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SUBMITTED ELECTRONICALLY

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-49 and Notice 2022-50)
Room 5203
P.O. Box 5203, Ben Franklin Station
Washington, D.C. 20044

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, D.C. 20220

Mr. William M. Paul
Principal Deputy Chief Counsel and Deputy Chief
Counsel (Technical)
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C. 20224

Re: Request for Comments on Regulatory Implementation of the Inflation Reduction Act and Prevailing Wage and Apprenticeship Requirements Pursuant to Notice 2022-51

Dear Ms. Batchelder and Mr. Paul:

NextEra Energy, Inc. ("NextEra") submits this letter in response to Notice 2022-51 (the "Notice"), in which Treasury and the Internal Revenue Service ("IRS") announced plans to issue guidance under the Inflation Reduction Act of 2022, Public Law 117-169, 136 Stat. 1818 (August 16, 2022) (the "IRA" or the "Act"), including Section 45 of the Internal Revenue Code (the "Code"). The Notice requested comments on general as well as specific questions pertaining to several provisions of the IRA, including the enhanced credit under Section 45(b)(6)-(8) available to taxpayers that satisfy certain prevailing wage and apprenticeship requirements.

In response to this Notice, NextEra submits the following responses concerning these requirements.

QUESTIONS

.01 Prevailing Wage Requirement

Question 1: 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)?

Yes, the IRA states that laborers and mechanics performing work in the construction, alteration, or repair of a Qualified Facility as defined under the Act ("Qualified Facility") "shall be paid wages at rates not less than the prevailing 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" the Davis-Bacon Act. 26 U.S.C. § 45(b)(7)(A). Other than requiring that certain wage rates determined under the Davis-Bacon Act be paid to such workers, the Act does not require application of other aspects of the Davis-Bacon Act. Notwithstanding, clarification is necessary to conform how a taxpayer, its contractors, or subcontractors can comply with the prevailing wage requirements under the Act.

In the interest of compliance, the Treasury, therefore, should consider the following material issues in this rulemaking process:

- The potential unavailability of wage determinations for the taxpayer in the applicable geographic area covering all trades utilized for the construction, alteration, or repair of a Qualified Facility;

- The need for a procedure for the timely issuance and/or communication of wage determinations by the United States Department of Labor ("DOL") to a taxpayer, its contractors, or subcontractors that cover all trades utilized for the construction, alteration, and repair of a Qualified Facility if any applicable wage determination is not available covering the locality where the construction, alteration, or repair of a Qualified Facility are to take place;

- The need for reasonable rules and standards applicable to a taxpayer in order to ensure compliance by its contractors and subcontractors engaged for the construction, alteration, or repair of a Qualified Facility;

- The need for reasonable recordkeeping standards that apply to a taxpayer, its contractors, and subcontractors to demonstrate compliance with the prevailing wage requirements;

- The need for standards regarding payroll and related practices for compliance with the prevailing wage requirements by a taxpayer, its contractors, and subcontractors; and

- Clarifying that the DOL will be responsible only for determining what constitutes prevailing wages and qualified apprentices and enforcing, for DOL purposes, those rules. The IRS will be responsible for determining (i) eligibility and qualification for enhanced tax credits under the Internal Revenue Code, and (ii) any penalties for failure to meet prevailing wage or apprenticeship requirements under the Code.

- Clarifying the circumstances under which the IRS will impose a penalty for non-compliance with the prevailing wage or apprenticeship requirements, including by defining the standards for "good faith efforts" and "intentional disregard"

In light of the foregoing considerations, we propose the following rules and regulations to address such issues.

Proposed Rules and Regulations:

I. Definitions.

All definitions in 29 C.F.R. 5.2 are incorporated by reference and shall apply to these regulations except as otherwise provided below.

(1) "DBA." The term, "DBA," shall mean the Davis-Bacon Act and its related Acts, subchapter IV of chapter 31 of title 40, United States Code.

(2) The "Act." The term, the "Act," shall mean the "Inflation Reduction Act."

(3) The "Taxpayer." The term, the "Taxpayer," shall mean the taxpayer as referenced in the Code and seeking an enhanced credit under Section 45(b)(6).

(4) "Covered Work." The phrase, "Covered Work," shall mean: (i) construction of a "Qualified Facility" within the meaning of Section 45(d), and (ii) the alteration or repair of such a Qualified Facility with respect to any portion of a taxable year within the 10-year period beginning on the date the Qualified Facility was originally placed in service. "Covered Work" does not include building services work for the routine maintenance of a Qualified Facility or other regularly-recurring, routine maintenance or repair work performed at the Qualified Facility, or the manufacturing of any component parts, whether manufactured for use in the operations at the Qualified Facility or in the construction, alteration, or repair work performed at the Qualified Facility. Construction, alteration, and repair only includes work performed at a Qualified Facility, as defined below, (1) the costs of which the Taxpayer is required to capitalize into the facility under section 263 or 263A and the regulations promulgated thereunder, and (2) that results in the facility being treated as originally placed in service by the Taxpayer.

(5) "Project." The term, "Project," shall mean work performed at the site where a Qualified Facility as defined under the Act is located and includes both Covered Work and other work that does not constitute Covered Work.

(6) "Wage Determination." The phrase, "Wage Determination," shall mean a wage rate not less than the prevailing rates for construction, alteration, or repair of a similar character in the locality in which a Qualified Facility is located as most recently determined by the Secretary of Labor.

