



January 25, 2023

Ms. Holly Porter
Associate Chief Counsel
(Passthroughs and Special Industries)
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

RE: Proposed Regulations on Prevailing Wage and Apprenticeship Requirements Under Section 45(b)(6)(B)(ii) and Other Substantially Similar Provisions

Dear Ms. Porter:

The American Institute of CPAs (AICPA) appreciates the efforts by the Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) to provide guidance to taxpayers pertaining to energy tax credit provisions of the Inflation Reduction Act of 2022¹ (IRA). On October 5, 2022, Treasury and the IRS issued [IR-2022-172](#) and Notices 2022-46 through 2022-51. On November 3, 2022, [IR-2022-193](#) and Notices 2022-56 through 2022-58 were released, requesting comments on various components of the new energy credits. Additionally, on November 30, 2022, [IR-2022-208](#) and [Notice 2022-61](#) were released, providing prevailing wage and apprenticeship initial guidance. This comment letter provides recommendations for proposed regulations on the prevailing wage and apprenticeship requirements.

Background

A key component of the energy tax credits provided for and amplified by the IRA, was the ability to reward certain taxpayers with additional credits related to projects meeting certain criteria. This criterion focuses on the resources used in the creation of a project (e.g., labor and materials) and the geographic location the project. Specifically, projects may qualify for an increased credit by paying laborers and mechanics prevailing wages, promoting apprenticeship programs, using domestic content in production, and creating projects in designated energy communities. The purpose of providing increased tax credits for these activities is to tangentially benefit the laborers who helped build the projects, the domestic content providers for supplying the projects, and distressed areas which benefit from both the creation and existence of such projects in their community.

Our comments focus on fair implementation of the criteria and the need for taxpayers and tax practitioners to have clarity and structure in determining whether increased credits have been earned.

¹ P.L. 117-169.

Recommendation

The AICPA recommends that Treasury and the IRS issue proposed regulations on the prevailing wage requirements for increased credits that offer taxpayers and tax practitioners detailed instructions for determining if prevailing wages are being paid. Such instructions should include guidance on how to perform an effective search, interpret the results from a search, and provide illustrative examples.

Analysis

To qualify for certain increased credit rates, taxpayers must ensure that any laborers or mechanics are paid wages not less than the prevailing wages for similar construction, repair, or alternation of a similar nature in the locality of the qualifying project or facility. Prevailing wage rates are determined by the Secretary of Labor in accordance with the Davis-Bacon Act².

Resources provided under the Davis-Bacon Act encompass a wide range of factors, including construction type, geographic areas, and labor classifications. General Davis-Bacon wage determinations are published at www.sam.gov. Users of this website are provided with several report and data bank options, without clear indications of what each option entails. This website and the reports within it are intended to be used by those knowledgeable in the realm of prevailing wages; in general, contractors and subcontractors. Notice 2022-61 provided guidance on the types of information to be specified and the process of determining wage determinations not published; however, no resources have been provided that guide users to locating and identifying the correct information.

Prevailing wage requirements for increased credits will require individuals not proficient in reading and understanding prevailing wage data to utilize such data during decision making. For example, real estate developers, private-equity investment managers, bankers, and tax professionals may be responsible for determining if a project meets prevailing wage standards. When taxpayers or third parties are attempting to verify prevailing wage requirements for a project, they should have a clear and concise path to such information.

We suggest that proposed regulations on prevailing wages include the following information:

- Guidance to users of www.sam.gov on which options to select and what criteria should be specified for an effective search.
- Directions on how to read and analyze wage determination reports and test wages against reports once correct results are obtained.
- Illustrative examples of the process of determining the prevailing wage for specific types of projects in specific localities.

² P.L. 107-217 as amended.

The increased credits created by the IRA will allow for the creation of energy efficient projects that were previously considered unfeasible due to financial hurdles. This opportunity means that several business, investment, lending, and reporting decisions will be made based on the requirements for such increased credits. Guidance to assure that decisions surrounding these projects are well-informed is crucial to the creation of these projects.

