November 4, 2022

SUBMITTED ELECTRONICALLY AND VIA USPS

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

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
United States Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, DC 20220

Mr. William M. Paul
Principal Deputy Chief Counsel and Deputy Chief
Counsel (Technical)
Internal Revenue Service
1111 Constitution Ave. N.W.
Washington, DC 20224

Re: Notice 2022-51 -- Responses to Request for Comments on Prevailing Wage and Apprenticeship Requirements Under the Inflation Reduction Act of 2022 (the "IRA")

Dear Ms. Batchelder and Mr. Paul:

SOLV Energy, LLC; Moss and Associates; Kiewit Power; McCarthy Building Companies, Inc.; and Mortenson Construction, collectively as a group of Engineering, Procurement, and Construction companies ("EPCs"), respectfully submit the following comments to the U.S. Department of Treasury ("Treasury") and the Internal Revenue Service (the "IRS") responding to questions raised in Notice 2022-51. The EPCs hereby request a meeting with individuals at Treasury and the IRS to discuss the contents of this letter and practical issues the EPCs will face and the government will need to address in its implementing regulations relating to the prevailing wage and apprenticeship requirements set forth in the IRA § 13101(f).

The EPCs work at a utility-scale level throughout the United States. The EPCs collectively employ over 17,000 solar workers across the country including through union and labor provider partners. The EPCs are responsible for the combined construction of more than 38 GW of solar energy projects nationwide. In addition, SOLV Energy's Operations and Maintenance ("O&M") division also manages approximately 9 GW of commercial and utility-scale solar across 180 sites in 28 states. As such, the EPCs are recognized leaders in the solar energy industry and will be impacted by the IRA prevailing wage and apprenticeship requirements.

The EPCs join the comments of the Solar Energy Industries Association ("SEIA") to the questions raised in Notice 2022-51. SEIA's comments reflect the combined experience of solar energy producers, contractors, and manufacturers across the United States. These industry

leaders have been at the forefront of development of solar energy and have a deep understanding of the challenges and issues that face the industry.

The EPCs provide these additional comments to the prevailing wage and apprenticeship requirements of Notice 2022-51. Our comments reflect the EPCs' particular experience in the solar industry and track the questions as raised in the Notice. We appreciate the opportunity to discuss our concerns with you prior to the issuance of any guidance or proposed prevailing wage and apprenticeship requirements set forth in the IRA.

EPCs COMMENTS TO NOTICE 2022-51

.01 Prevailing Wage Requirement

(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)?

The EPCs support the issuance of guidance to clarify a number of issues related to prevailing wage requirements and their applicability in this area, including but not limited to issues discussed further below.

Prevailing wages generally are a well-understood, longstanding practice in Federal spending and for many state and local government- managed and -funded projects, including those subject to the requirements of the Davis-Bacon Act, 40 U.S.C. §§ 3141, *et seq.* ("DBA"). However, many of the workforce requirements and practices common in Davis-Bacon projects, which traditionally have been classified as Building, Heavy, Highway, or Residential, do not easily translate to the realities of the solar industry. Implementing the IRA's requirements through DBA processes also raise several practical issues, because the compliance infrastructure for government contractors will not be available to contractors on private, IRA-qualified projects. Our comments below focus on several of these matters.

As an initial matter, we join SEIA in respectfully recommending that Treasury and IRS determine and communicate what published format these clarifications will take and how public input will be solicited and considered. Treasury and IRS should clarify the published format and the specific process for the public to provide input on "guidance" as that term appears in § 45(b)(6)(B)(ii) (as well as § 48(a)(9)(B)(ii) and, presumably, similar provisions related to carbon capture projects, hydrogen projects, energy efficient commercial building deductions, and alternative fuel vehicle refueling projects). In order to ensure that predictable and reliable clean energy business planning can occur, and renewable energy companies can maximize incorporating the prevailing wage and apprenticeship requirements, the EPCs and SEIA recommend that:

