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Notice 2022-51 – "Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements"

November 4, 2022

SUBMITTED ELECTRONICALLY

Internal Revenue Service
CC: PA:LPD:PR (Notice 2022-51)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, D.C. 20044

RE: Combined Heat and Power Alliance Comments on Notice 2022-51

Introduction

The Combined Heat and Power Alliance ("CHP Alliance") is the leading national voice for the deployment of combined heat and power ("CHP"). We are a diverse coalition of business, labor, contractor, non-profit organizations, and educational institutions with the common purpose to educate all about CHP, and how CHP can make manufacturers and other businesses more competitive, reduce energy costs, enhance grid and customer reliability, and reduce emissions.

The CHP Alliance appreciates the opportunity to submit comments in response to the request of the Treasury Department and Internal Revenue Service (IRS) in Notice 2022-51. The CHP Alliance supports regulations, guidance, and administration of the enhancements to the investment and production tax credits in the Inflation Reduction Act that enables greater deployment of CHP and waste heat to power ("WHP") systems and incentivizes opportunities for good paying jobs. These comments share our thoughts on the prevailing wage, apprenticeship, domestic content, and energy community tax credit enhancements. In general, we believe the Treasury Department and IRS should strive to create guidance that is reasonable, achievable, and provides certainty to project developers seeking to take advantage of these opportunities to transition the U.S. to a cleaner energy system, create jobs, and enhance the competitiveness of the economy.

Prevailing Wage Requirements

Question: *Section 45(b)(7)(A) provides that a taxpayer must ensure that any laborers and mechanics employed by the taxpayer, or any contractor or subcontractor, are paid wages at rates not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality in which such facility is located as most recently determined by the*

Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, which is commonly known as the Davis-Bacon Act. Is guidance necessary to clarify how the Davis-Bacon prevailing wage requirements apply for purposes of § 45(b)(7)(A)?

The CHP Alliance believes it would be helpful for the Treasury Department and IRS to establish the applicable Department of Labor prevailing wage determination tools taxpayers and contractors should use to determine prevailing wages. Currently, federal prevailing wage determinations are based upon the wage determination tools available at: https://sam.gov/content/wage-determinations. When using such classifications, it will be important to be mindful of the fact that different occupations and tasks can often be reasonably assigned across multiple occupational Department of Labor classifications. Consequently, no penalties or recapture events should apply in situations where the employer has classified a worker or the job they perform with a reasonable basis for such classification.

The CHP Alliance also believes the prevailing wage requirements should be applied only to the types of workers described in the IRA. Under the IRA, the prevailing wage requirements for the investment tax credits (sections 48 and 48E) apply to "laborers and mechanics" employed in the construction of the construction of an energy project, and performing alterations and repairs during the 5-year period after the energy project is placed in service. The construction of a CHP facility involves onsite and offsite work performed by individuals, who should not be considered performing the tasks of a laborer or mechanic. This would include supervisory and quality control work, which often performed by a general contractor, such as overseeing the installation of the equipment, structural support, piping, and wiring. Likewise, individuals performing preliminary work that is not construction, alteration, or repair such as design and engineering activities should not be included under this requirement. In addition, CHP equipment distributors also perform onsite inspections to ensure that equipment has been properly installed. The equipment manufacturers' quality assurance work is related to the purchase of equipment rather than the construction of the facility, and is also supervisory in nature, which should be considered outside the scope of the duties of "laborers and mechanics."

The CHP Alliance also believes it would be helpful for the Treasury Department and IRS to provide clarification that distinguishes "construction, alteration, and repair" activities from routine maintenance activities and minor repairs. Major equipment for CHP systems, like engines and turbines, have regular maintenance schedules. This routine maintenance activity and minor repair work should not be considered construction, alteration, or repair for purposes of meeting the requirements of the tax credit.

Question: *What documentation or substantiation should be required to show compliance with the prevailing wage requirements?*

The CHP Alliance recommends provision of documentation should be done as part of the audit process, as is customary in tax law enforcement. To be prepared for such audits, we do

recommend the Treasury Department and IRS provide guidance on the types of documentation that will be necessary to show compliance with these requirements. The federal government's requirements for demonstrating compliance with prevailing wage requirements for federal contracts could serve as a model for the types of records that a taxpayer would need to maintain.

