and a taxpayer may not alternate between methods." The final rule reassures taxpayers that they "may continue to rely on the guidance provided in Notice 2022-61 and the IRS Notices" until such time as "the Treasury Department and the IRS issue further guidance on determining when construction or installation begins."

1. Continuity Requirement

To retain the "Beginning of Construction" exception from the IRA PWA requirements after January 29, 2023, taxpayers must demonstrate either continuous construction or continuous efforts. This is called the "Continuity Requirement." It must be satisfied regardless of whether the taxpayer relies on the "Physical Work Test" or the "Five Percent Safe Harbor" to establish the beginning of construction. Whether a taxpayer meets the Continuity Requirement under either test is determined by the relevant facts and circumstances.

2. Continuity Safe Harbor

Taxpayers may rely on a "Continuity Safe Harbor" under which a taxpayer will be deemed to satisfy the Continuity Requirement for establishing the beginning of construction if certain kinds of qualified facilities are placed in service within a designated time that varies depending on the Code section. This period is no more than four calendar years after the calendar year during which construction of the qualified facility began for purposes of sections 30C, 45V, 45Y, and 48E, 45 and 48 credits. It is no more than six calendar years after the calendar year during which construction of the qualified facility or carbon capture equipment began for purposes of section 45Q. For purposes of the Continuity Safe Harbor, certain offshore projects and projects built on federal land under sections 45 and 48 satisfy the Continuity Requirement if such a project is placed into service no more than ten calendar years after the calendar year during which construction of the project began. Again, taxpayers may continue to rely on the guidance provided in Notice 2022-61 and the IRS Notices for guidance on the Continuity Safe Harbor.

B. One Megawatt Exception

The increased credit amounts generally are available under sections 45, 45Y, 48, and 48E with respect to certain facilities, projects, and technologies, with a maximum net output (or capacity for energy storage technology under section 48E) of less than one megawatt (One Megawatt Exception) even if they do not meet the PWA requirements and regardless of whether construction began after January 29, 2023.

The final rule makes clear that under sections 45L, 45U, 45Z, and 48C, there is no One Megawatt exception. Thus taxpayers need to satisfy the applicable PWA requirements or a different exception to claim the increased credit amount regardless of "how small the facility (or respective underlying creditable activity) may be" under these sections.

III. IRA Prevailing Wage Requirements

A. IRA Prevailing Wage Requirements Generally

In general, the prevailing wage requirements of the IRA provide that taxpayers must ensure that all laborers and mechanics employed by the taxpayer (or any contractor or subcontractor) on the construction, alteration, or repair of a qualified facility are paid wages at rates that are not less than the prevailing rates determined by the Department of Labor in accordance with the Davis-Bacon Act (DBA) for the type of work performed in the geographic area of the facility.

The Agencies received several comments questioning the scope of a taxpayer's obligation to ensure that all "contractors" and "subcontractors" comply with the PWA standards. In response to these comments, the final rule clarifies that this obligation applies to all contractors and subcontractors even if the taxpayer is not "in privity of contract with each contractor and subcontractor." It also applies to situations in which the taxpayer is not in privity of contract with the contractors because the sponsor or developer of the facility assumes responsibility for construction of the facility.

B. Correction Payment for Failure to Satisfy IRA Prevailing Wage Requirements

Under the IRA, a taxpayer who is not eligible for the BOC Exception or the One Megawatt Exception and fails to satisfy the Prevailing Wage Requirements under section 45(b)(7)(A), is deemed to have satisfied those requirements if the taxpayer makes a correction payment to any laborer or mechanic who was paid wages below the required prevailing rate. If the failure was inadvertent, as opposed to intentional, the amount of the correction payment is the difference in the wages each worker should have been paid plus 6% interest and $5,000 per laborer or mechanic who were paid below the prevailing wage.