(7) "Qualified Apprentice." The phrase, "Qualified Apprentice," shall mean an individual who is employed by the Taxpayer or by a contractor or subcontractor and who is participating

in a registered apprenticeship program, as defined in 26 U.S.C. § 3131(e)(3)(B), and whose Labor Hours are subject to the ratio requirements under Section 45(b)(8).

(8) "Laborers and Mechanics." The phrase, "Laborers and Mechanics," shall mean workers who perform Covered Work on a Project and to whom payment of prevailing wages is required for purposes of enhanced tax credit eligibility under the Act.

(9) "Journeyperson." The term, "Journeyperson," shall mean a Laborer and Mechanic who is not a Qualified Apprentice and whose labor hours are subject to the ratio requirements under Section 45(b)(8) of the Act. A Journeyperson does not include a foreman, superintendent, owner, or person employed in bona fide executive, administrative, or professional capacity.

(10) "Labor Hours." The phrase, "Labor Hours," shall mean all work hours spent by Journeypersons and Qualified Apprentices at the Project site and shall be limited to such work hours associated with construction, alteration, or repair work performed at the Project. Labor Hours shall further include time spent by a Qualified Apprentice receiving training relevant to the labor or services furnished at the Project site as well as all other time considered to be compensable under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*.

(11) "Department of Labor" or "DOL." The phrases, "Department of Labor" or "DOL," shall mean the United States Department of Labor.

(12) "Administrator." The term, "Administrator," shall mean the Administrator of the Wage and Hour Division of the Department of Labor.

(13) "Secretary." The term, "Secretary," shall mean the United States Secretary of the Treasury or her delegate.

II. Prevailing Wage Requirement.

To meet the prevailing wage requirement of this Subsection, the Taxpayer must ensure that:

(1) Laborers and Mechanics employed by the Taxpayer for Covered Work are paid in accordance with the Wage Determination applicable to the Qualified Facility.

(2) Laborers and Mechanics employed by any contractor or subcontractor retained by the Taxpayer for Covered Work are paid in accordance with the Wage Determination applicable to the Qualified Facility.

(3) The following provisions shall apply to the applicability of Wage Determinations for purposes of compliance with the prevailing wage requirements under the Act:

i. To the extent that an applicable Wage Determination covering the locality where the Project is located is not available for use by the Taxpayer, its contractors, or subcontractors, the Taxpayer, its contractors, or subcontractors shall apply to the Administrator for a Wage Determination applicable to the Project or an applicable

trade utilized at the Project. Said application shall be made no later than 60 days from the commencement of Covered Work at the Project.

ii. During the time period from the date of the commencement of Covered Work at the Project until such time when the Department of Labor issues the requested Wage Determination applicable to the Project or an applicable trade utilized at the Project, all Laborers and Mechanics engaged to perform Covered Work at the Project whose work is not covered by a Wage Determination are permitted to be paid wages and other remuneration at rates that are commercially reasonable, but no less than the basic minimum wage rates applicable to the locality at which the Project is situated. For example, the Taxpayer may consider utilizing other existing Department of Labor wage determinations for comparable trades in or around the applicable locality until such time as the Department of Labor issues an applicable Wage Determination.

iii. Within 15 days after the issuance by the Department of Labor of a Wage Determination applicable to the Project, Laborers and Mechanics subject to such Wage Determination shall be paid in accordance with the rates set forth therein. The Taxpayer shall pay, or require its contractor or subcontractor to pay, any Laborer or Mechanic who received wages at rates less than required under the Wage Determination the difference between the applicable wage rates under the Wage Determination and the rates they actually received for Covered Work that they performed at the Project. Said wage difference shall be paid by no later than 90 days from the date when the Department of Labor issues or publishes the applicable Wage Determination, or issues a decision on a conformance request under 29 C.F.R. 5.5(a)(1)(ii)(A).

iv. The Taxpayer shall be responsible for submitting proposed wage rates and any questions or comments with regard to conformance to the Administrator.

(4) Pay periods for Laborers and Mechanics performing work on a Project. Laborers and Mechanics shall be paid wages no less frequently than on a bi-weekly basis, and to the extent practicable or required by applicable state law, on a weekly basis.

(5) Contractors and Subcontractors. The Taxpayer shall obtain confirmation from its contractors and subcontractors of their obligation to comply with the prevailing wage requirements of the Act.

i. Taxpayers may obtain the confirmation required by this paragraph by including in contracts for Covered Work provisions that include the clauses set forth in 29 C.F.R. 5.5 relating to minimum wages, apprentices, withholding, payroll and basic records, and liabilities and penalties for violations as applicable under the Act.

ii. The Taxpayer can obtain confirmation from subcontractors performing Covered Work by obtaining from its contractor a certification, under penalty of perjury, that the contractor has included in each subcontract for Covered Work provisions that include the clauses set forth in 29 C.F.R. 5.5 relating to minimum

wages, apprentices, trainees, withholding, payroll and basic records, and liabilities and penalties for violations as applicable under the Act.

iii. For contractors and subcontractors who contract by means of purchase orders or other informal type contract forms, the Taxpayer can satisfy its obligation to obtain confirmation by attaching copies of the applicable Wage Determination and labor standards clauses to the subcontract form. *See* 29 C.F.R. 5.5(a)(6).

iv. The Taxpayer may discharge any liability or avoid any associated penalties under the Act related to an underpayment of wages by a contractor or subcontractor by satisfying any underpayment determined by the Administrator to be due and owing the contractor's or subcontractor's Laborers and Mechanics as required by the applicable labor standards provisions of the prime contract and prescribed by the Act.

