INTERNAL REVENUE
BULLETIN

HIGHLIGHTS OF THIS ISSUE

Bulletin No. 2024–34
August 19, 2024

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

EMPLOYEE PLANS

Rev. Proc. 2024-32, page 523.

This revenue procedure updates the procedures in Rev. Proc. 2017-55 to set forth the procedure by which the sponsor of a defined benefit plan that is subject to the funding requirements of § 430 may request approval from the IRS for the use of plan-specific substitute mortality tables in accordance with § 430(h)(3)(C) and § 1.430(h)(3)-2. This revenue procedure also specifies the date by which the use of a previously approved substitute mortality table must be terminated in conjunction with the replacement of the generally applicable mortality tables specified in § 430(h)(3)(A) and § 1.430(h)(3)-1.

T.D. 10005, page 510.

These regulations update the requirements that a plan sponsor of a single-employer defined benefit plan must meet to obtain IRS approval to use mortality tables specific to the plan in calculating present value for minimum funding purposes (as a substitute for the generally applicable mortality tables).

EXEMPT ORGANIZATIONS

Announcement 2024-31, page 533.

Revocation of IRC 501(c)(3) Organizations for failure to meet the code section requirements. Contributions made to the organizations by individual donors are no longer deductible under IRC 170(b)(1)(A).

INCOME TAX

Notice 2024-60, page 515.

This notice describes the information that must be included in a written report described in § 1.45Q-4(c)(2) (LCA Report) and provides the procedures a taxpayer must follow to submit the LCA Report and required supporting information to the IRS and the Department of Energy for review under § 1.45Q-4(c)(5) before any credit for carbon oxide sequestration allowed under § 45Q(a)(2)(B)(ii) or (a)(4)(B)(ii) is determined for qualified carbon oxide utilized by any taxpayer in the manner described in § 45Q(f)(5) as implemented by § 1.45Q-4 (§ 45Q utilization credit).

Notice 2024-61, page 520.

The notice announces the inflation adjustment factor and phase-out amount for the enhanced oil recovery credit for taxable years beginning in the 2024 calendar year. The format of the notice is identical to the format of previously published notices on this issue. The notice concludes that because the reference price for the 2023 calendar year ($76.10) exceeds $28 multiplied by the inflation adjustment factor for the 2024 calendar year ($28 multiplied by 2.0615 = $57.72) by $18.38, the enhanced oil recovery credit for qualified costs paid or incurred in 2024 is phased-out completely.

T.D. 9998, page 412.

The final regulations provide the rules for taxpayers satisfying the prevailing wage and registered apprenticeship requirements to qualify for increased credit or deduction amounts under the Internal Revenue Code. The final regulations provide guidance regarding correction and penalty procedures that allow taxpayers who initially fail to satisfy the prevailing wage and apprenticeship requirements to claim the increased credit or deduction amounts. The final regulations also address specific prevailing wage and apprenticeship recordkeeping and reporting requirements. Published: TD 9998 [June 25, 2024].

Finding Lists begin on page ii.

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

The contents of this publication are not copyrighted and may be reprinted freely. A citation of the Internal Revenue Bulletin as the source would be appropriate.

Part I

26 CFR 1.30C-3; 1.45-6 through 1.45-8; 1.45-12; 1.45L-3; 1.45Q-6; 1.45U-3; 1.45V-3; 1.45Y-3; 1.45Z-3; 1.48C-3; 1.179D-3

T.D. 9998

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Increased Amounts of Credit or Deduction for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final rule.

SUMMARY: This document sets forth final regulations regarding the increased credit amounts or the increased deduction amount available for taxpayers satisfying prevailing wage and registered apprenticeship (collectively, PWA) requirements established by the Inflation Reduction Act of 2022. These final regulations affect taxpayers intending to satisfy the PWA requirements to be eligible for increased amounts of Federal income tax credits or an increased deduction, including those intending to make elective payment elections for available credit amounts, and those intending to transfer increased credit amounts. These final regulations also affect taxpayers intending to satisfy the prevailing wage requirements to be eligible for increased amounts of those Federal income tax credits that do not have associated apprenticeship requirements. Additionally, these final regulations affect taxpayers who initially fail to satisfy the PWA requirements (or prevailing wage requirements, as applicable) and subsequently comply with the correction and penalty procedures in order to be deemed to satisfy the PWA requirements (or prevailing wage requirements, as applicable). Finally, these final regulations address specific PWA and prevailing wage recordkeeping and reporting requirements.

DATES: *Effective date*: These regulations are effective August 26, 2024.