Apprenticeship Requirements

As with the prevailing wage requirements, the CHP Alliance believes there are activities associated with the construction of CHP facilities that fall outside the scope of "construction, alteration, or repair work" or is performed by the types of supervisory and professional individuals, which the IRA excludes from the total hours worked under the apprenticeship requirement. The hours worked in supervisory and quality control, often performed by a general contractor, such as overseeing the installation of the equipment, structural support, piping, and wiring should be excluded as it is performed by professional and supervisory workers. Likewise, individuals performing preliminary work that is not construction, alteration, or repair such as design and engineering activities be included under this requirement. In addition, CHP equipment distributors also perform onsite inspections to ensure that equipment has been properly installed. This quality assurance work is related to the purchase of equipment rather than the construction of the facility, and is also supervisory in nature, which should be outside the scope of the counted labor hours.

As with the prevailing wage requirement, CHP Alliance also believes for purposes of the apprenticeship requirement it would be helpful for the Treasury Department and IRS to provide clarification that distinguishes "construction, alteration, and repair" activities from routine maintenance activities and minor repairs. Major pieces of equipment in CHP systems, such as engines and turbines, have recommended maintenance manuals and schedules, which are published by the equipment manufacturer. The labor hours incurred performing routine maintenance activity and minor repair work should not be considered construction, alteration, or repair for purposes of the apprenticeship requirement.

Question: *Section 45(b)(8)(C) provides that each taxpayer, contractor, or subcontractor who employs four or more individuals to perform construction, alteration, or repair work with respect to a qualified facility must employ one or more qualified apprentices from a registered apprenticeship program to perform that work. What factors should the Treasury Department and the IRS consider regarding the appropriate duration of employment of individuals for construction, alteration, or repair work for purposes of this requirement?*

The CHP Alliance believes the hour requirements should be tied to the overall project hours. Taxpayers, contractors, or subcontractors should not be required to employ their apprentice at hours equal to those of their other employees working on the project. The project should meet the hour requirements based upon the overall project hour percentages required in section 45.

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Question: *Section 45(b)(8)(D)(ii) provides for a good faith effort exception to the apprenticeship requirement. (a) What, if any, clarification is needed regarding the good faith effort exception? (b) What factors should be considered in administering and promoting compliance with this good faith effort exception?*

The CHP Alliance respectfully requests the Treasury Department and IRS to consider the following factors related to the implementation of the good faith exception, including:

- *Distance Limits*: How far beyond the construction site for the qualified facility do the taxpayer, contractors, and subcontractors need to seek registered apprentices? The CHP Alliance believes there should be a reasonable limit on the distance away from the project site taxpayers, contractors, and subcontractors are expected to recruit apprentices, which considers the type of community the project is located in (urban, suburban, rural, etc.) and reasonable driving distances from the project location. If apprentices are not available within a reasonable geographical scope, the good faith exceptions with respect to non-availability should apply.
- *Registration Status Change:* If an apprentice is registered at the time of initial employment, but their program loses its registered status during construction project, the hours of the apprentices that were eligible at the start of construction should count towards the qualified hours under a good faith exception. If a registered apprentice drops out of the program, the good faith exception should apply if the employer makes a good faith effort to recruit a replacement.
- *Misrepresentation:* If a taxpayer, contractor, or subcontractor reasonably relies on a fraudulent misrepresentation that an apprentice is properly registered, then the reliance should qualify for the exception. This could involve a consideration of the employer's past history of working with apprentices and compliance with similar requirements.
- *Grace Periods:* It would be helpful for the Treasury Department and IRS to define permissible grace periods to replace apprentices, which consider employers' good faith efforts to find replacements.
- *Interstate Registration:* Do apprentices registered in an apprentice program outside the state where the qualified facility is located meet the requirements for purposes of the federal tax credit? Clarification of this question with respect to the tax credits would be helpful.
- *Apprentice to Journey Worker Ratios:* It would be helpful for the Treasury Department and IRS to clarify and harmonize the differences between federal and state ratios with respect to different activities and occupations.