(6) Rules Concerning the Engagement of Laborers and Mechanics.

i. Nothing in the Act shall be interpreted to impose any requirement that a Taxpayer, its contractors, or subcontractors enter into a project labor agreement, engage in collective bargaining with any "labor organization" as defined under the National Labor Relations Act, 29 U.S.C. § 152(5), or otherwise enter into an employment agreement, either express or implied, with any Laborers and Mechanics engaged in construction, alteration, or repair work with respect to a Qualified Facility, unless otherwise required by other applicable law.

ii. Nothing in this Act shall be interpreted to impose any requirement that a Taxpayer, its contractors, or subcontractors guarantee continued employment of the Laborers and Mechanics who performed Covered Work after their performance of the Covered Work is completed, whether in the same year or a different year. Nor should anything in this Act be interpreted to impose any requirement that any Laborers or Mechanics may only be terminated for just cause. The Act does not alter any "at-will" employment relationship between the Taxpayer, its contractors, or subcontractors and the worker.

iii. Unless otherwise required by other applicable law, the prevailing wage and apprenticeship requirements of the Act do not apply to Taxpayers, or to their contractors or subcontractors, after the completion of the Covered Work, even if they choose to continue to employ the Laborers and Mechanics who performed Covered Work after their performance of the Covered Work is completed, whether in the same year or a different year.

iv. Nothing in the Act shall be deemed to require a Taxpayer, its contractors, or subcontractors to guarantee the completion of the apprenticeship or other training programs by any apprentice engaged for purpose of the Act unless otherwise required under other applicable law.

v. Nothing in this Act shall be deemed to create a joint employer or co-employer relationship under circumstances in which such relationship does not otherwise exist pursuant to existing Treasury or Department of Labor rules and regulations.

III. Recordkeeping and Information Reporting

A Taxpayer claiming an enhanced credit under Section 45(b)(6)(B)(3) shall maintain records of payroll and information reporting specified in this subsection for all Covered Work. If a Taxpayer maintains the documentation required by this section and provides that documentation to the Internal Revenue Service within 90 days of a request, the Taxpayer shall be treated as satisfying the prevailing wage and apprenticeship requirements, including but not limited to the requirements that the Taxpayer's contractors and subcontractors satisfy the prevailing wage and apprenticeship requirements for Covered Work. The documentation must be in existence when the return is filed. The Secretary may, in its discretion, excuse a minor or inadvertent failure to provide required documents, but only if the Taxpayer has made a good faith effort to comply, and the Taxpayer promptly remedies the failure when it becomes known. The documentation required by this subsection is as follows:

(1) The Taxpayer shall maintain payroll records sufficient to show that its Laborers and Mechanics and those of its contractors and subcontractors were paid in accordance with the relevant Wage Determination for Covered Work. The following payroll records are examples that a Taxpayer may maintain to satisfy this requirement: Statement of Compliance accompanying certification by contractors and subcontractors in the form required under 29 C.F.R. 3.3, 29 C.F.R. 3.4, and 29 C.F.R. 5.5(a)(3) (including Form WH-347), or another form with equivalent information that is specified by the Secretary, payroll journals that support the information contained in the Statement of Compliance, time cards or similar records of hours worked, earnings statements that specify the hourly rate(s), hours worked, gross and net wages paid and deductions and withholdings from wages, summary plan descriptions of benefits, monthly statements of benefits provided, records showing costs incurred in the provision of benefits, quarterly payroll tax filings, and Form W-2s.

IV. Enforcement

The Secretary's responsibility is to establish rules regarding the Taxpayer's entitlement to credit under the Act and the potential application of any penalty under the Internal Revenue Code. The Secretary recognizes that pursuant to the Act, the Department of Labor and its Administrator of the Wage and Hour Division issue wage determinations applicable to the construction, alteration, and repair of Qualified Facilities. However, a determination by the Department of Labor concerning a Taxpayer's compliance with the prevailing wage requirements of the DBA shall not be determinative of whether the Taxpayer is entitled to the enhanced credit under Section 45(b)(6)-(8). Pursuant to Section 45(b)(7)(B), a Taxpayer is required to pay any wage underpayment and any penalties imposed for violations of the prevailing wage requirements. Absent a Taxpayer's refusal to correct violations and pay any wage underpayments and penalties, the Secretary shall not deny, revoke, or recapture the tax credit. In the event that the Secretary is required to evaluate a Taxpayer's entitlement to tax credit due to non-compliance, the Secretary shall further consider the following:

(1) The Secretary shall not deny, revoke, or recapture a tax credit:

i. if the violation of the prevailing wage requirements under the Act was not the result of intentional disregard as defined below;

ii. if the Taxpayer reasonably relied on contract provisions in its contracts with its contractors, or certifications of compliance by its contractors and subcontractors; or

iii. if non-compliance with or violation of the prevailing wage requirements under the Act occurred despite the Taxpayer's good faith efforts to comply with those requirements.

(2) In the event that the Department of Labor issues a determination that a Taxpayer or its contractors or subcontractors has failed to pay the prevailing wage as determined in accordance with the DBA, no tax credit for which a Taxpayer has applied or previously been granted will be subject to denial, revocation or recapture until after the Secretary applies the factors stated above.