- Treasury and IRS issue contemporaneous guidance addressing both prevailing wage and apprenticeship issues;
- The Treasury and IRS guidance initially should be issued as proposed guidance subject to further comment (*i.e.*, in a form that expressly will not trigger the 60-day clock in § 45(b)(6)(B)(ii)) so that interested parties have the ability to provide public comments regarding the specific proposals of Treasury and IRS within a reasonable period;
- Informational sessions, such as virtual and in-person meetings, should be conducted by Treasury and the Department of Labor to provide additional opportunity to stakeholders to provide feedback and ask questions; and
- To facilitate such feedback and questions, Treasury should issue a list of major questions received in response to this request with proposed answers.

The EPCs believe this process is both necessary under the Administrative Procedure Act and appropriate, given the unique provisions of the IRA and the need to provide clarity to the solar industry to accomplish the Act's purpose of spurring and supporting long-term growth of solar development.

Definition of "Construction, Alteration, and Repair"

The EPCs believe one of the critical issues requiring clarification under the IRA is the scope and meaning of the terms "construction, alteration, and repair" in the context of solar projects.

Solar projects share some common features with traditional construction projects—foundations must be laid, structures must be built, and equipment must be installed. The EPCs understand that this on-site construction work is "construction, alternation, and repair" for purposes of the DBA and IRA.

Other solar project work does not fall within the traditional meaning of "construction, alteration, and repair." For example, the clearing of land and other generic site-preparation work is similar to standalone demolition work that is generally not covered by the DBA. *See, e.g.,* U.S. Dept. of Labor, WHD Op. Ltr. DBRA-40 (Jan. 24, 1986); U.S. Dept. of Labor Op. Ltr. DBRA-48 (April 13, 1973); U.S. Dept. of Labor Field Op. Handbook, § 15d03(a). Land ultimately used for solar projects often is cleared by the landowner for the purpose of harvesting timber or to make the land usable for a variety of industrial or commercial uses. This preparation of the land for variable industrial or commercial use should not be considered specific to a solar project. These decisions generally are made by the property owner at their discretion. Determining that land-clearing is covered work in some circumstances and not others would lead to inconsistent results between pre-cleared land and land the property owner decides to clear at a later date. Applying this artificial distinction will discourage solar development in certain areas and encourage landowners to begin clearing land unnecessarily to avoid complicating issues regarding IRA coverage.

Site procurement, design, survey work, and pile testing are additional examples of pre-construction project work that would not be covered by traditional DBA principles. This work generally is performed by engineers, architects, and other employees in administrative or professional positions, rather than laborers or mechanics. Treasury should confirm that both this pre-construction work and general land-clearing do not fall within the scope of "construction, alteration, or repair" work. *See* U.S. Dept. of Labor, Field Op. Handbook §§ 15e01, 15e07 (administrative, executive, professional, clerical employees, including architects and engineers, are not covered by DBA).

Similarly, the manufacturing and assembly of solar panels typically is off-site work not within the definition of "construction, alteration, or repair" under the DBA. Panel components produced by third-party suppliers or solar development companies generally are fungible and can be used across a range of solar projects. They are manufactured off-site, and thus do not constitute "building or work" on a construction project, *see e.g.,* 29 C.F.R. § 5.2(i), or would otherwise fall under the "material supplier exception," *see, e.g.,* U.S. Dept. of Labor Field Op. Handbook § 15e16. This rule also should apply to all assembly and manufacturing processes completed prior to the panels or other components arriving on-site and being installed. To conclude otherwise would violate traditional DBA principles limiting construction to on-site activities. Moreover, because producers often have the option of assembling components at any point prior to installation, applying DBA prevailing wage rules in a manner that would reach beyond the traditional coverage of on-site work would encourage producers to centralize all manufacturing and assembly processes at overseas production sites, thereby frustrating the IRA's purpose of generating U.S.-based manufacturing jobs.