If the IRS determines that a taxpayer failed to satisfy the prevailing wage requirements due to "intentional disregard" of those requirements, then the correction payment to the laborer or mechanic is three times the amount described above and $10,000 per laborer or mechanic not paid in compliance with these requirements. To use the correction payment to obtain increased credit or deduction amounts under the IRA, the taxpayers must make the correction and penalty payments within 180 days after the IRS issues a final determination. Note that if the taxpayer does not make the required correction and penalty payments, and therefore is not allowed the increased credit or deduction amount, ***no penalty is assessed for failing to pay the prevailing rate.***

The final regulations adopted comments asking the Agencies to add new factors that may be considered in determining whether the failure to pay the prevailing rate was due to "intentional disregard," and thus subject to the higher corrective payment provisions. These factors include whether the taxpayer has: (1) provided or otherwise made available to laborers and mechanics paystubs or other individual payroll records reflecting the amount being paid per pay period (including the specific hourly rate and any deductions from wages); (2) conducted investigations or otherwise reviewed complaints of retaliation or adverse actions against workers for reporting the underpayment of wages and took appropriate corrective action; (3) provided notice regarding

possible rights under the Taxpayer First Act; and (4) whether the taxpayer failed to maintain and preserve records consistent with the requirement of §1.45-12 for taxpayers to retain records sufficient to demonstrate compliance with the applicable PWA requirements.

The final regulations do not prescribe a specific method for a taxpayer to make corrective payments to laborers or mechanics, but the Agencies are clear that "regardless of how payments are made, taxpayers must maintain records demonstrating when and how correction payments were made."

C. Timing of Prevailing Rate Wage Determination for PWA Requirements

With respect to the proper timing of a wage determination, the Agencies revised the language in the proposed rule providing that the applicable prevailing wage rates 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 taxpayer. The Agencies were sympathetic to comments about the need for taxpayers to reduce uncertainty and determine expected labor costs prior to entering into contracts for the construction of a qualifying facility. As a result, the Agencies revised the final rule to provide that the applicable prevailing rates are determined at the ***time the contract*** for the construction, alteration, or repair of the facility ***is executed*** by the taxpayer and a contractor. The final rule provides that the prevailing wage rates at the time such contract is executed apply to all subcontractors of ***that contractor*.**

Under the final rule, if a taxpayer executes separate contracts with more than one contractor, then for each such contract, the applicable prevailing rates with respect to any work performed by the contractor (and all subcontractors of the contractor) are determined at the time the contract is executed by the taxpayer and the contractor. Thus, consistent with the DBA, the final regulations allow for more than one wage determination to apply with respect to the construction, alteration, or repair of a facility in cases in which a taxpayer executes separate contracts with more than one contractor. The final rules go on to provide that in the absence of a contract, or if a contractor or subcontractor is unable to determine the date of execution of the contract, the applicable wage determinations are those in effect at the time construction starts.

In the final regulations, the Agencies also adopt a similar framework for alterations or repairs that occur after the facility is placed in service with applicable wage determinations applying when a contract is executed between a taxpayer and contractor for the alteration or repair of a facility, or absent a contract, when the repair or alteration starts. The final regulations also add all contracts for construction, alteration, or repair to the list of records that may be necessary to demonstrate compliance with the applicable Prevailing Wage requirements.

D. New Labor Classifications and Supplemental Wage Determinations

Generally, the Agencies rejected comments regarding the need for the regulations to facilitate new classifications of construction workers for clean energy projects and raising issues about the DOL wage determination and conformance processes generally. They did, however, revise the final rule to eliminate the proposed regulation's requirement that a taxpayer, contractor, or subcontractor request a supplemental wage determination no more than 90 days before the

beginning of construction of a facility. The Agencies agreed with concerns raised in comments that the 90-day before construction period is too short because of the high importance of the prevailing wage determination on the cost of labor.

The final rule provides that requests for supplemental wage determinations cannot be made more than 90 days before the date the contract between the taxpayer and a contractor for construction, alteration, or repair of the facility is expected to be executed. They further prescribe that any supplemental wage determinations are required to be incorporated into the contract between the taxpayer and contractor within 180 days of issuance, consistent with DOL's DBA rules at 29 CFR 1.6(a)(3)(i).

Under the final regulations, requests for prevailing wage rates for additional classifications can be made any time after a contract for the construction, alteration, or repair of a facility has been executed between the taxpayer and a contractor. The Agencies note, however, that DOL's Wage and Hour Division (WHD) has advised them that most taxpayers will likely not need to use the process for requesting a supplemental wage determination or request a rate for an additional classification because of the availability of general wage determinations.

To retain consistency with the DBA and address commenters' concerns regarding cost certainty and preventing unreasonable delays, the final regulations state that DOL will resolve requests for a prevailing wage rate for an additional classification within 30 days of receipt or advise the requester within the 30-day period that additional time is necessary. The final regulations do not, however, adopt the suggestion of some commenters that a delay in receiving an additional wage rate excepts a taxpayer from the requirement to pay wages at rates not less than the prevailing rates for that classification.