(3) Penalties for Non-compliance with the Prevailing Wage Requirements under the Act. A Taxpayer, its contractors, or subcontractors shall not be determined to be subject to any penalty under the Act, including under Section 45(b)(7)(B), for non-compliance with the prevailing wage requirements if the Secretary finds that the Taxpayer:

i. engaged in good faith efforts to comply with the Wage Determinations issued by the Department of Labor;

ii. acted in reasonable reliance on a Statement of Compliance or certifications submitted by its contractor or subcontractor, as set forth in 29 C.F.R. 5.5(a)(3)(ii) and the provisions above;

iii. acted in reasonable reliance on guidance by the Department of Labor or the Secretary;

iv. acted based on a reasonable belief that its Laborers or Mechanics were properly classified in a particular trade and paid in accordance with such reasonable interpretation, or has other bona fide defenses for any underpayment;

v. actively cooperated with any investigation concerning compliance with the prevailing wage requirements and promptly took corrective action upon issuance of a final determination;

vi. participated in good faith to resolve complaints by Laborers or Mechanics who performed Covered Work at the Project through a dispute resolution program established by the Taxpayer, its contractors, or subcontractors to resolve such disputes. The establishment, maintenance and good faith participation by the Taxpayer, its contractors, and subcontractors in such program and any corrective actions taken as a result shall be considered by the Secretary as a good faith effort to comply with the prevailing wage requirements under the Act.

vii. for any Taxpayer, contractor and/or subcontractor whose Laborers or Mechanics are covered by collective bargaining agreements and are subject to a dispute resolution program with applicable labor organizations, participation in such a program shall be considered by the Secretary as a good faith effort to comply with the prevailing wage requirements under the Act.

(4) Enhanced Penalties for Prevailing Wage Violations. The Taxpayer shall not be deemed to be subject to the enhanced penalty pursuant to Section 45(b)(7)(B)(iii) in the absence of

any finding by the Secretary that any failure to meet the prevailing wage requirements of the Act was due to intentional disregard by the Taxpayer.

i. A violation of the prevailing wage requirements is due to intentional disregard if the Taxpayer has knowingly or willfully chosen not to comply or has knowingly or willfully failed to take reasonable steps to cause its contractors or subcontractors to comply. Whether a violation is due to intentional disregard is based on examination of the facts and circumstances on a case by case basis, including:

(A) Whether the violation is part of a pattern of conduct or willful neglect by the Taxpayer, contractor, or subcontractor to follow prevailing wage requirements of the Act;

(B) Whether correction was promptly made upon discovery of the violation or non-compliance with the prevailing wage requirement, including prompt payment of any underpayment of wages and benefits;

(C) Whether the Taxpayer fails or refuses to timely cure any non-compliance identified in its findings;

(D) Whether the Taxpayer exhibited good faith diligence in its administration of the prevailing wage requirements under the Act, such as reasonable efforts to achieve compliance by its contractors and subcontractors and reasonable reliance on the certifications of compliance by its contractors and subcontractors;

(E) Whether the Secretary finds that the Taxpayer failed or refused to cooperate in its enforcement of the prevailing wage requirements under the Act; and

(F) Whether the Taxpayer acted in reasonable reliance on guidance by the Department of Labor or based on a reasonable belief that its Laborers or Mechanics were properly classified in a particular trade and paid in accordance with such reasonable interpretation, or has other bona fide defenses for any underpayment.

(5) Nothing in this Act shall be interpreted to confer a private right of action against a Taxpayer, its contractors, or subcontractors or their respective principals for damages or equitable or other relief.

Question 2: Section 45(b)(7)(B)(i) generally provides a correction and penalty mechanism for failure to satisfy prevailing wage requirements. What should the Treasury Department and the IRS consider in developing rules for taxpayers to correct a deficiency for failure to satisfy prevailing wage requirements?

The prevailing wage and apprenticeship obligations under the Act are voluntary in nature, and are solely for the purpose of allowing the Taxpayer to earn enhanced credits. As such, it would be unjust to the Taxpayer if its tax credit could potentially be revoked after it had relied in good faith on the

Department of Labor's Wage Determination, cooperated in any investigation regarding its compliance, and participated in its resolution.

Further, clarification is necessary to specify the authority and powers of the Secretary and confirm that the Department of Labor's role under the Act is limited to issuing Wage Determinations and rules concerning the status or qualification of apprentices. We propose that the Secretary exercise its authority under the Act to assess penalties when necessary and determine eligibility for the tax credit in the event of non-compliance.

Specific rules and standards should also be established concerning the imposition, measure and mitigation of fines and other penalties in the event of non-compliance. For example, standards should be defined to address the situation where a Taxpayer exercises reasonable diligence in maintaining compliance with these requirements and relies in good faith on its contractors' and subcontractors' representation of compliance. Another example involves the Taxpayer's timely cure of any non-compliance and/or payment of fines. The Taxpayer's good faith efforts and/or reliance should be considered in the Secretary's assessment of penalties in the event of non-compliance.

The Secretary should further expressly pronounce that a tax credit that has been granted is not subject to revocation, recapture or rescission unless a Taxpayer or its contractors or subcontractors fail to cure any final determination of non-compliance and satisfy any penalties under the Act imposed against the Taxpayer or its contractors or subcontractors.

Please refer to Section IV of the proposed regulations provided in response to Question 1 concerning correcting a deficiency for failure to satisfy prevailing wage requirements.

Question 3: What documentation or substantiation should be required to show compliance with the prevailing wage requirements?

Recordkeeping is a material component in an employer's compliance with the prevailing wage and apprenticeship requirements of the Act. To promote certainty, NextEra suggests that the regulations or other IRS guidance set forth the standards of recordkeeping that Taxpayers are to follow to establish compliance with the prevailing wage and apprenticeship requirements. For example, rules and regulations should identify the basic pay and time records that must be maintained, such as regular payroll documents showing the pay rates, hours worked and deductions taken, daily sign-in and out sheets or other records of hours worked, benefit contribution reports (if applicable) and other records that confirm compliance with the prevailing wage requirements, in addition to Statements of Compliance by contractors and subcontractors or other certified payroll or similar certification documents.