Finally, Treasury should issue guidance clarifying that certain commissioning and post-construction work is not "construction, alteration, or repair" in the solar context. A variety of start-up and maintenance work must be conducted on solar projects that materially differs from work on a construction project. In traditional construction, for example, clean-up work and other activities devoted to confirming or completing construction tasks generally are considered covered work under the DBA. *See, e.g.,* U.S. Dept. of Labor Field Op. Handbook, § 15d02. Solar projects also have construction-related completion tasks, such as site clean-up and structural repairs. However, other commissioning tasks relate to the performance of solar equipment, not the construction of structures and buildings to operate the equipment. For example, the initial energizing of inverters and other solar equipment generally is done by the operator. These commission tasks generally focus on the operational quality of the solar panels themselves, and to that extent should not be considered "construction, alteration, or repair."

Treasury guidance also should recognize several maintenance tasks that are part of the normal operation of a solar project are not "construction, alteration, or repair." Routine checking of connectors and wiring, washing of modules, and the replacing of fuses, auxiliary equipment, and individual panels are part of the normal maintenance of any solar facility and performed by dedicated O&M maintenance technicians. Specific maintenance

work required to conform with warranty requirements for installed equipment also is not "construction, alternation, or repair." Regular landscaping management (including mowing, trimming, and other vegetation management) likewise relates to the operational maintenance of a solar facility, rather than alteration or repair of that facility. Treasury should specifically identify this industry-specific maintenance work in its guidance as outside of the scope of the IRA's prevailing wage requirements. Confirming this guidance is particularly important in the solar industry, as many O&M maintenance technicians that perform these functions travel between different solar facilities on a regular basis, and thus would be subject to multiple prevailing wage rates if their work were misclassified as "construction, alteration, or repair."

Job Classifications

Another critical area where Treasury must provide for alternatives to traditional DBA principles is in the area of job classification. Currently, the U.S. Department of Labor ("DOL") maintains county-by-county determinations regarding prevailing wages for various trades and positions that perform traditional construction work. However, these generic job classifications do not accurately reflect the job classifications at a typical utility-scale solar project.

Solar photovoltaic installation workers often perform a range of tasks that cut across an array of traditional construction work. For example, in several states, a typical worker on a single solar installation project may perform a variety of tasks during their employment, including the installation of the posts, installation of the racking system, and mounting of the solar panels.[1] Further complicating this issue is the fact that union contracts or jurisdictional rules in some areas may require a solar construction project to use specific trade workers from one trade to perform work traditionally associated with another, *i.e.*, the racking system is generally installed by a Laborer, but in states such as California,

[1] Even if this work were segmented and performed by only certain employees, it is difficult to classify under existing DBA classifications. For example, installation of the foundation in which the solar panel structure is attached are referred to as "posts" and installed similarly to highway guard-rail installation. Yet existing prevailing classifications do not easily align to this work. Prevailing wage classifications in California refer to "guard rail" in Laborers Group 3, and "guard rail post driver operator" in Power Equipment Operators, Group 4. *See* Gen. Dec. No. CA20220025 (Oct. 7, 2022). In Indiana, the Laborers Classifications (Heavy and Highway), Group 1, refers to "guard rail erector" and the Power Equipment Operator, Group 1, refers to guard rail post driver. *See* Gen. Dec. No. IN20220006 (Oct. 21, 2022). And in Texas, there is no classification for any of these categories. *See* Gen. Dec. No. TX20220032 (Feb. 25, 2022). Further complicating the analysis is the fact that, while many solar projects appear properly classified in "Heavy" construction for DBA purposes, some projects are dedicated to supplying power to specific buildings or facilities. Treasury guidance should confirm whether solar construction always qualifies for "Heavy" construction classifications, even if they may be constructed to provide power to particular structures.

iron workers claim this work, and in others such as Massachusetts, the union has convinced the state that the racking system is a conductive component, and therefore must be installed by a licensed electrician.[2]

