RETC WORKING GROUP™
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November 4, 2022

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

Re: Notice 2022-51, Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements

To Whom it May Concern:

On behalf of the members of the Novogradac Renewable Energy Working Group (the RE Working Group), we appreciate the opportunity to comment on Notice 2022-51, Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements (the Notice). The RE Working Group was founded to identify and address technical and administrative issues that arise around the Inflation Reduction Act (IRA) of 2022. The group counts among its members attorneys, investors, syndicators, lenders, for-profit and nonprofit developers, sponsors, consultants, and other renewable energy professionals interested in working together to coalesce around solutions to technical renewable energy issues and make the renewable energy tax credit programs more efficient in providing benefits.

Attached please find the RE Working Group's comments include requests for guidance, responses to questions and recommendations regarding the Notice. Our comments are meant to provide the Treasury and IRS with information needed to help guide their decisions as they make plans to implement the IRA's energy provisions.

Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance. We would be happy to discuss our comments in further detail. Thank you in advance for your time and consideration.

Yours very truly,

Novogradac & Company LLP

By

Tony Grappone, Partner

Attachment: RE Working Group Comments on Notice 2022-51

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Response to Notice 2022-51, Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content and Energy Communities Requirements
Novogradac Renewable Energy Working Group

General comment
The RE Working Group encourages the Treasury Department and the IRS provide initial temporary guidance that allows for a comment period and grants industry stakeholders with an opportunity to identify issues with guidance and allow for final guidance that is easier to interpret and implement. We would also request that the start the statutory 60-day timer for prevailing wage and apprenticeship requirements be delayed until final guidance is issued.

.01 <u>Prevailing Wage Requirement</u>

(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)?

Comments
We request guidance that specifies the Department of Labor's Wage and Hours Division (WHD) will use data from the Bureau of Labor Statistics (BLS) to more accurately reflect the prevailing wages in clean energy industry occupations and that WHD will also request and obtain feedback from smaller, rural, tribal as well as minority and women owned businesses.

(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?

Comments
We request that the Treasury Department and the IRS consider providing guidance in the form of examples that illustrate how taxpayers can correct a deficiency for failure to satisfy prevailing wage requirements.

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

Comments
We request that the Treasury Department and the IRS should require similar documentation or substantiation that is used by taxpayers to show compliance with prevailing wage criteria required by the Department of Housing and Urban Development (HUD).

(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?

Comments
We request guidance that clarifies that for purposes of the Inflation Reduction Act of 2022, Davis-Bacon prevailing wage requirements should not apply to "non-covered" work and services as promulgated by the US Department of Energy (DOE) by promulgating 48 CFR §970.2204-1-1 (Administrative controls and criteria for application of the Davis-Bacon Act in operational and maintenance activities).

We also request the Treasury Department and the IRS consider providing an exemption from this requirement if the total amount incurred during the year with respect to alteration or repair work is less than 5% of the total amount incurred in connection with all repairs and maintenance during the year.

(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.

.02 <u>Apprenticeship Requirement</u>

(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?

Comments
We recommend that the Treasury Department and IRS provide guidance indicating that application of the apprenticeship requirements of the Inflation Reduction Act of 2022 to "construction, alteration, or repair" work does not include maintenance work required for the continued operation of a facility, assembly, installation and replacement of machinery, parts and consumables of a facility, or work necessitated by casualty impairing the ability of a facility to return to operation and that the categories for non-coverage be the same or similar to those delineated in 48 CFR §970.2204-1-1 (a)(2), (3) & (6). We further recommend that the Treasury Department and IRS consider limiting exception to replacement/repair on equipment that is beyond warranty period, consumables, and casualty, with de minimis exception specific to technology allowing construction, alteration, or repair work that does not exceed X% of the aggregate cost of the applicable original components.