The regulations should state that, where a taxpayer has contracted with multiple tiers of contractors and subcontractors, the taxpayer may rely in good faith on contract provisions requiring the lower-tier contractor(s) or subcontractor(s) to perform and comply with the prevailing wage and apprenticeship requirements of the Act to demonstrate that it has communicated and requires compliance with the requirements to its contractors and subcontractors. In addition to contract provisions, taxpayers should be entitled to rely on certifications of compliance from contractors and subcontractors to demonstrate good faith effort to ensure compliance. For this reason, a payroll certification procedure akin to the certified payroll and Statement of Compliance procedure described in the existing DBA regulations should be implemented. We further propose that this certification procedure follow and otherwise be consistent with the existing frequency of pay practice(s) of the Taxpayer, its contractors, or subcontractors.

Please refer to Section III of the proposed regulations provided in response to Question 1 concerning documentation or substantiation required to show compliance with the prevailing wage requirements.

Question 4: Is guidance for purposes of § 45(b)(7)(A) needed to clarify the treatment of a qualified facility that has been placed in service but does not undergo alteration or repair during a year in which the prevailing wage requirements apply?

Guidance is necessary to confirm that the Act does not require Taxpayers, or their contractors or subcontractors, to continue to employ the Laborers and/or Mechanics who performed Covered Work after the Covered Work is completed, whether in the same year or a different year. The Act does not impose a "just cause" requirement for termination of employment or expand an existing employer-employee relationship beyond its current status. If, for example, a Laborer or Mechanic is hired for the purpose of satisfying the requirements of the Act, the Act does not alter the "at-will" relationship between the Taxpayer, its contractors and/or subcontractors and their worker.

Guidance is also necessary to confirm that, unless otherwise required by other applicable law, the labor standards and apprenticeship requirements of the Act do not apply to Taxpayers, or to their contractors or subcontractors, after the completion of the Covered Work, even if they choose to continue to employ the Laborers and/or Mechanics who performed Covered Work after their performance of the Covered Work is completed, whether in the same year or a different year. A worker is not subject to prevailing wages unless the worker is performing Covered Work on another Qualified Facility subject to the enhanced credit provisions of the Act. Please refer to Section II(6) of the proposed regulations provided in response to Question 1.

Rules and regulations should also clarify that building services and related work required for the routine maintenance of a Qualified Facility or other regularly-recurring, routine maintenance or service (including but not limited to building security, janitorial, cleaning, facility repair, or similar work) is not covered by the prevailing wage or apprenticeship requirements. Similarly, rules and regulations should clarify that neither the manufacture of any component parts, whether manufactured for use in the operations at the Qualified Facility or in the construction, alteration, or repair work performed at the Qualified Facility, shall be covered by the prevailing wage or apprenticeship requirements. We want to emphasize that these activities do not constitute construction, alteration, or repair work with respect to a Qualified Facility and are therefore not Covered Work under the Act. Finally, guidance is necessary to confirm that the prevailing wage requirements only pertain to the construction, alteration, and repair of a Qualified Facility that is performed onsite. We have defined the terms "Covered Work" and "Project" in Section I(4)-(5) of the proposed regulations provided in response to Question 1 to reflect this.

Question 5: Please provide comments on any other topics relating to the prevailing wage requirements for purposes of § 45(b)(7)(A) that may require guidance.

There are several other areas in which guidance is needed in order to clarify the prevailing wage requirements under the IRA. First, we want to emphasize that guidance is necessary to define the parameters of what work is covered by the Act. In particular, we believe it is necessary to define "Covered Work" and to ensure that only the construction of a Qualified Facility within the meaning of Section 45(d) and the alteration or repair of such Qualified Facility with respect to any portion of a taxable year within the 10-year period beginning on the date the Qualified Facility was originally placed in service is required to conform to the prevailing wage requirements. Additionally, we believe it is necessary to define "Project" to clarify that the requirements apply only to work performed at a Qualified Facility, (1) the costs

of which the Taxpayer is required to capitalize into the facility under section 263 or 263A and the regulations promulgated thereunder, and (2) that results in the facility being treated as originally placed in service by the Taxpayer. Please refer to Section I(4)-(5) of the proposed regulations provided in response to Question 1.

Second, guidance is also required to clarify that nothing in the Act alters the nature of the employment relationship between the Taxpayer, its contractors, and subcontractors and the workers. For example, the IRA does not require the Taxpayer, its contractors, or subcontractors to enter into any project labor agreement, engage in collective bargaining with any labor organization claiming jurisdiction over any trade to be utilized on a Project, or enter into an express or implied employment agreement with any Laborer, Mechanic or Apprentice engaged to perform Covered Work. Please refer to Section II(6) of the proposed regulations provided in response to Question 1.

Finally, rules and regulations are needed to clarify that the Act does not confer a private right of action for damages, equitable or other relief. Such clarification is important to maintain consistency with existing enforcement mechanisms for equivalent prevailing wage requirements. Please refer to Section IV(5) of the proposed regulations provided in response to Question 1.