Question: *What documentation or substantiation do taxpayers maintain or could they create to demonstrate compliance with the apprenticeship requirements in § 45(b)(8)(A), (B), and (C), or the good faith effort exception?*

Domestic Content Requirements

Iron and Steel

Question: *(c) Should the definitions of "steel" and "iron" under 49 C.F.R. 661.3, 661.5(b) and (c) be used for purposes of defining those terms under §§ 45(b)(9)(B) and 45Y(g)(11)(B)? If not, what alternative definitions should be used?*

In general, the CHP Alliance believes the principles behind the definitions of steel and iron provided under 49 C.F.R. 661.3, 661.5(b) and (c) should apply to the domestic content requirements under sections 45 and 45Y—and by extension to sections 48 and 48E. The Appendix A to 49 C.F.R. 661.3 describes steel and iron end products in terms of structural items that are primarily steel and iron like bridges and rails. Likewise, 49 C.F.R. 66.16(c) uses similar examples, and further clarifies the requirements do not apply to steel and iron used as components or subcomponents of manufactured products, rolling stock, or bimetallic items that include steel or iron components. Furthermore, the iron and steel requirements should not apply to subcomponents used to integrate the components to the qualified facility. Items that are primarily iron and steel, which have only a secondary structural function should be considered manufactured product components.

Manufactured Product

Question: *Does the term "manufactured product" with regard to the various technologies eligible for the domestic content bonus credit need further clarification? If so, what should be clarified? Is guidance needed to clarify what constitutes an "end product" (as defined in 49 C.F.R. 661.3) for purposes of satisfying the domestic content requirements?*

The CHP Alliance believes it would be helpful for the Treasury Department and IRS to provide guidance on the definitions of "end product" as defined in 49 C.F.R. 661.3 in ways that apply to the types of facilities and energy property, since the examples of end products in Appendix A to section 661.3 are related to transit projects rather than energy projects. Under this definition, domestic content is determined through identification of end products, components, and subcomponents.

For CHP systems, the end product is the qualifying CHP facility. In some cases, this could include a packaged microturbine and some engines which are delivered with the major components like heat recovery modules, batteries (for island-capable systems), and the control systems pre-assembled. In other cases, there are components, which are directly incorporated into the end product at the construction site these could include the engine or turbine, battery (for island capable systems), heat recovery modules or heat recovery steam generators, chillers (if combined cooling, heating, and power), controller systems, and the fuel skid (for biogas

systems). The subcomponents would include articles used to produce the components, as well as articles that integrate the components into the qualified facility.

Question: *b) Does the determination of "total costs" with regard to all manufactured products of a qualified facility that are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States need further clarification? If so, what should be clarified? Is guidance needed to clarify the term "mined, produced, or manufactured"?*

The cost of the articles composed primarily of iron and steel should be included in computing the total costs for manufactured components. Cost is determined at the component level with every component is determined to be a U.S. manufacture product or not based upon the requirements of 49 C.F.R. 661.5 for iron and steel articles, and 49 C.F.R. 661.3 for other components. Consequently, guidance should confirm that when components undergo a manufacturing process in the U.S., then the origin of the subcomponents is immaterial to determining whether the component is of U.S. origin and the entire cost of the component would be considered of U.S. origin.

Energy Community Requirements

Timing of Energy Community Designations

Question: *(5) For each of the three categories of energy communities allowed under § 45(b)(11)(B), what past or possible future changes in the definition, scope, boundary, or status of a "brownfield site" under § 45(b)(11)(B)(i), a "metropolitan statistical area or non-metropolitan statistical area" under § 45(b)(11)(B)(ii), or a "census tract" under § 45(b)(11)(B)(iii) should be considered, and why?*

The Treasury Department and IRS should allow developers to either certify or seek a designation of a project site as an energy community before construction begins, up until the project's completion. Developers of CHP and WHP projects require certainty in their planning process, which begins with estimating whether a potential project is financially sound. If project proponents can be certain about the availability of this incentive for their project from the start, the more likely the project is to advance towards completion.