We also request guidance that confirms that if a taxpayer, contractor, or subcontractor who employs four or more individuals is required to hire one or more qualified apprentices from a registered apprenticeship program to perform that work and that does not mean that one or more qualified apprentices is required for every 4 or more individuals employed. In other words, if a taxpayer, contractor or subcontractor employs eight individuals the minimum required number of qualified apprentices is one and not two.

In addition, we request that the Treasury Department and the IRS provide guidance with respect to how full time and part time employment is defined and we encourage alignment with existing Department of Labor guidelines and to choose the least inefficient means possible to achieve program objectives.

We also request illustrative examples that illustrate different scenarios in which apprenticeship-to-journeyman criteria can be satisfied.

(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?

Comments
We request guidance that clarifies that the Treasury Department and IRS will allow locally owned and operated apprenticeship programs to partner with those administered by the Department of Labor (DOL) or states or to become eligible for the requirements in some other way.

We also encourage the DOL to consider the rural nature of many renewable energy projects and extend less stringent requirements to owners of projects in remote areas where compliance may be particularly burdensome.

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

Comments
We request guidance that confirms taxpayers are only required to provide compliance documentation upon request.

(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?

Comments
Documentation from workforce/apprenticeship organizations and employers, such as apprenticeship enrollment records by programs (such as through RAPIDS), payroll, scheduling, and timecards or commercial contracts, may facilitate documentation for evidentiary purposes. We recommend that Treasury consider issuing a consistent list of factors necessary for audit purposes rather than requiring a specific tool so as to avoid negatively affecting industry's ability to deploy more solar energy due to new or burdensome tool integration.

(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?

Comments
Examples of documentation or substantiation that taxpayers can maintain include representatives and/or certificates of compliance from contractors and subcontractors or certificate of non-availability of apprentices from a qualified apprenticeship program.

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

Comments
Treasury should clarify whether apprentices in a registered apprenticeship program in one state continue to meet requirements for purposes of the Federal tax credit if they are working in a different state with differing registered apprenticeship standards. We believes that hiring the enormous number of apprentices required under the IRA is likely to be a challenge. Allowing apprentices to work in other states for purposes of the tax credit would help meet this challenge and would be consistent with the apprenticeship requirements of the IRA.

B) Registered Apprenticeship Program Types – Equitable consideration should be given for all the approved types of registered apprenticeship programs as specified in the IRA language.
C) Intentional Disregard definition equivalency – Acknowledgement that "intentional disregard" in § 45(b)(8)(D)(ii) is the same as § 45(b)(7)(B)(iii).

D) Apprentice-to-journeyworker ratio – The language currently states that the appropriate ratio to apply can be that of the Department of Labor or the State Apprenticeship Agency. Some states have different ratios and some collective bargaining agreements, and apprenticeship training programs may include different ratios. Treasury should clarify how to treat those differences. For example, where the state ratio may require a lower number of apprentices assigned to a journey-worker than the Federal ratio, clarity is needed on which ratio to apply. Similarly, the Federal ratio may be lower than the State applicable ratio. We proposes that whichever ratio results in more apprentices on-site, to increase the workforce opportunities in the industry, should be the prevalent ratio.

E) Compliant Examples – We urge that Treasury provide illustrative examples of companies complying with the "total labor hours" requirement in apprenticeship provisions. This includes definitions of and how to account for those workers included (those carrying out construction, alteration, and repair) and the excluded employee categories (foremen, superintendents, owners, and persons within the meaning of part 541 of title 29, Code of Federal Regulations).
F) Tribal Lands and TERO – We support that Treasury will conduct a Tribal Consultation in late November with the Tribal Leaders of Federally Recognized Tribes and that there will be subsequent comments regarding the Prevailing Wage and Apprenticeship provisions that will contribute to guidance. We specifically request that Treasury preserve the Tribal Employment Rights Ordinance (TERO) requirements.

G) Meetings / Discussions – In order to ensure that predictable and reliable clean energy business planning can occur and permit renewable energy companies to properly incorporate the prevailing wage and apprenticeship requirements of the IRA, we respectfully recommend that Treasury consider holding meetings on specific topics and allow time for ongoing input by interested parties. Since many of these topics are new ground in tax policy, we respectfully urge ongoing opportunity for input and review, including the ability to provide public comments on draft guidance within a reasonable comment period.