.02 <u>Apprenticeship Requirement</u>

Question 1: 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 length of the project for which construction, alteration, or repair work is performed with respect to a Qualified Facility will in most instances be significantly shorter than the amount of time that a Qualified Apprentice needs to spend in order to complete the training mandated under applicable curriculum in the registered apprenticeship program. There will likely be instances in which a Qualified Apprentice exhausts the on-the-job training opportunities associated with a Qualified Facility but is unable to satisfy the hours requirements of the registered apprenticeship program in which the Qualified Apprentice is enrolled. Rules and regulations should be issued regarding the disposition of Qualified Apprentices engaged in the construction, alteration, and repair of a Qualified Facility after their work has been completed. A Taxpayer, its contractors, or subcontractors, should be under no obligation for the continued training, employment, and/or payment of a Qualified Apprentice after their work at the Project has been completed. Furthermore, guidance is necessary to clarify that, unless required by other applicable law, the enrollment or engagement of Qualified Apprentices for the construction, alteration, or repair work performed at a Qualified Facility does not subject the Taxpayer, its contractors, or subcontractors to a collective bargaining agreement with a referring labor organization. The Taxpayer, its contractors, or subcontractors should only be responsible for on-the-job training of the Qualified Apprentices that is relevant to the Covered Work. The foregoing, however, must further be subject to the availability of relevant apprenticeship programs and Qualified Apprentices in the applicable trades within a reasonable geographic proximity to the Qualified Facility. To the extent no such program or Qualified Apprentice is available, a Taxpayer, its contractors, or subcontractors may be deemed to meet the good faith effort requirement under Section 45(b)(8)(D)(ii). See also discussions and proposed regulation below.

Question 2: 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?

In addition to the need for clarification stated in NextEra's response to Question 1, rules and regulations should be implemented setting forth the manner in which a Taxpayer, its contractors, and subcontractors can fulfill their responsibilities to comply with the apprenticeship requirements in connection with Covered Work performed at geographic locations in which no registered apprenticeship program exists or insufficient Qualified Apprentices in applicable trades can be engaged. It is also unclear when a Taxpayer can qualify for the exception under Section 45(b)(8)(D)(i) by payment of the designated penalty in lieu of satisfying the ratio and Labor Hours requirement. Clarification is further required concerning the records that a Taxpayer, its contractors, and subcontractors must maintain to demonstrate their good faith effort.

In furtherance of the above, we propose the following regulations:

V. Apprenticeship Requirements.

(1) To meet the apprenticeship requirements of this Subsection, the Taxpayer must ensure that:

i. Except as provided in paragraphs (ii) and (iii), with respect to the construction of any Qualified Facility, Qualified Apprentices shall perform not less than the following applicable percentages of the total Labor Hours of the construction, alteration, or repair work (including such work performed by any contractor or subcontractor):

(A) in the case of a Qualified Facility the construction of which begins before January 1, 2023, 10 percent,

(B) 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

(C) in the case of a Qualified Facility the construction of which begins after December 31, 2023, 15 percent.

ii. 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 shall employ one or more Qualified Apprentices to perform such work.

iii. The Taxpayer shall be subject to any applicable requirements for apprentice-to-journeyworker ratios of the Department of Labor or the applicable State apprenticeship agency.

(2) A Taxpayer shall not be treated as failing to satisfy the Apprenticeship Requirement of this section, if:

i. Taxpayer, its contractors, or subcontractors requested Qualified Apprentices from a registered apprenticeship program as defined in Section 26 U.S.C. § 3131(e)(3)(B), and were unsuccessful in hiring Qualified Apprentices due to the denial of the request by the registered apprenticeship program, the refusal to cooperate by the program due to improper or unlawful demands by or on behalf of the program or its sponsor(s), including but not limited to demands by labor organizations to engage in collective bargaining, the failure of the program to respond to such request within five business days, or the inability of the program to identify and refer a sufficient number of qualified candidates for the Taxpayer, its contractors, or subcontractors to have Qualified Apprentices perform the applicable percentages of the total Labor Hours specified in paragraph V(1) above.

ii. In the event that the Taxpayer, its contractors, or subcontractors are unable to identify a registered apprenticeship program that can refer Qualified Apprentices who reside at the locality of the Project or within reasonable commuting distance from the Project for a trade it deems necessary to perform the Covered Work, the Taxpayer shall notify the Secretary in writing of its inability to identify such a program. The Taxpayer shall be deemed to have satisfied the good faith effort exception under Section 45(b)(8)(D) by taking these actions.

iii. The Act shall not be deemed to require a Taxpayer, its contractors, or subcontractors to enter into a project labor agreement, engage in collective bargaining with any "labor organization" as defined under the National Labor Relations Act, 29 U.S.C. § 152(5) or otherwise enter into an employment agreement, either express or implied, with any Laborers and/or Mechanics engaged in construction, alteration, or repair work with respect to a Qualified Facility in order to satisfy the good faith efforts provision under Section 45(b)(8)(D)(ii).

iv. A Taxpayer meeting these requirements is deemed to have made a good faith effort at compliance with the apprenticeship requirement and shall not be liable for any amount described in paragraph (3)(ii) or (iii), below.

(3) A Taxpayer shall not be treated as failing to satisfy the apprenticeship requirement of this section if the Taxpayer:

i. submits to the Secretary a report of the total Labor Hours for which the Apprenticeship Requirement was not satisfied with respect to Covered Work on a Qualified Facility, and

ii. makes payment to the Internal Revenue Service in an amount equal to the product of $50 and the total labor hours for which the Apprenticeship Requirement was not satisfied with respect to Covered Work on a Qualified Facility.

iii. If the Secretary determines that any failure to satisfy the apprenticeship requirement of this Section is due to intentional disregard, the Taxpayer shall, in lieu of the payment specified in subparagraph (ii), above, make payment to the Internal Revenue Service in an amount equal to the product of $500 and the total labor hours

for which the Apprenticeship Requirement was not satisfied with respect to Covered Work on a Qualified Facility.