E. Relief from Prevailing Wage Requirements for Indian Tribes, but Not the TVA

In response to comments from several Indian Tribes requesting an exception to the final rule's requirement to pay prevailing wage, the Agencies made two accommodations. First, they adopted into the final PWA standards from DOL prevailing wage regulations the "force account" exception to DBA prevailing wages. Under this exception, work done by Tribal governments using their own employees generally is not subject to the DOL DBA requirements because governmental agencies are not considered contractors or subcontractors under the DBA and will similarly be excepted from the Prevailing Wage requirements under the IRA. This exception extends to joint ownership arrangements that involve an Indian Tribal government (including a subdivision, agency, or instrumentality of an Indian Tribal government).

Second, out of respect for the sovereignty of Tribes, the Agencies revised the final PWA regulations to provide a special rule for Indian Tribal governments that perform construction, alteration, or repair of a facility on Indian land, as that term is defined in 25 U.S.C. 3501(2). Under this special rule, if the Indian land encompasses or overlaps more than one geographic area with respect to which the DOL has made an applicable wage determination, then the Indian Tribal government may choose the applicable wage determination for any one of those geographical areas and apply that applicable wage determination for work performed on

any qualified facility that is located on the Indian land. This rule applies to a qualified facility that is subject to joint ownership arrangements that involve an Indian Tribal government (including a subdivision, agency, or instrumentality of an Indian Tribal government). This rule is "intended to ease the administrative burden on Indian Tribal governments because they can use a single applicable wage determination for all projects on Indian land."

The Agencies agreed with commenters arguing that there is no statutory basis to except the Tennessee Valley Authority (TVA) from the PWA requirements set forth in the final rule.

IV. IRA Apprenticeship Utilization Requirements

With respect to the construction of any qualified facility, taxpayers must satisfy the apprenticeship participation requirements regarding qualified apprentices, labor hours, and apprentice-to-journeyworker ratios. The final rule agrees with concerns expressed by commenters about the impracticality of applying the IRA Apprenticeship Requirements to alteration and repair activities ***after*** a facility is placed in service. These commenters argued that such work must usually be done as quickly as possible and is often a short-term project on which requesting, hiring, and onboarding qualified apprentices would cause costly delays. The Agencies revised the final rule to provide that "alterations and repairs occurring while a facility is being constructed would be subject to the Apprenticeship Requirements, but those occurring after the facility is placed in service would not."

A. Apprenticeship Participation Requirement

The final rule's apprenticeship requirements apply to "each 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." The final regulations clarify that the Participation Requirement applies if the taxpayer, contractor, or subcontractor employ four individuals in the construction of the qualified facility ***at any time during the construction***, regardless of ***whether they are employed at the same location or at the same time***.

B. Definition of Qualified Apprentices and Impact of Pending DOL Apprenticeship Rule

Consistent with the IRA, the final regulations define "qualified apprentices" as "an individual who is employed by the taxpayer or by any contractor or subcontractor and who is participating in a registered apprenticeship program registered pursuant to the National Apprenticeship Act and satisfying the standards for registered apprenticeship programs at 29 CFR Part 29, subpart A." The final regulations make clear that a "qualified apprentice" includes "individuals in the first 90 days of probationary employment with the registered apprenticeship program." The Agencies rejected calls to permit other programs, such as "trade schools, colleges, programs run by local high schools and school districts, and other privately run, non-registered apprenticeship or workforce development programs to supply apprentices" to taxpayers, contactors, or subcontractors to satisfy the Apprenticeship Requirements. Notably, the final rules were clearly written with an eye towards the pending DOL Apprenticeship Rule that reinstates Subpart A to 29 CFR Part 29, which was removed when the Trump-era Industry Recognized Apprenticeship Program regulations were rescinded. Treasury wrote these final regulations with the

understanding that the pending DOL apprenticeship rule would be finalized creating a new Subpart B to 29 CFR Part 29 as proposed.