Applicability date: For date of applicability, *see* §§1.30C-3(c), 1.45-6(d), 1.45-7(e), 1.45-8(h), 1.45-12(f), 1.45L-3(c), 1.45Q-6(c), 1.45U-3(c), 1.45V-3(c), 1.45Y-3(c), 1.45Z-3(c), 1.48C-3(b), 1.179D-3(c).

FOR FURTHER INFORMATION CONTACT: The Office of Associate Chief Counsel (Passthroughs & Special Industries) at (202) 317-6853 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

I. *Overview*

This document contains final regulations that amend the Income Tax Regulations (26 CFR part 1) under sections 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48C, and 179D of the Internal Revenue Code (Code), as enacted or amended by the Inflation Reduction Act of 2022 (IRA), Public Law 117-169, 136 Stat. 1818 (August 16, 2022).

The IRA amended sections 30C, 45, 45L, 45Q, 48, 48C, and 179D to provide increased amounts of credit or an increased deduction, as applicable, for taxpayers who satisfy certain requirements and added sections 45U, 45V, 45Y, 45Z, and 48E to the Code to provide new credits, which also contain provisions for increased credit amounts for taxpayers who satisfy certain requirements. Increased credit amounts are available under sections 30C, 45, 45Q, 45V, 45Y, 45Z, 48, 48C, and 48E, and an increased deduction is available under section 179D for taxpayers satisfying certain PWA requirements. Increased credit amounts are available under sections 45L and 45U for taxpayers satisfying certain prevailing wage requirements.[1] The IRA includes correction and penalty provisions available in certain situations for taxpayers that have initially failed to satisfy the PWA requirements and are not otherwise eligible for the increased amount of credit or deduction because they do not qualify for an exception.

Increased amounts of credits or an increased deduction are generally available under sections 30C, 45, 45Q, 45V, 45Y, 48, 48E and 179D with respect to certain facilities, properties, projects, technologies, or equipment if beginning of construction (or beginning of installation for section 179D) of the facility, property, project, technology, or equipment, as applicable, occurs before January 29, 2023 (BOC Exception). Additionally, the increased credit amounts generally are available under sections 45, 45Y, 48, and 48E with respect to certain facilities, projects, and technologies, as applicable, with a maximum net output (or capacity for energy storage technology under section 48E) of less than one megawatt (One Megawatt Exception). Generally, if a taxpayer satisfies the PWA requirements, meets the BOC Exception, or meets the One Megawatt Exception, the amount of credit or deduction determined is equal to the otherwise determined amount of the underlying credit or deduction multiplied by five.

II. *PWA Provisions*

A. *In general*

The principal PWA requirements are set forth in section 45(b)(6), (7), and (8). In general, section 45(b)(6) provides the increased credit amount for taxpayers satisfying the PWA requirements or meeting one of the exceptions, section 45(b)(7) provides the prevailing wage require-

[1] The provisions in sections 45L and 45U relating to increased credit amounts do not contain apprenticeship requirements. For simplicity, where possible, the preamble to these final regulations uses the acronym PWA to refer to the prevailing wage and apprenticeship requirements generally, including the prevailing wage requirements in sections 45L and 45U.

ments (Prevailing Wage Requirements),[2] and section 45(b)(8) provides the apprenticeship requirements (Apprenticeship Requirements).[3]

In general, section 45 provides a credit for taxpayers producing electricity from qualified energy resources at a qualified facility during the 10-year period beginning on the date the facility was originally placed in service, and selling that electricity to unrelated persons during the taxable year. Under section 45(a), the credit is equal to 0.3 cents multiplied by the kilowatt hours of electricity: (i) produced by the taxpayer from qualified energy resources and at a qualified facility during the 10-year period beginning on the date the facility was originally placed in service, and (ii) sold by the taxpayer to an unrelated person during the taxable year. Under section 45(b)(6), with respect to a qualified facility, if a taxpayer satisfies the PWA requirements, meets the BOC Exception, or meets the One Megawatt Exception, then the amount of the credit determined under section 45(a) is multiplied by five.

B. *Prevailing Wage Requirements*

Section 45(b)(7)(A) provides that with respect to any qualified facility, "the taxpayer shall ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in – (i) the construction of such facility, and (ii) with respect to any taxable year, for any portion of such taxable year which is within the [10-year period beginning on the date the qualified facility was originally placed in service], the alteration or repair of such 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 subchapter IV of chapter 31 of title 40, United States Code [Davis-Bacon Act or DBA]."