.03 <u>Domestic Content Requirement</u>

General comment with respect to domestic content requirements.
We respectfully request guidance that clarifies which types of on-site assembly and/or installation activities, if any, are considered part of the manufacturing process of a manufactured product and/or end product used by a qualified facility.

(1) Sections 45(b)(9)(B) and 45Y(g)(11)(B) provide that a taxpayer must certify that any steel, iron, or manufactured product that is a component of a qualified facility (upon completion of construction) was produced in the United States (as determined under 49 C.F.R. 661).

(a) What regulations, if any, under 49 C.F.R. 661 (such as 49 C.F.R. 661.5 or 661.6) should apply in determining whether the requirements of section §§ 45(b)(9)(B) and 45Y(g)(11)(B) are satisfied? Why?

Comments
We suggest that guidance be issued clarifying that the cost of components that represent less than a percentage of the total cost of the "end product" are exempt under 661.5(c) and that "end product" be defined as manufactured equipment that is shipped or delivered to the site of installation. We also request that components used for installation, such as tower foundations and solar racking should be treated as separate "end products".

(b) What should the Treasury Department and the IRS consider when determining "completion of construction" for purposes of the domestic content requirement? Should the "completion of construction date" be the same as the placed in service date? If not, why?

Comments
We recommend that the Treasury Department and the IRS provide guidance with respect to replacement parts that do not qualify as domestic content. For example, if a facility that satisfied the domestic content criteria at the time it was originally placed in service but subsequently incorporates replacement parts that would have prevented the facility to meet the domestic criteria if part of the originally placed in service facility, we request that, absent willful intent to circumvent the domestic content criteria, the facility continue to be treated as satisfying the domestic content criteria.

(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?

Comments
We request guidance that confirms that 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).

(d) What records or documentation do taxpayers maintain or could they create to substantiate a taxpayer's certification that they have satisfied the domestic content requirements?

Comments
We request guidance that indicates a manufacturer of an end product should be able to furnish this information upon request. Examples of information they might be ablet to provide include but are not limited to: a finished goods costed bill of materials which includes burdened labor, updated on an annual basis, that substantiates component costs of the end-product. For component costs that exceed a certain percentage total end product costs, we suggest that manufacturers maintain records that indicate the supplier and original source of the steel and iron used to complete that component.

(2) Sections 45(b)(9)(B)(iii) and 45Y(g)(11)(B)(iii) provide that manufactured products that are components of a qualified facility upon completion of construction will be deemed to have been produced in the United States if not less than the adjusted percentage of the total costs of all of such manufactured products of such facility are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States.

(a) Does the term "component of a qualified facility" need further clarification? If so, what should be clarified and is any clarification needed for specific types of property, such as qualified interconnection property?

Comments
We request guidance that clarifies for purposes of Sections 45(b)(9)(B)(iii) and 45Y(g)(11)(B)(iii) if the term "components" excludes or includes items that are part of the on-site installation process. We also request guidance that provides examples of the term "components"

(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"?

Comments
We request guidance that clarifies whether or not the determination of "total costs" includes or excludes indirect costs such as developer profit and overhead as well as on-site property taxes and insurance. We would also like to request guidance that clarifies how indirect costs incurred in connection with acquiring and delivering end products to the site of installation shall be included or excluded from the domestic content analysis.

(c) 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?

Comments
We request that guidance be provided in the form of examples that clarifies the meaning of the terms "manufactured products" and "end products". Additionally, we request confirmation that iron or steel racking and other support structures for solar or similar technologies should be considered "manufactured products" notwithstanding Exhibit A to 49 C.F.R. 661.3.

(d) Does the adjusted percentage threshold rule that applies to manufactured products need further clarification? If so, what should be clarified?