C. Apprentice Labor Hours Requirement

The IRA provides that "[t]axpayers shall 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." The regulations track the IRA in defining "labor hours" as the total number of hours devoted to the performance of construction, alteration, or repair work by any individual employed by the taxpayer or by any contractor or subcontractor, and excluding any hours worked by foremen, superintendents, owners, or persons employed in a bona fide executive, administrative, or professional capacity as defined under Labor Department Regulations at 29 CFR Part 541. The final rules state that the "applicable percentage" of "total labor hours" to be performed by "qualified apprentices" depends on the date when construction of the qualified facility begins and is delineated follows:

- 10% in the case of a qualified facility the construction of which begins before January 1, 2023,
- 12.5% in the case of a qualified facility the construction of which begins after December 31, 2022, and before January 1, 2024, and
- 15% in the case of a qualified facility the construction of which begins after December 31, 2023.

The final regulations clarify that the apprentice labor hours requirement applies to the construction of a facility, not on a contractor-by-contractor or trade-by-trade basis. The final regulations further explain that taxpayers determine whether this requirement has been satisfied by "aggregating all labor hours worked by laborers and mechanics on the construction of the facility (including those hours worked by contractors with fewer than four employees), from the beginning of construction through the time the facility is placed in service and calculating whether the applicable percentage of those labor hours was worked by qualified apprentices." Additionally, since the statute requires not less than the applicable percentage of total labor hours of construction, alteration, or repair work with respect to the qualified facility be performed by qualified apprentices, on-the-job training hours worked by qualified apprentices at a location other than the location of the facility do not count for purposes of the Labor Hours requirement. The final regulations provide examples to illustrate these calculations.

D. Resolving Conflicts over Ratios and Wages for Travelling Apprentices

As far as the ratio of qualified apprentices to journeyworkers, the final rule defers to "the applicable requirements for apprentice-to-journeyworker ratios of the DOL or the applicable state apprenticeship agency." The final rule responds to requests for clarification on the applicable prevailing rates and apprentice-to-journeyworker ratio if work is performed outside of the geographic area in which an apprentice's apprenticeship program typically operates. The

Agencies largely adopted the proposed rule's provisions, while clarifying that if more than one apprentice-to-journeyworker ratio could apply because the construction work is occurring in a geographic area where the registered apprenticeship program is not registered, the taxpayer must comply with the apprentice-to-journeyworker ratio set for the geographic area where the construction occurs. Thus, if the geographic area in which the construction is occurring requires a higher number of journeyworkers per apprentices than the ratio required by the registered apprenticeship program, then the taxpayer, contractor, or subcontractor must follow the stricter ratio. The final regulations also adopt the proposed rule's language that the wage rates (expressed in percentage of the journeyworker hourly rate) applicable in the geographic area in which the construction, alteration, or repair work is performed must be observed.

E. Good Faith Effort Exception to IRA Apprenticeship Requirement

Under the IRS final rule, a taxpayer is deemed to have satisfied the IRA's Apprenticeship requirements with respect to a qualified facility if the taxpayer has requested in writing qualified apprentices from a registered apprenticeship program, and:

- such request has been denied, provided that such denial is not the result of a refusal by the taxpayer, or any contractors or subcontractors engaged in the performance of construction, alteration, or repair work with respect to such qualified facility, to comply with the established standards and requirements of the registered apprenticeship program;

  or

- the registered apprenticeship program fails to respond to such request within five business days after the date on which such registered apprenticeship program received the request.

This is called the "Good Faith Effort Exception," and the Agencies describe it as an acknowledgement "that the supply of available qualified apprentices may not always match the demand necessary to meet the Apprenticeship requirements." Still, the final rule predicts that use of this exception "is expected to be rare because registered apprenticeship programs can operate across state and county lines and are expected to expand according to demand."

1. Denial by Programs a Taxpayer, Contractor, or Subcontractor Sponsors

Importantly, a taxpayer, contractor, or subcontractor cannot satisfy the Good Faith Effort Exception through a denial from a registered apprenticeship program it sponsors on its own. If the program sponsored by the taxpayer has no available qualified apprentices, the taxpayer must contact other registered apprenticeship programs for qualified apprentices to satisfy the Apprenticeship Requirements or the Good Faith Effort Exception, or establish that there are no other registered apprenticeship programs with an area of operation that includes the location of the facility.