To resolve these types if issues, the EPCs recommend that Treasury and the DOL adopt the classification for Solar Photovoltaic Installers already used by the DOL's Bureau of Labor Statistics ("BLS"). *See* U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook,* Solar Photovoltaic Installers (https://www.bls.gov/ooh/construction-and-extraction/solar-photovoltaic-installers.htm); U.S. Dept. of Labor, Bureau of Labor Statistics, *Standard Occupational Classification Manual*, Solar Photovoltaic Installers, (https://www.bls.gov/soc/2018 /soc_2018_manual.pdf). This position is the most closely associated with the work performed on solar development projects and the data associated with this classification most accurately aligns the prevailing wages for construction work performed on utility-scale solar projects. If BLS has not gathered prevailing wage data on these positions at the county level, it should rely on geographic listings at the metropolitan statistical area and non-metropolitan statistical area levels or rely on Executive Order 14026, which applies $15.00 per hour as the applicable base wage rate. To the extent Treasury and the DOL determine that post-construction O&M work also is subject to prevailing wage requirements, it should consider a specific classification for this work as well.

Creating an industry-specific classification is particularly important to the EPCs and other industry participants because IRA-qualifying projects will not have access to the same classification conformance infrastructure as is available for government contractors on DBA-covered contracts. In the government contracting context, construction contractors have access to a contracting officer to assist them in making job classification determinations, and a detailed administrative appeals process to determine whether those classifications conform to statutory requirements. IRA projects will not have access to the same resources.

In these circumstances, Treasury and the DOL need to provide as much industry-specific prevailing wage guidance as possible. In the absence of industry-specific job classifications, the DOL will be inundated with conformance requests and projects will be unnecessarily delayed or foregone altogether because contractors will not have reliable and accurate cost information to estimate and bid the work, or over-estimate the project to cover unknown risk due to the lack of clarity regarding trade classification and wage determination. These risks ultimately undermine the IRA's goal of encouraging solar development, because energy producers and their financing parties may cancel or scale back projects based on the inability to accurately determine wage rates at the bidding stage.

Determination of Compliance With Job Classification Prevailing Wage Requirements

[2] *See, e.g.,* https://www.ecmweb.com/renewables/article/20897203/the-battle-over-solar-installations-in-massachusetts.

As discussed above, the DOL currently does not provide prevailing wage information for solar project installers. Because the IRA includes penalty provisions for contractors that fail to pay prevailing wages on covered projects, the EPCs believe Treasury and the DOL must provide an industry-specific classification to allow solar project participants the opportunity to reasonably comply with the IRA's requirements.

If Treasury and the DOL are unable to provide industry-specific job classifications, the EPCs believe that Treasury's guidance must recognize that any reasonable application of the existing job classifications should qualify as satisfying the prevailing wage requirements of Section 13101(f)(7)(A). Contractors that make prevailing wage conformance requests likewise should be deemed to have complied with the IRA if they make a reasonable classification determination in the absence of a conformance determination from DOL within 30 days of the request. As discussed above, energy producers and their contractors will not have fair notice of the prevailing wage requirements for their projects, and enforcement of this provision likely will be inconsistent, if contractors are left to apply a range of job classification determinations to work for which those classifications were not designed. Simply put, contractors may be subject to significant penalties for making reasonable classification decisions when choosing among a range of job classifications, none of which accurately describe the totality work performed in solar installation. Imposing civil penalties under these circumstances would violate due process. *See, e.g., F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) ("basic principles of due process" requires "fair notice" and "explicit standards for those who apply them").

The EPCs understand that there may be circumstances where only one job classification could reasonably apply to a solar project worker. But a construction worker on a solar project often performs a range of tasks that relate to multiple trades. Moreover, it is common for union contracts or other factors to require that solar construction workers from one trade perform work traditionally associated with another. In these circumstances, Treasury guidance should recognize that any job classification associated with a substantial (*i.e.,* in excess of 25 percent) of the worker's overall tasks, or with their assigned trade, qualifies as complying with Section 13101(7)(A). This is consistent with the type of work traditionally done on solar construction projects, where employees are able to take work opportunities across a range of trade work.