(4) Neither the Taxpayer, its contractors, or subcontractors shall be required to create or maintain a registered apprenticeship program.

(5) The responsibility of the Taxpayer, its contractors, or subcontractors shall be limited to providing on-the-job training relevant to the Covered Work.

(6) None of the Taxpayer, its contractors or its subcontractors shall be required to provide lodging or to transport Qualified Apprentices from locations beyond reasonable commuting distance from the Project. The term "reasonable commuting distance" is a flexible term that will vary with local conditions. The factors to be considered in determining what is a reasonable commuting distance include: the accessibility of the place of employment, the quality of the roads, the availability of public transportation, and usual or customary travel times. The commuting distance is measured from the worker's home.

(7) The Taxpayer, its contractors, or subcontractors shall not be required to identify a registered apprenticeship program outside of the State where the Project is located and, whether or not within the same State, 120 or more miles from the location of the Project.

(8) To the extent that the Taxpayer elects to pay the monetary penalties described in Section 45(b)(8)(D)(i)(II), it shall not be deemed to have intentionally disregarded the Apprenticeship Requirements, if it notifies the Secretary in writing of its intention to pay the $50 per Labor Hour penalty in lieu of meeting the Labor Hours or participation requirements under the Act within 30 days from the commencement of performance of Covered Work Project and makes such payment within 120 days after the completion of the Project. Upon completion of the payment hereunder, the Taxpayer is deemed to have complied with the Apprenticeship Requirements under the Act. The Taxpayer may submit a written application for a reasonable extension of time from the Secretary to comply with the foregoing provision.

VI. Recordkeeping and Information Reporting

A Taxpayer claiming an enhanced credit under Section 45(b)(6)(B)(3) shall maintain records of payroll and information reporting specified in this paragraph for all Covered Work, and to the extent applicable, maintain copies of the relevant entries in the Registered Apprenticeship Partners Information Management Data System (RAPIDS) database or a State Apprenticeship Agency's database. If a Taxpayer maintains the documentation required by this section and provides that documentation to the Internal Revenue Service within 90 days of a request, the Taxpayer shall be treated as satisfying the apprenticeship requirements – including the requirements that the Taxpayer's contractors and subcontractors satisfied the prevailing wage and apprenticeship requirements for Covered Work. The documentation must be in existence when the return is filed. The Internal Revenue Service may, in its discretion, excuse a minor or inadvertent failure to provide required documents, but only if the Taxpayer has made a good faith effort to comply, and the Taxpayer promptly remedies the failure when it becomes known. The documentation required by this subsection is as follows:

(1) The Taxpayer shall maintain payroll records sufficient to show that its Journeypersons and Qualified Apprentices and those of its contractors and subcontractors were paid in accordance with the relevant Wage Determination for Covered Work. The following payroll records are examples of documents that a Taxpayer may maintain to satisfy this requirement: Statement of Compliance accompanying certification by contractors and subcontractors in the form required under 29 C.F.R. 3.3, 29 C.F.R. 3.4, and 29 C.F.R. 5.5(a)(3) (including Form WH-347), or another form with equivalent information that is specified by the Secretary; payroll journals that support the information contained in the Statement of Compliance; time cards or similar records of hours worked; earnings statements that specify the hours worked; quarterly payroll tax filings; and Form W-2s.

(2) Rosters of all Journeypersons, Qualified Apprentices, and other workers employed by the Taxpayer or their contractors or subcontractors to perform construction, alteration, or repair work with respect to the Qualified Facility, including the work hours, wage rates, and classification for each. Rosters shall be compiled for each pay period of the Taxpayer, but no less frequently than bi-weekly.

VII. Enforcement

(1) Penalties for Non-Compliance with the Apprenticeship Requirements under the Act. Taxpayer, its contractors, or subcontractors shall not be determined to be subject to any penalty under Section 45(b)(8)(D)(i)(II) for non-compliance with its apprenticeship requirements if the Taxpayer, its contractors, or subcontractors can demonstrate that:

i. the inability to meet the Labor Hours or ratio requirements was due to circumstances outlined in Section V(2) and that the Taxpayer, its contractors, or subcontractors have taken the steps required thereunder;

ii. the Taxpayer or its contractors reasonably relied on the certifications of compliance submitted by its contractors or subcontractors in accordance with Section VI(1);

iii. non-compliance with the Labor Hours or ratio requirements was timely cured within a reasonable time after notice or discovery of non-compliance with these requirements; or

iv. an exception described under Section 45(b)(8)(D) is met.

(2) Enhanced Penalties for Non-compliance with the Apprenticeship Requirements. The Taxpayer, its contractors, or subcontractors shall not be deemed to be subject to the enhanced penalty pursuant to Section 45(b)(8)(D)(iii) in the absence of any finding that any failure to meet these requirements was due to intentional disregard by the Taxpayer, its contractor, or subcontractor.

i. A violation of the apprenticeship requirements is due to intentional disregard if the Taxpayer, any contractor, or subcontractor has knowingly or willfully chosen not to comply. Whether a violation is due to intentional disregard is based on examination of the facts and circumstances on a case by case basis, including:

(A) Whether the violation is part of a pattern of conduct or willful neglect by the Taxpayer, its contractor, or subcontractor to follow applicable regulations and guidance issued by the Secretary or the Department of Labor;

(B) Whether correction was promptly made upon discovery of the violation or non-compliance, including prompt steps to meet the labor hours and ratio requirements;

(C) Whether the Taxpayer fails or refuses to timely cure any non-compliance of which it had actual knowledge;

(D) Whether the Taxpayer exhibited good faith diligence in its administration of the apprenticeship requirements under the Act, such as efforts to achieve compliance by its contractors and subcontractors and reasonable reliance on the certifications of compliance by its contractors and subcontractors;

(E) Whether the Taxpayer failed or refused to cooperate in any enforcement proceeding relating to the apprenticeship requirements under the Act;

(ii) The following shall not constitute intentional disregard under the Act:

(A) Non-compliance due to the demand by labor organizations that the Taxpayer, its contractors, or subcontractors engage in collective bargaining or enter into a project labor agreement as a condition for referral of Qualified Apprentices.