Comments
We request guidance that clarifies the portion of costs incurred to acquire end products that are comprised of materials that were mined, produced or manufactured within and outside the United States of America (US). For example, if a taxpayer purchases modules that cost $10 and 50% of the cost of modules is attributable to materials that were mined, produced or manufactured within and outside the US, what percentage of the cost of modules should be considered mined, produced or manufactured within and outside the US. In other words, we request guidance that confirms if 49 CFR 661.5(d) applies.

(e) Does the treatment of subcomponents with regard to manufactured products need further clarification? If so, what should be clarified?

Comments
We request guidance that provides examples of sub-components as well as components.

(3) Solely for purposes of determining whether a reduction in an elective payment amount is required under § 6417, §§ 45(b)(10)(D) and 45Y(g)(12)(D) provide an exception for the requirements contained in §§ 45(b)(9)(B) and 45Y(g)(10)(B) (respectively) if the inclusion of steel, iron, or manufactured productions that are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent or relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.

(a) Does the determination of "overall costs" and increases in the overall costs with regard to construction of a qualified facility need further clarification? If so, what should be clarified?

Comments
We request guidance that clarifies the manner in which on-site installation costs should be factored into the determination of "overall costs".

(b) What factors should the Secretary include in guidance to clarify when an exception to the requirements under section §§ 45(b)(10)(D) and 45Y(g)(12)(D) applies? What existing regulatory or guidance frameworks, such as the Federal Acquisition Regulation (FAR) and Build America Buy America (BABA) guidance, may be useful for developing guidance to grant exceptions under §§ 45(b)(10)(D) and 45Y(g)(12)(D)?

Comments
We recommend that the Secretary consider technology specific exceptions due based on the availability of components and sub-components used in the manufacturing process and allow for the exception criteria be revisited over time.

(c) Do the "sufficient and reasonably available quantities" and "satisfactory quality" standards need further clarification? If so, what should be clarified?

Comments
We recommend that guidance be provided in the form of examples that help illustrate the meaning of "sufficient and reasonably available quantities" and "satisfactory quality".

(4) Sections 48 and 48E have domestic content bonus amount rules similar to other provisions of the Code. Section 48(a)(12) has domestic content requirement rules similar to § 45(b)(9)(B) and § 48E(a)(3)(B) has domestic content rules similar to the rules of § 48(a)(12). What should the Treasury Department and the IRS consider in providing guidance regarding the similar domestic content requirements under § 48(a)(12) and § 48E(a)(3)(B)?

Comments: no additional consideration recommendations as of 11/4/2022.

(5) Please provide comments on any other topics relating to the domestic content requirements that may require guidance.

Comments: Clarification is needed on how combination projects will be treated regarding the domestic content bonus, e.g., a single site location or project that incorporates both rooftop and ground-mounted solar. It is recommended that such projects have the option of receiving different adder amounts for separate systems located on a single customer premises.

Treasury should recognize that a retrofit or addition to an existing qualified facility would be considered a new qualifying facility for the purposes of domestic content requirements.

.04 <u>Energy Community Requirement</u>

(1) 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?

Comments
We request guidance that clarifies how qualified facilities that straddle an energy community and a non-energy community should be evaluated. For example, if a minimum portion of the qualified facility is located within a energy community, can the entire qualified facility be deemed to be located within the energy community.

We also request guidance that clarifies how offshore wind projects can qualify as being located in an energy community. For example, if the physical point of interconnection is located in an energy community we encourage the Treasury Department and the IRS to consider the offshore wind facility to be located in an energy community.

(2) 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?

Comments
We request guidance that clarifies that sites contaminated by petroleum or petroleum products meet the definition of brownfield site under 42 U.S.C. 9601(39)(D) and thereby qualify for the energy community bonus. We also request guidance that clarifies that Superfund sites, as defined by 42 U.S.C. 9601 et seq., as qualifying as energy communities. Furthermore, we request guidance with respect to exceptions provided for under 42 U.S.C. 9601(39)(B).