2. No Registered Program in the Geographic Area of the Qualified Facility

The final rule also clarifies that if there is no registered apprenticeship program with a geographic area of operation that includes the location of the facility, taxpayers will be deemed to have satisfied "the Good Faith Effort Exception for the qualified apprentices they (or the contractor or subcontractor) would have requested for that occupation and location." But the Agencies warn that:

> *Taxpayers, contractors, and subcontractors should keep records sufficient to substantiate that there are no existing registered apprenticeship programs with a geographic area of operation that includes the facility at the time the request would have been made, as well as documentation of the requests for apprentices that would have been made, including the specific work and hours that would have been performed by the apprentices if a registered apprenticeship program were available.*

Examples of evidence that no registered apprenticeship programs were available could include "written confirmation from registered apprenticeship programs that they do not have a geographic area of operation" that includes the facility or "confirmation from the DOL [Office of Apprenticeship (OA)] or the relevant State apprenticeship agency that there are no existing registered apprenticeship programs with a geographic area of operation that includes the facility."

The Agencies also highlight that the DOL OA, in collaboration with participating state apprenticeship agencies, "has created an online search tool to assist taxpayers, contractors, and subcontractors in finding registered apprenticeship programs (available here)." Taxpayers, contractors, and subcontractors "can search for registered apprenticeship programs by occupation or industry in a certain State, city, or zip code." It is important to ensure that your registered apprenticeship programs are accurately included in this search tool.

3. A Qualified Written Request to a Registered Apprenticeship Program

The final rule retains the proposed rule's requirements for using the Good Faith Effort Exception that taxpayers, contractors, or subcontractors make a "qualified written request" for apprentices that is delivered electronically or by registered mail. Such written request must include proposed dates of employment, the occupations of apprentices that are needed, the location of the work to be performed, the number of apprentices needed, the expected number of labor hours to be performed by the apprentices, and the name and contact information of the taxpayer, contractor, or subcontractor requesting the employment of apprentices from the registered apprenticeship program. To address concerns about abuse of "the Good Faith Effort Exception," the final rule supplements the requirements of the written request made to an apprenticeship program by adding new requirements that such requests include the identity of who will employ the qualified apprentices and a statement of intent to employ qualified apprentices consistent with the estimated hours and dates of employment included in the request. The Agencies also rejected calls from employers who are signatories to collective bargaining agreements with building trades labor unions permitting them to request qualified apprentices from the labor union instead

of from a registered apprenticeship program because of the statutory requirement that requests for qualified apprentices must be made to a registered apprenticeship program. The final rule clarifies that taxpayers, contractors, or subcontractors are ***not required*** to contact the DOL OA or State apprenticeship agency to satisfy the Good Faith Effort Exception, despite strong encouragement to do so.

As far as the timing for submission of qualified written requests for qualified apprentices, the final regulations require that taxpayers, contractors, and subcontractors "must make an initial request for qualified apprentices from a registered apprenticeship program at least 45 days before the qualified apprentice is requested to begin work on the facility so that registered apprenticeship programs have adequate time to plan for the anticipated need." The final regulations also clarify that to satisfy the Good Faith Effort Exception, any subsequent requests to the same registered apprenticeship program must be made no later than 14 days before qualified apprentices are requested to begin work on the facility.

4. Responses from Registered Apprenticeship Programs

Once a qualified written request is sent to a registered apprenticeship program, the apprenticeship program has five days to issue a "substantive response." Under the final regulations, to qualify, a reply from an apprenticeship program must be "a substantive written reply that agrees, in part or in whole, to the specific requirements in the taxpayer's, contractor's, or subcontractor's request." Apprenticeship programs need to be aware that "automated or other non-substantive responses or acknowledgments are not responses for purposes of the Good Faith Effort Exception." If there is no substantive "response" within the five-day period, the Good Faith Effort Exception is deemed satisfied. The Agencies do, however, require that if there is no response to a request, or if it is denied, then to continue relying on the Good Faith Effort Exception beyond one year, a taxpayer must submit an additional request 365 days (366 days in case of a leap year) after the denial of a previous request. Note that subsequent requests for qualified apprentices do not need to be made to the same registered apprenticeship program that received and denied an earlier request. The final regulations also clarify that the annual duration for requesting apprentices applies if a taxpayer, contractor, or subcontractor is not able to locate a registered apprenticeship program with an area of operation that includes the location of the facility.