"Ensur[ing] That Laborers and Mechanics Employed by Contractors Are Paid Prevailing Wages"

The lack of clear job classifications for construction workers on solar projects also impacts employers' ability to "ensure that… laborers or mechanics employed by… contractor[s] or subcontractor[s]" are in compliance with the IRA's prevailing wage requirements. The absence of industry-specific classifications multiplies confusion regarding the application of the IRA's requirements, as each contractor in the chain (*i.e.,* general contractors, first-tier contractors, second-tier contractors, etc.) may reach a different determination as to the appropriate job classification for a worker, and each determination may be reasonable.

For this reason, Treasury should issue specific, objective criteria as to what it means for project owners, general contractors, and others to "ensure" these requirements are followed. The EPCs propose that a higher-level contractor should be deemed to have "ensured" compliance if it has incorporated the applicable prevailing wage obligations in lower-tier contracts and has a reasonable process in place to periodically review or audit subcontractor compliance with the IRA's requirements. If the DOL does not issue industry-specific job classifications, it should be enough for a higher-level contractor to "ensure" compliance by following these steps. As noted above, the absence of compliance assistance typically available on DBA projects and the potential challenges faced by the DOL to provide timely conformance determinations means that contractors will be subject to inappropriate penalty determinations for job classifications decisions they made reasonably and in good faith.

(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?

On the IRA's correction and penalty provisions, the EPCs recommend clarifying guidance in the following areas:

"Intentional Disregard"

The IRA imposes significant penalties on employers that show a "intentional disregard" of its prevailing wage and apprenticeship requirements. However, the statute does not define the term "intentional disregard."

The EPCs believe Treasury should confirm that "intentional disregard" carries the same meaning as the term "willful" under the Fair Labor Standards Act. The terms both focus on intentional, rather than negligent, conduct. The standard for willfulness under the FLSA—whether the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute," *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 133 (1988)—thus should apply equally to the "intentional disregard" provision of the IRA. Proving this standard remains, as under the FLSA, with Treasury and the DOL for all purposes.

Appeal Processes

The EPCs also believe Treasury should detail a reasonable and timely administrative appeals process to address any disputes regarding compliance with the IRA's prevailing wage and apprenticeship provisions. An administrative appeal process is required to provide an opportunity for timely and meaningful review of Treasury or DOL deficiency or misclassification determinations. In any such appeal process, the burden should remain with Treasury to establish that the taxpayer failed to comply with the IRA. In job classification conformance appeals, this should require that Treasury demonstrate by a preponderance of the evidence that the taxpayer's classification was unreasonable under

the standards discussed above. This standard is particularly appropriate if the DOL fails to issue industry-specific job classifications for purposes of IRA compliance.

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

Certification of Compliance

The EPCs believe Treasury must implement IRA-specific compliance confirmation processes, because neither Treasury nor the DOL will have the capacity to address traditional DBA compliance mechanisms.

On DBA projects, contractors generally are required to submit certified payroll data on a recurring basis. This data can be reviewed by the contract officer, who may have specific discussions with the contractor regarding DBA compliance issues identified in the payroll information.

Because contract officers will not be part of the IRA compliance process, the submission of certified payroll information on a regular basis will be unduly burdensome for taxpayers and the government (which must store the information). And because no individually-assigned compliance officer will be reviewing the data on a regular basis, it will provide no meaningful compliance benefit. The EPCs instead propose that Treasury utilize the recordkeeping provisions of the FLSA to guide its compliance process. Under FLSA recordkeeping rules, employers are required to maintain certain records accurately and provide them to investigators upon demand. *See, e.g.,* 29 C.F.R. § 516.2. These records include identifying information for employees, pay rates, premium pay, hours of work, and other pay-related information. These records, combined with a taxable year certification, should be sufficient to allow Treasury to conduct its audit responsibilities and ensure compliance by taxpayers.