Recommendation

The AICPA recommends that Treasury and the IRS issue proposed regulations that provide taxpayers the ability to rely on reporting and recordkeeping of contractors and subcontractors when determining whether prevailing wage and apprenticeship thresholds are met. The proposed regulations should detail the requirements and responsibilities of contractors to document prevailing wage and apprenticeship determinations to establish the following:

- The level of reliance a taxpayer may place on reports provided by contractors, and similarly, the reliance contractors may place on reports of subcontractors.
- Reporting requirements between taxpayers, contractors, and subcontractors.
- Whether a standardized reporting format is necessary; and if so, what information is to be included, and how often reporting is required between the parties.
- Relief from the penalties for intentional disregard of prevailing wage and apprenticeship requirements when a taxpayer relies on an agreement with a contractor to meet such requirements.

Analysis

Many energy-efficient projects and facilities rely on the use of contractors and subcontractors. Taxpayers will need to rely on such contractors to achieve the prevailing wage and apprenticeship requirements of increased credits. However, the means of tracking and reporting a project's qualification under these requirements currently falls solely on the taxpayer under Notice 2022-61.

Proposed regulations should permit taxpayers to rely on documentation from contractors and subcontractors. Proposed regulations should also establish the level of reliance a taxpayer may place on reports provided by contractors, and similarly, the level of reliance contractors may place on reports of subcontractors. If reliance is permitted, the proposed regulations should provide the reporting requirements between all parties to assure proper documentation is available when claiming a credit. Treasury and the IRS should determine if a standardized reporting format is necessary; and if so, the information to be included, and how often reporting is required between the parties. Creating requirements of how and when information is reported between these parties will reduce ambiguity and foster proper credit claims.

The prevailing wage and apprenticeship requirements provide for a penalty mechanism for taxpayers that claim the increased credit amount but fail to meet the requirements of such increased credits due to intentional disregard. Taxpayers that have a written agreement with a contractor that

such requirements be met have demonstrated their attempt to act in good faith. For this reason, an exception from the penalties for intentional disregard should be provided to any taxpayer that entered into a bona fide agreement of such kind.

Recommendation

The AICPA recommends that Treasury and the IRS issue proposed regulations stating that labor provided under a union contract is deemed to meet prevailing wage and apprenticeship requirements.

Analysis

The prevailing wage and apprenticeship requirements related to qualification for increased credit rates are meant to promote, in part, fair compensation and increased opportunity of laborers and mechanics. Labor unions have similar goals and negotiate labor contracts meant to achieve these goals for their members. Union contracts are typically thoroughly negotiated and very difficult to modify or amend. Taxpayers enter union contracts under the assumption that labor contracted for through such a contract is providing fair compensation and opportunities. Therefore, any energy efficient project labor subject to a union contract is meeting the goal of the prevailing wage and apprenticeship requirements and should qualify for any increased credit.

Recommendation

The AICPA recommends that Treasury and the IRS issue proposed regulations that establish the facts and circumstances to be used to determine if a taxpayer meets the good faith effort exception for the apprenticeship requirement. We recommend that proposed regulations include the following information:

- The format for which a denial or non-response for apprenticeship is to be documented.
- How the five business days response time is to be tested and measured.
- Guidance on determining if a taxpayer's request for qualified apprentices is in accordance with usual and customary business practices for registered apprenticeship programs in a particular industry.
- Examples of denial rationale that meet and do not meet the exception requirement.

Analysis

The apprenticeship requirement for increased credits provides that a taxpayer will not be treated as failing this requirement if they satisfy a good faith effort requirement. To demonstrate a good faith effort, a taxpayer must request qualified apprentices from a registered apprenticeship program and such request is either denied (not including denied as a result of a taxpayer or contractor failing to comply with the apprenticeship program's guidelines) or not responded to within five business days.

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While these requirements provide a framework to demonstrate a good faith effort, additional guidance is necessary to provide taxpayers with confidence they will qualify for this exception.

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We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please contact April Little, Chair, AICPA Environmental, Social, and Governance (ESG) Tax Task Force, at (832) 476-3730, or April.Little@us.gt.com; Jon Williamson, AICPA Senior Manager – Tax Policy & Advocacy, at (216) 509-2972, or me, at (601) 326-7119, or JanLewis@HaddoxReid.com

Sincerely,



Jan Lewis
Chair, AICPA Tax Executive Committee

cc: The Honorable Lily L. Batchelder, Assistance Secretary for Tax Policy, Department of the Treasury
Mr. Douglas O'Donnell, Acting Commissioner, Internal Revenue Service
Mr. William Paul, Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical), Internal Revenue Service