The final regulations clarify that partial denials may also serve as a valid basis for the Good Faith Effort Exception with respect to the portion of apprentices denied, provided that the taxpayer, contractor, or subcontractor hires the qualified apprentices that are available for the construction as provided by the registered apprenticeship program in its response. The Agencies also provide an example in the final rule of how a denial that follows an initial acceptance and is received prior to the start of the requested work may also serve as a valid basis for the Good Faith Effort Exception. This is intended to protect taxpayers in instances where an apprenticeship program promises qualified apprentices but proves unable to deliver them by the date required.

Interestingly, while the final regulations do not require taxpayers to use qualified apprentices from a program located in the same geographic area as the project to meet the Labor Hours

Requirement, to qualify for the Good Faith Effort Exception, requests for qualified apprentices must be made to "at least one apprenticeship program with a geographic area of operation that includes the geographic location of the facility." The final regulations also clarify that the geographic area of operation of a registered apprenticeship program has the same meaning as geographic area and locality for purposes of the Prevailing Wage Requirements. The Agencies explain that in most cases, "this will mean that the registered apprenticeship program operates in the county, independent city, or other civil subdivision of the State in which the facility is located, regardless of where the registered apprenticeship program is physically located."

5. Apprenticeship "Standards and Requirements" for the Good Faith Effort Exception

The final rule seeks to ensure that taxpayers cannot manufacture a denial and get the benefit of the Good Faith Effort Exception by refusing to comply with the "established standards and requirements" of a registered apprenticeship program. In a change from the proposed rule, the final regulations define "established standards and requirements to include not only the requirements of the DOL Registered Apprenticeship Regulations at 29 CFR parts 29 and 30, but also:

> *Those additional requirements that are established by the registered apprenticeship program for the placement of apprentices, applicable to all employers participating in the registered apprenticeship program, and not found by the DOL OA or a State apprenticeship agency to be contrary to the DOL guidance regarding the administration of registered apprenticeship programs.*

The Agencies explain the significance of this revised interpretation as follows:

> *If a registered apprenticeship program requires all employers who request qualified apprentices to enter into an agreement with the registered apprenticeship program, sign a collective bargaining agreement, and pay user fees, and these requirements have not been found by the DOL OA or a State apprenticeship agency to be contrary to DOL guidance regarding the administration of registered apprenticeship programs, then a denial of the request because the employer refused to enter into the agreement, sign the collective bargaining agreement, or pay the user fees would not qualify as a valid denial for purposes of the Good Faith Effort Exception.*

6. Recordkeeping Requirements for the Good Faith Exception

The final regulations retain the requirement from the proposed rule that taxpayers "must maintain and preserve sufficient records to demonstrate compliance with the PWA requirements." If the taxpayer is relying on the Good Faith Effort Exception, "this includes any written requests for the employment of qualified apprentices from registered apprenticeship programs and all correspondence with the registered apprenticeship program regarding the request, including denials of such requests." The Agencies further state that whether, and to what extent information must be provided to the IRS at filing "will be addressed in IRS forms,

instructions, and publications."

C. Apprenticeship Cure Provision

If a taxpayer cannot satisfy the Good Faith Effort Exception, it may still be treated as satisfying the IRA's apprenticeship requirements if it makes a corrective payment to the IRS. If the failure to satisfy these requirements is inadvertent, the amount of the payment is equal to the product of $50 multiplied by the total labor hours for which the qualified apprentice requirements were not satisfied with respect to the construction, alteration, or repair work on the qualified facility. If, however, the IRS determines that the failure to satisfy the IRA apprenticeship requirements was due to "intentional disregard" of the apprenticeship requirements, then the penalty amount increases to $500 multiplied by the total labor hours for which the qualified apprentice labor hour and participation requirements were not satisfied.

The final regulations provide a non-exhaustive list of facts and circumstances that may be considered in determining whether the failure to satisfy IRA apprentice requirements is due to "intentional disregard." They include whether: (1) the taxpayer used and complied with an apprenticeship utilization plan; (2) the taxpayer required contractors and subcontractors to forward to the taxpayer requests to registered apprenticeship programs within five business days of when requests are made; (3) whether taxpayers regularly reviewed contractors' and subcontractors' use of qualified apprentices; and (4) whether taxpayers investigated complaints concerning failures to comply with the Apprenticeship requirements and complaints concerning retaliation.