(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?

The Definition of "Construction" Should Remain Consistent Under the IRA

As noted previously herein, a critical clarification is around the definition of "construction." Although it is the EPCs' view that certain scopes of work in the solar construction industry should not be considered "construction" (such as land-clearing), in the event Treasury concludes such activities would be considered construction, the guidance must be consistent. Treasury guidance should confirm that the term "construction" has the same meaning for purposes of Section 13101(f)(6)(B)(ii) and Section 13101(f)(7)(i), as the IRA uses the same term in both sections. Thus, if Treasury determines that land-clearing is "construction" for purposes of the IRA's prevailing wage requirements under Section 13101(f)(7)(i), then this activity also must render as a "qualified facility" under Section 13101(f)(6)(B)(ii) any project where land-clearing occurred 60 days prior to the issuance of IRA guidance.

.02 Apprenticeship Requirement

(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 EPCs recommend that Treasury's apprenticeship guidance remain consistent with general IRA compliance guidance on issues such as the scope and meaning of "construction, alteration, or repair," job classification, ensuring compliance with the IRA's apprenticeship requirements, and compliance processes and obligations. It recommends additional clarifying guidance on the following issues specific to apprentices:

Portability of Apprenticeship Work and Non-Discrimination

The IRA requires that solar projects "employ one or more qualified apprentices" to perform covered work. A "qualified apprentice" is defined as one "who is participating in a registered apprentice program, as defined in section 3131(e)(3)(B)."

Although the statutory language is clear, Treasury's guidance should confirm that a "qualified apprentice" will satisfy the IRA requirements, regardless of where they perform their work. Many solar construction workers "follow the work"—they may work on a solar construction project in California one month, and another in Utah the next. The statutory language permits these apprentices to perform covered work in both locations, so long as they participate in a qualified program. Treasury's guidance should confirm this statutory reality, even if these apprentices may be subject to different prevailing wage rates depending upon the location in which they work.

The EPCs also request that Treasury and DOL confirm the portability of apprentices between trades. As noted above, solar installers typically perform a variety of work that overlaps with (and often is claimed by) various trades. This can vary within a project, or on a geographic basis. For example, as discussed above, the same work may be claimed by different trade unions depending upon the jurisdiction. Apprentices participating in one trade's program in one state should not be penalized if their work is claimed by another trade when they move to another state. The DOL should provide clear guidance that apprentices may qualify to perform work for which they are being trained, regardless of the trade that claims jurisdiction over the work.

Finally, the EPCs request that Treasury and the DOL confirm, consistent with the statutory language, that contractors may satisfy IRA apprenticeship requirements by using apprentices from any DOL-certified program. Moreover, consistent with this non-discrimination principle, Treasury guidance should give assurance that DOL's certification of new apprenticeship programs will be based on objective criteria and determined on a

non-discriminatory basis. Because it will be crucial to expand the capacity of existing apprenticeship programs to meet an increase in demand for solar projects under the IRA, it is critical that DOL make timely certifications based on the merit of the specific program, without giving preference to programs based on their union affiliation or other criteria that are unrelated to the merits of the certification application.

(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?

Good Faith Efforts to Comply with Apprenticeship Requirements

In the EPCs' experience, the availability of qualified apprentices varies significantly by market and trade. The EPCs anticipate that the market of qualified apprentices may become even more limited as solar construction increases as a result of the IRA. The EPCs recommend that Treasury's guidance regarding "good faith efforts" to obtain apprenticeships account for these realties. Substantial delays in obtaining qualified apprentices for projects significantly impacts cost structures and overall viability of projects and may delay construction if contractors cannot access a sufficient labor supply.