The Davis-Bacon Act, enacted in 1931, requires the payment of minimum prevailing wages determined by the Department of Labor (DOL) for laborers and mechanics working on contracts entered into by Federal agencies and the District of Columbia, if such contracts are in excess of $2,000 and are for the construction, alteration, or repair of public buildings and public works. Section 3142 of the DBA requires that Federal agencies entering into contracts covered by the DBA include the requirements of the DBA in the contract, including the requirement to incorporate the applicable wage determinations that set forth the prevailing wages to be paid to laborers and mechanics. The Copeland Act, 40 U.S.C. 3145, sets forth a requirement that the contractor submit certified weekly payroll records to the contracting Federal agency. Congress has included DBA requirements in other laws, often referred to as the Davis-Bacon Related Acts, under which Federal agencies provide assistance for construction projects through grants, loans, insurance, and other methods. The DOL Wage and Hour Division (WHD) administers the DBA prevailing wage provisions.

C. *Correction and penalty related to failure to satisfy Prevailing Wage Requirements*

Under section 45(b)(7)(B) of the Code, a taxpayer who is not eligible for the BOC Exception or the One Megawatt Exception and fails to satisfy the Prevailing Wage Requirements under section 45(b)(7)(A), is deemed to have satisfied those requirements if the taxpayer makes a correction payment to any laborer or mechanic who was paid wages at a rate below the required prevailing rate for any period during any year of the construction, alteration, or repair of the qualified facility and pays a penalty to the Internal Revenue Service (IRS).

Under section 45(b)(7)(B)(i)(I), the amount of the correction payment is the sum of: (i) the difference between the amount of wages paid to the laborer or mechanic during the period and the amount of wages required to be paid to the laborer or mechanic during that period in order to meet the Prevailing Wage Requirements; and (ii) interest on the amount under (i) at the underpayment rate established under section 6621 (determined by substituting six percentage points for three percentage points in section 6621(a)(2)) for the applicable period.

Under section 45(b)(7)(B)(i)(II), the amount of the penalty is $5,000 multiplied by the total number of laborers and mechanics who were paid wages at a rate below the prevailing wage rate described in section 45(b)(7)(A) for any period during the year. Deficiency procedures do not apply with respect to the assessment or collection of this penalty pursuant to section 45(b)(7)(B)(ii).

Under section 45(b)(7)(B)(iii), if the IRS determines that the failure to satisfy the Prevailing Wage Requirements is due to "intentional disregard" of those requirements, then the correction payment to the laborer or mechanic is three times the amount that would otherwise be determined under section 45(b)(7)(B)(i)(I), and $10,000 is substituted for $5,000 in calculating the penalty under section 45(b)(7)(B)(i)(II).

Section 45(b)(7)(B)(iv) provides that once the IRS makes a final determination that a taxpayer has failed to satisfy the Prevailing Wage Requirements, the taxpayer must make the correction and penalty payments within 180 days after the final determination to be eligible for the increased credit amount. If the taxpayer does not make the required correction and penalty payments, and therefore is not allowed the increased credit amount, no penalty is assessed under section 45(b)(7)(B).

D. *Apprenticeship Requirements*

Under section 45(b)(8), with respect to the construction of any qualified facility,

[2] The Prevailing Wage Requirements in sections 30C(g), 45L(g), 45Q(h), 45U(d), 45V(e), 48(a)(10), 48C(e), and 179D(b) are similar to the requirements provided under section 45(b)(7). Sections 30C, 45L, 48C, and 179D, however, do not require the payment of wages at rates not less than the prevailing rates after construction, re-equipping, expansion, establishment, or installation, as applicable, ends. Sections 45Y(g)(9) and 45Z(f)(6)(A) adopt by cross-reference the Prevailing Wage Requirements under section 45(b)(7). Section 48E(d)(3) adopts by cross-reference the Prevailing Wage Requirements under section 48(a)(10). Section 48(a)(10)(C) provides for a special 5-year recapture rule that applies for purposes of the Prevailing Wage Requirements with respect to sections 48 and 48E.

[3] Sections 30C(g)(3), 45Q(h)(4), 45V(e)(4), 45Y(g)(10), 45Z(f)(7), 48(a)(11), 48C(e)(6), 48E(d)(4), and 179D(b)(5) cross-reference the Apprenticeship Requirements in section 45(b)(8). Sections 45L and 45U do not have Apprenticeship Requirements.

taxpayers must satisfy the Apprenticeship Requirements. The Apprenticeship Requirements impose rules regarding labor hours, apprentice-to-journeyworker ratios, and participation by qualified apprentices.

