

VIA ELECTRONIC SUBMISSION

October 30, 2023

Douglas W. O'Donnell
Deputy Commissioner for Services and Enforcement
U.S. Department of the Treasury
Internal Revenue Service
1111 Constitution Ave. NW
Washington, DC 20224

Re: Comments of Construction Industry Coalition to the Treasury Department and Internal Revenue Service on Reg-100908-23, Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements

Dear Mr. O'Donnell:

The undersigned organizations submit the following comments to the U.S. Treasury Department and Internal Revenue Service in response to Reg-100908-23, Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements, published in the Federal Register on Aug. 30, 2023.¹

The IRS/Treasury notice of proposed rulemaking requests public comments on proposed regulations affecting an estimated \$270 billion worth of increased tax credit or deduction amounts available for taxpayers constructing clean energy projects conditioned on satisfying prevailing wage and registered apprenticeship (collectively, PWA) requirements established by the Inflation Reduction Act of 2022.

The undersigned organizations appreciate the opportunity to provide feedback on this proposed rule, hereinafter referred to as the PWA NPRM.

Many members of the undersigned organizations have successfully built all aspects of “clean” and renewable energy projects of the types under the pre-IRA tax code—which generally provided for tax incentives of 30% of investments in qualifying projects—

IRA, clean energy developers are not realizing the value of the new baseline tax incentives due to the onerous and unclear PWA requirements. We have the following comments.

¹ <https://www.federalregister.gov/documents/2023/08/30/2023-18514/increased-credit-or-deduction-amounts-for-satisfying-certain-prevailing-wage-and-registered>.

² The increased credit provisions in sections 45L and 45U do not contain apprenticeship requirements, but are included in NPRM PWA descriptions for the sake of simplicity.

expect the new GRAP requirements in the IRA to also reduce competition, increase costs and lead to delays of clean energy project construction.

The PWA NPRM outlines punitive correction and penalty procedures against clean energy project developers/owners—referred to as taxpayers in the NPRM—for any failure to pay Davis-Bacon prevailing wages. As well as paying back wages to workers to meet the prevailing rate with interest, taxpayers and contractors must also pay a penalty equal to \$5,000 multiplied by the total number of workers that were underpaid.⁵ However, if the IRS deems that this underpayment was due to “intentional disregard,” the back pay to workers is increased to three times the normal sum and the penalty payment is increased to \$10,000 per worker.⁶

The PWA NPRM establishes a similar penalty procedure for failure to meet government-registered apprenticeship program requirements, with a penalty of \$50 multiplied by the total labor hours for which GRAP requirements were not satisfied.⁷ This penalty increases to \$500 per labor hour if the IRS deems the taxpayer or contractor acted with intentional disregard.⁸

The PWA NPRM outlines a number of factors the IRS would consider when analyzing whether a violation was committed with intentional disregard for both prevailing wage⁹ and GRAP requirements.¹⁰ The PWA NPRM states that developers can avoid severe intentional disregard penalties if they have required contractors to sign a project labor agreement (PLA) covering construction activity on the clean energy project seeking enhanced tax credits under the IRA.

In short, the PWA NPRM's controversial pro-PLA policy coerces owners into requiring discriminatory and inflationary PLAs as protection against violations attributable to unclear rules established in the IRS's incomplete and inadequate rulemaking on an extremely novel and disruptive application of new policy onto private clean energy construction projects.

The undersigned organizations strongly oppose the PWA NPRM's waiver of enhanced intentional disregard penalties if a clean energy construction project developer/taxpayer has required its contractors to sign an anti-competitive and inflationary PLA.

This violates the plain text of IRA, which includes no PLA requirement and certainly does not authorize waiver of intentional violations and additional penalties based on a clean energy project developer's inclusion of a PLA requirement in its solicitation for construction services. Because experienced and qualified nonunion contractors are much less likely to execute PLAs, this problematic policy change arbitrarily establishes unequal treatment for intentional violations made by union contractors and nonunion contractors.

Typical PLA mandates, whether required by government entities or coerced through regulatory policy—as is the case in this NPRM—discourage competition from nonunion contractors, who employ the overwhelming majority of all construction workers, and deny jobs to their existing workforce through several common PLA provisions summarized in these comments.

⁵ <https://www.federalregister.gov/d/2023-18514/p-311>.

⁶ <https://www.federalregister.gov/d/2023-18514/p-319>.

⁷ <https://www.federalregister.gov/d/2023-18514/p-390>.

⁸ <https://www.federalregister.gov/d/2023-18514/p-399>.

⁹ <https://www.federalregister.gov/d/2023-18514/p-323>.

¹⁰ <https://www.federalregister.gov/d/2023-18514/p-401>.

Simply put, clean energy developers coerced into mandating anti-competitive PLAs by illegal IRS policy should expect to pay more, which ultimately limits the number and quality of clean energy projects.

The undersigned organizations support fair and open competition and oppose PLA schemes on clean energy projects receiving enhanced tax incentives because hardworking taxpayers deserve more efficient and effective policies that will encourage all qualified contractors and their skilled workforces to compete to build long-lasting, quality projects at the best price.¹⁸

We urge the IRS to abandon its illegal and coercive scheme to push clean energy project developers into requiring PLAs. In addition, we urge the IRS to provide clarity to the regulated community in a timely manner on new and disruptive PWA policies lic.006 Tf4Bw 5.6.8 refBT0 g12 -0 0 1