The EPCs believe that Treasury guidance should set objective steps taxpayers may take to comply with the "good faith effort" requirement. The EPCs propose that employers satisfy the "good faith effort" requirement if, at the beginning of a project, they: (1) post an apprenticeship opening for a project for at least five business days on the RAPIDS system or any other state or local apprenticeship job posting site without receiving a response by a qualified apprentice; or (2) submit a written request for qualified apprentices to a labor union with jurisdiction over the apprentice's work and do not receive a qualified apprentice within five business days. Taxpayers also should be able to satisfy the "good faith effort" requirement by other means, depending upon the circumstances. For example, demonstrated participation in local job fairs or posting opportunities through temporary labor agencies or recruiters also would demonstrate a good faith effort to obtain apprentices for a project.

The EPCs also believe that Treasury should confirm that when apprentices leave employment during the pendency of a solar project, taxpayers are not penalized for the apprentice's departure if it engages in "good faith efforts" to replace the apprentice. For example, if an apprentice voluntarily resigns employment on June 1 and is replaced on June 30, the period during which the apprentice was being replaced is not subject to the labor hours and journeyman ratios in Sections 13101(f)(8) if the taxpayer engaged in "good faith efforts" (as defined above) to replace the apprentice. This approach is fully consistent with the IRA's language and purpose, which is to require the use of apprentices except when it is not reasonable to expect the taxpayer to obtain one.

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

Good Faith Factors

As discussed above, providing objective criteria that taxpayers can meet to establish "good faith efforts" to obtain apprentices is the best way to promote compliance with the IRA's apprenticeship requirements. Making documented efforts to post opportunities or request apprentices from union programs for a defined period of time ensures that taxpayers make consistent efforts to obtain apprentices and allows Treasury and the DOL to direct apprenticeship candidates to particular programs for opportunities.

Because an employer's "good faith efforts" to obtain apprentices necessarily focuses on the particular apprentice position at issue, the EPCs believe the factors to establish "good faith efforts" generally should be position-specific. However, taxpayers should be permitted, but not required, to submit other information to demonstrate "good faith efforts." This may include evidence of compliance with the apprenticeship requirements on other elements of the project and the taxpayer's overall historical use of apprentices and compliance with apprenticeship requirements.

(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?

Records Retention

The IRA requires that covered projects maintain a minimum level of apprentice labor hours and journeyman-to-apprentice ratios. The information required to confirm these standards is straightforward: (1) total qualifying project work hours; (2) apprentice work hours; and (3) apprentice and journeyman employees. To the extent the taxpayer relies upon the good faith effort exception, it also must maintain records demonstrating its efforts to obtain apprentices and the periods of time during which it was unable to fill apprentice positions despite its good faith efforts.

The EPCs submit that these records should be retained under typical recordkeeping provisions for wage documents under the FLSA and applicable Treasury regulations for tax purposes. Because the DOL and Treasury will not have dedicated contract officers to review these records on a monthly basis, submitting certified payroll records will unduly burden both employers and the government.

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

Apprentices From Disqualified Programs

Although it is rare for apprentice programs to be decertified, the EPCs request that Treasury confirm that taxpayers receive credit for apprentices provided through programs that subsequently lose their certification. This should include all time spent by apprentices on the project if they subsequently complete their apprenticeship or join a different qualified program. This will ensure continuity of apprentice employment and eliminate the need to

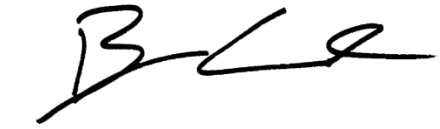
replace apprentices with new workers if their program is decertified. In the absence of such guidance, employers will be required to immediately terminate apprentices if their program loses its certification in order to comply with the IRA's requirements.

* * * * *

The EPCs look forward to working with Treasury and the IRS in crafting guidance that supports the IRA's purposes and encourages the development of solar projects across the United States.

Sincerely,

George Hershman
CEO, SOLV Energy



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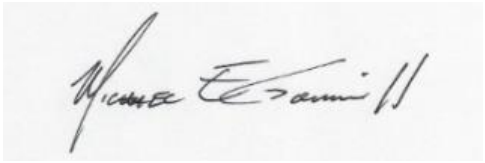

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