(3) Which source or sources of information should the Treasury Department and the IRS consider in determining a "metropolitan statistical area" (MSA) and "non-metropolitan statistical area" (non-MSA) under § 45(b)(11)(B)(ii)? Which source or sources of information should be used in determining whether an MSA or non-MSA meets the threshold of 0.17 percent or greater direct employment related to the extraction, processing, transport, or storage of coal, oil, or natural gas, and an unemployment rate at or above the national average unemployment rate for the previous year? What industries or occupations should be considered under the definition of "direct employment" for purposes of this section?

Comments
We recommend that the Treasury Department and the IRS consider information provided by Office of Management and Budget (OMB) when determining an MSA.

(4) Which source or sources of information should the Treasury Department and the IRS consider in determining census tracts that had a coal mine closed after December 31, 1999, or had a coal-fired electric generating unit retired after December 31, 2009, under § 45(b)(11)(B)(iii)? How should the closure of a coal mine or the retirement of a coal-fired electric generating unit be defined under § 45(b)(11)(B)(iii)?

Comments
Establish rules that allow taxpayers to meet census tract criteria at the time the taxpayer begins physical on-site construction of the qualified facility and allow for transition relief similar to the transition relief rules provided for in the New Markets Tax Credit program under section 45D.

(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?

Comments
We request that guidance that confirms a project is able to meet the energy community either at the time physical on-site construction of the qualified facility begins or when the qualified facility is placed in service.

With respect to non-MSAs, we recommend that a non-MSA be defined as a county that is located outside an MSA area.

We also encourage the Treasury Department and the IRS to address situations where energy property is located in an energy community but is moved to a non-energy community within the 5 year recapture period (i.e. relocation of a rooftop solar facility) and this type of situation would cause a recapture with respect to the 10% adder.

(6) 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?

Comments
We request guidance in the form of examples of how to determine if the MSA or non-MSA has or had 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas. We also encourage the Treasury Department and the IRS to consider providing a safe harbor with respect to making this determination.

(7) Please provide comments on any other topics relating to the energy community requirement that may require guidance.

Comments
For the purposes of determining census tracts "in which" a coal mine has closed are a coal-fired electric generating unit has retired, Treasury should consider the entire footprint of a coal mine or coal power plant's operations in determining the census tract or tracts in which such a facility has closed or retired

.05 <u>Increased Credit Amount for Qualified Facility With Maximum Net Output of Less than 1 Megawatt</u>

Section 45(b)(6)(A) provides for an increased credit amount in the case of any qualified facility that satisfies the requirements of § 45(b)(6)(B). One way that a qualified facility can satisfy the requirements of § 45(b)(6)(B) is if it is a facility with a maximum net output of less than 1 megawatt (as measured in alternating current). Similarly, § 48(a)(9)(A) provides for an increased credit amount in the case of any energy project that satisfies the requirements of § 48(a)(9)(B), and one way that an energy project can satisfy the requirements of § 48(a)(9)(B) is if it is a project with a maximum net output of less than 1 megawatt of electrical (as measured in alternating current) or thermal energy. Sections 45Y(a)(2)(B) and 48E(a)(2)(A) also provide similar rules. Does the determination of when a facility or project will be considered to have a maximum net output of less than 1 megawatt need further clarification? If so, what should be clarified?

Comments

We request guidance that clarifies if a project comprised of multiple facilities (i.e. multiple energy properties), each of which functions independently as a single project (consistent with IRS Notice 2018-59 Section 7.01(2)(a) (but excluding (viii) (if portfolio-level financing), (iv), and (v)) with a maximum net output of less than 1 megawatt (as measured in alternating current) qualifies. Furthermore, we encourage the Treasury Department and the IRS to consider how IRS Notice 2018-59 applies, if at all, in terms of disaggregation of projects comprised of multiple units of property (for this purpose as well as for the qualification of interconnection property under § 48(a)(8).