Allowing the energy community designation to be determined during the project planning process will encourage more active investment in energy communities. If by contrast, the determination is made when the project is placed in service, it would more often be the result of happenstance. This will be especially helpful to consider in instances in which the criteria can shift based upon administrative, economic, or social change. For example, the Census Department may adjust the boundaries of census tracts; and employment and taxation status fluctuate depending on economic conditions or changes in tax laws. Flexible timing to qualify as an energy community under all three methods will serve to encourage conscious efforts to

invest in communities that are most at risk of economic hardship as the United States transitions towards cleaner energy resources.

Census Tract Lines

Question: *Section 45(b)(11)(A) provides an increased credit amount for a qualified facility located in an energy community. What further clarifications are needed regarding the term "located in" for this purpose, including any relevant timing considerations for determining whether a qualified facility is located in an energy community? Should a rule similar to the rule in § 1397C(f) (Enterprise Zones rule regarding the treatment of businesses straddling census tract lines), the rules in 26 C.F.R. §§ 1.1400Z2(d)-1 and 1.1400Z2(d)-2, or other frameworks apply in making this determination?*

Regardless of the type of model selected for determining if a qualifying facility is in an energy community, the Treasury Department and IRS should allow taxpayers under the established percentage of assets or business activity taking place within the allowed census tract to receive a partial credit for the activity and assets that are located within the qualified census tracts.

In addition, it would be helpful for the Treasury Department and IRS to clarify the meaning of "directly adjoining" census tracts. For example, the CHP Alliance believes any bordering census tract, including borders on touching corners should be considered directly adjoining.

Brownfield Sites

Question: *Does the determination of a brownfield site (as defined in subparagraphs (A), (B), and (D)(ii)(III) of § 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(39))) need further clarification? If so, what should be clarified?*

The CHP Alliance believes these provisions could be further clarified with an assurance that brownfields do not need to fall under the definition of all three of the above referenced subparagraphs of the Comprehensive Environmental Response, Compensation, and Liability Act to be considered a brownfield site for purposes of the energy communities bonus credit. The mine scarred land referenced in subparagraph (D)(ii)(III) is part of a list of additional types of brownfields not defined in the earlier subparagraphs. Brownfields that fall under the definitions in subparagraphs (A) and (B) should be considered qualified brownfields under this definition as well, because the brownfields in subparagraph (D), like mine scarred land, constitute an additional set of sites that are eligible to be considered brownfields. Thus, if the site is considered an eligible brownfield under any of the listed subparagraphs, it should be considered a brownfield for purposes of the definition of an energy community.

CHP and WHP are excellent compliments to revitalizing industrial areas, and can provide a critical clean energy resource for the industrial sector. This provision should be interpreted in a manner that allows the broadest possible range of brownfield sites to qualify for the bonus credit to encourage revitalization of America's industrial sector. The CHP Alliance also encourages the Treasury Department and IRS to work with the Environmental Protection Agency to create a process for efficiently identifying and certifying eligible brownfield sites, and to define mine-scarred land consistent with EPA definitions to include lands and associated watersheds impacted by the extraction, beneficiation, or processing of ore, minerals, and coal has occurred.

Question: *Under § 45(b)(11)(B)(ii)(I), what should the Treasury Department and the IRS consider in determining whether a metropolitan statistical area or non-metropolitan statistical area has or had 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas? What sources of information should be used in making this determination? What tax revenues (for example, municipal, county, special district) should be considered under this section? What, if any, consideration should be given to the unavailability of consistent public data for some of these types of taxes?*

The tax revenues considered should include both state and federal severance taxes and/or royalties tied to oil, natural gas, and coal extraction.

Conclusion

The CHP Alliance appreciates the opportunity to provide comments on the questions raised in the Treasury Department and IRS's request for information, which raise many complex and interrelated questions. Given the complexity of the questions arising out of this legislation, we hope the Treasury Department and IRS follow their previous practices and remain open to reexamining initial guidance when new information or external circumstances may support changes. Our organization would appreciate the opportunity to continue to engage with the Treasury Department and IRS on the implementation of the Inflation Reduction Act through additional comment opportunities, meetings, and other means. Please feel free to contact me with any questions you have.