(B) Non-compliance due to a lack of apprenticeship programs meeting the requirements of Section 45(b)(8)(D)(ii) and 26 U.S.C. § 3131(e)(3)(B) or available Qualified Apprentices within the geographic limitations described in Section V(6); and

(C) Election by the Taxpayer to pay the monetary penalty under Section 45(b)(8)(D)(i)(II) in conjunction with notification to the Secretary concerning this election to pay as described in Section V(3).

(b) What factors should be considered in administering and promoting compliance with this good faith effort exception?

The regulations should address the potential unavailability of registered apprenticeship programs or Qualified Apprentices for the necessary trades for Covered Work within geographic proximity to the Project. This unavailability may render it impossible for the Taxpayer, its contractors, or subcontractors to utilize Qualified Apprentices to qualify for enhanced credits under Section 45(b)(6). There should be clarification to confirm that the Act does not require a Taxpayer, its contractors, or subcontractors to create or maintain such a program in advance of performing Covered Work. Indeed, the timing for the establishment of any such program or submission or attainment of approval for the program will likely not meet the staffing needs for the construction, alteration, or repair of a Qualified Facility. Please refer to Section V(2)-(3) of the proposed regulations provided in response to Question 2(a) concerning factors to be considered in administering and promoting compliance with the good faith effort exception.

(c) Are there existing methods to facilitate reporting requirements, for example, through current Davis-Bacon reporting forms, current performance reporting requirements for contracts or grants, and/or through DOL's Registered Apprenticeship Partners Information Management Data System (RAPIDS) database or a State Apprenticeship Agency's database?

The Department of Labor's Registered Apprenticeship Partners Information Management Data System (RAPIDS) database or a State Apprenticeship Agency's database are insufficient to demonstrate compliance with the apprenticeship requirements of the IRA. These databases may not contain the most up-to-date information. A Taxpayer, its contractors, or subcontractors, however, may be able to use such databases as a means to confirm whether an apprentice identified by the Taxpayer, its contractors, or subcontractors qualifies as a Qualified Apprentice. The information and records needed to confirm compliance with the ratio and labor hours requirements will largely be maintained by the Taxpayer, its contractors and/or subcontractors.

The current DBA reporting form, WH-347, or a report that contains similar information and certification requirement allows for the Taxpayer, its contractors, and subcontractors to record the participation and Labor Hours of Qualified Apprentices engaged to perform Covered Work and certify their compliance with the apprenticeship requirement under the Act. A Taxpayer, its contractors, and subcontractors should be reasonably authorized to rely on the certification of their lower-tier contractors and subcontractors regarding their compliance with this requirement.

For proposed rules and regulations concerning reporting requirements, please refer to Section VI of the proposed provisions provided in response to Question 2(a).

Question 3: 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?

With respect to reasonable standards for recordkeeping by taxpayers, their contractors, or subcontractors to demonstrate compliance, we respectfully refer the Treasury to NextEra's response to Question 2(c) above, and the Section VI of the proposed rules and regulations provided in response to Question 2(a).

Question 4: Please provide comments on any other topics relating to the apprenticeship requirements in § 45(b)(8)(B) that may require guidance.

Specific rules and standards should also be established concerning the imposition, measure and mitigation of fines and other penalties in the event of non-compliance with the apprenticeship requirement under the Act. For example, standards should be defined to address the situation where a Taxpayer exercises reasonable diligence in maintaining compliance with these requirements and relies in good faith on its contractors' and subcontractors' representation of compliance. Another example involves the Taxpayer's timely cure of any non-compliance and/or payment of fines. The Taxpayer's good faith efforts and/or reliance should be considered in any assessment of appropriate penalties in the event of non-compliance. The Secretary should also expressly pronounce that a tax credit granted is not subject to revocation, recapture or rescission unless a Taxpayer or its contractors or subcontractors fail to cure any final determination of non-compliance and satisfy any penalties assessed under the Act.

Finally, as addressed in NextEra's response to the Treasury's requests concerning the prevailing wage requirement under the Act, the Taxpayer should not be required to engage in collective bargaining with a labor organization for the purpose of meeting the apprenticeship requirement under the Act. A Taxpayer,

its contractors, or subcontractors should be deemed to have met the good faith exception under Section 45(b)(8)(D)(ii) in the event that a request for apprentices were made by the Taxpayer, one of its contractors or subcontractors, to a registered program, and said program fails or refuses to respond or cooperate in the request because the program's sponsoring labor organization demand that the Taxpayer, its contractors, or subcontractors engage in collective bargaining was rejected.

For proposed rules and regulations addressing the above issues, we respectfully refer the Treasury to Sections V(2)-(8) and VII of NextEra's proposed regulations provided above in response to Question 2(a).