V. Treatment and Discussion of Project Labor Agreements (PLAs)

The final rule retains language from the proposed rule that penalties will not be imposed for failure to comply with PWA requirements, including the increased penalty amounts for intentional violations. However, the Agencies refused to adopt suggestions to create a presumption that projects subject to a PLA are deemed to be in compliance. Notably, the day the rule was released, Treasury Deputy Secretary Wally Adeyemo and Acting Secretary of Labor Julie Su published a joint blog highlighting the use of PLAs as "a best practice for large construction projects and a tool to help project developers comply" with the IRAs PWA requirements and stressed the protections PLAs afford against penalties.

A. The Agencies Defend the Benefits of PLAs

It is notable that in the final rule the Agencies emphatically "disagree with" the Associated Builders and Contractors and other commenters asserting that the provisions on PLAs alleviating penalties for noncompliance are unwarranted, coercive, and increase costs. Treasury and the IRS debunk claims that PLAs increase the cost of construction, citing "studies" showing "that PLAs in general do not lead to a statistically significant increase in construction costs." The Agencies also reject assertions that encouraging PLAs will result in reduced hiring of local, minority, women, veteran, and other potentially disadvantaged groups. They explain that "PLAs often include provisions that create or strengthen equitable paths to construction jobs for underserved workers, including local hire requirements, equitable recruitment goals, and community

engagement requirements." Treasury and the IRS also refute comments claiming that PLAs compel workers to become union members, noting that workers may elect to just pay agency fees.

Treasury and the IRS generally agree with commenters that "qualifying project labor agreements can help ensure compliance with the PWA requirements" in the final regulations. To this end, in the final rule, to be a "qualifying project labor agreement," a PLA is required to include provisions: (1) mandating the payment of wages at rates that are not less than the prevailing rates; (2) complying with the IRA Apprenticeship requirements; and (3) establishing mechanisms for workers, labor organizations, and taxpayers to correct any underpayments.

B. Special Definition of Qualifying Project Labor Agreement for Purposes of Section 45U Credit for Alteration or Repair Work on a Qualified Nuclear Power Facility

Recognizing the merits of comments explaining the nuclear power industry's unique circumstances and that nuclear operators cannot enter into qualifying project labor agreements as defined in the proposed rule, the Agencies modified the definition of a "qualifying project labor agreement" in the final rule for purposes of section 45U. Under the special definition, to be a qualifying project labor agreement for purposes of section 45U, a PLA must satisfy only the following four requirements:

(1) be a collective bargaining agreement with one or more labor organizations (as defined in 9 U.S.C. 152(5)) of which employees of the qualified nuclear power facility are members and such agreement establishes the terms and conditions of employment at the qualified nuclear power facility;
(2) contain guarantees against strikes, lockouts, and similar job disruptions;
(3) set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the collective bargaining agreement; and
(4) contain provisions to pay wages at rates not less than the prevailing wages in accordance with subchapter IV of chapter 31 of title 40 of the United States Code, which are the prevailing wage rates for blue collar employees of the federal government.

VII. Compliance and Enforcement

Treasury and the IRS dismissed the many comments taking issue with the IRS' reliance on post-filing enforcement and calls for it to take steps at the outset of a project to ensure compliance with prevailing wage requirements before a taxpayer seeks a credit or deduction. The Agencies specifically declined to require the submission of pre-filing certified payroll records or other sworn reports, the pre-filing review of submitted payroll records, job site visits by the IRS, and interviews of workers regarding the accuracy of submitted information. Their rationale for rejecting such ideas is that:

> *The IRS's authority to determine a taxpayer's compliance with the PWA requirements generally arises after the taxpayer files a claim for the increased tax credit. Because taxpayers may choose not to claim the increased credit amount, the IRS cannot determine a taxpayer's compliance or engage in enforcement*

activities before the taxpayer files a tax return claiming the increased credit amount. Imposing pre-filing requirements through regulations would not be a reasonable interpretation of the statutory language and would not permit the IRS to enforce the PWA requirements in advance of filing. Many of the DBA requirements (for example, certified weekly payroll, public notice of wage classifications and wage rates, required contract provisions) are either statutorily required under the DBA (or a related act) or designed to apply to all Federal construction contracts with certainty at the time of contract award (that is, in advance of work being performed). Those same pre-filing requirements are not prescribed in the Code.

The Agencies go on to explain that they rejected comments to adopt provisions to ensure compliance with PWA requirements before a taxpayer files because:

> *The requirement to pay prevailing wages does not become binding until a taxpayer files a claim for the increased amount of credit, and the IRS has a well-established record of effective post-filing enforcement.*

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