1. Labor Hours Requirement

Section 45(b)(8)(A)(i) provides that "[t]axpayers shall ensure that, with respect to construction of any qualified facility, not less than the applicable percentage of the total labor hours of the construction, alteration, or repair work (including such work performed by any contractor or subcontractor) with respect to such facility shall, subject to [section 45(b)(8)(B)], be performed by qualified apprentices" (Labor Hours Requirement). For purposes of the Labor Hours Requirement, section 45(b)(8)(A)(ii) provides that the applicable percentage is: (i) in the case of a qualified facility the construction of which begins before January 1, 2023, 10 percent, (ii) 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 (iii) in the case of a qualified facility the construction of which begins after December 31, 2023, 15 percent.

Section 45(b)(8)(E)(i) defines "labor hours" as the total number of hours devoted to the performance of construction, alteration, or repair work by any individual employed by the taxpayer or by any contractor or subcontractor, and excluding any hours worked by foremen, superintendents, owners, or persons employed in a bona fide executive, administrative, or professional capacity (within the meaning of those terms in part 541 of title 29, Code of Federal Regulations). Section 45(b)(8)(E)(ii) defines "qualified apprentice" as "an individual who is employed by the taxpayer or by any contractor or subcontractor and who is participating in a registered apprenticeship program, as defined in section 3131(e)(3)(B)." Section 3131(e)(3)(B) defines a "registered apprenticeship program" as an apprenticeship program registered under the Act of August 16, 1937 (commonly known as the National Apprenticeship Act, 50 Stat. 664, chapter 663, 29 U.S.C. 50 *et seq.*) that meets the standards of subpart A of part 29 and part 30 of title 29 of the Code of Federal Regulations.[4] The DOL Office of Apprenticeship (OA) administers provisions under the National Apprenticeship Act related to registered apprenticeship programs.

2. Ratio Requirement

Under section 45(b)(8)(B), the Labor Hours Requirement is subject to any applicable requirements for apprentice-to-journeyworker ratios of the DOL or the applicable State apprenticeship agency (Ratio Requirement).

3. Participation Requirement

Under section 45(b)(8)(C), 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 must employ one or more qualified apprentices to perform such work (Participation Requirement).

E. *Exceptions to Apprenticeship Requirements*

1. In General

Under section 45(b)(8)(D)(i), a taxpayer is not treated as failing to satisfy the Apprenticeship Requirements if: (i) the taxpayer satisfies the requirements described in section 45(b)(8)(D)(ii) (Good Faith Effort Exception), or (ii) in the case of any failure by the taxpayer to satisfy the Labor Hours Requirement under section 45(b)(8)(A) and the Participation Requirement under section 45(b)(8)(C), the taxpayer makes a penalty payment to the IRS (Apprenticeship Cure Provision).

2. Good Faith Effort Exception

Under the Good Faith Effort Exception provided by section 45(b)(8)(D)(ii), a taxpayer is deemed to have satisfied the Apprenticeship Requirements with respect to a qualified facility if the taxpayer has requested qualified apprentices from a registered apprenticeship program, and (i) such request has been denied, provided that such denial is not the result of a refusal by the taxpayer or any contractors or subcontractors engaged in the performance of construction, alteration, or repair work with respect to such qualified facility to comply with the established standards and requirements of the registered apprenticeship program, or (ii) the registered apprenticeship program fails to respond to such request within five business days after the date on which such registered apprenticeship program received such request.

3. Apprenticeship Cure Provision

Under section 45(b)(8)(D)(i)(II), if the Good Faith Effort Exception does not apply, then the taxpayer will not be treated as failing to satisfy the Labor Hours Requirement or the Participation Requirement if the taxpayer makes a penalty payment to the IRS in an amount equal to the product of $50 multiplied by the total labor hours for which the Labor Hours Requirement or the Participation Requirement was not satisfied with respect to the construction, alteration, or repair work on the qualified facility. Under section 45(b)(8)(D)(iii), if the IRS determines that the failure was due to intentional disregard of the Labor Hours Requirement or Participation Requirement, then the penalty amount increases to $500 multiplied by the total labor hours for which the Labor Hours Requirement or Participation Requirement was not satisfied.

III. *Other Increased Credit Amount Provisions*

A. *Beginning of Construction Exception*

Under the BOC Exception in section 45(b)(6)(B)(ii), a qualified facility the construction of which began prior to the date that is 60 days after the IRS publishes guidance with respect to the requirements

[4] Effective November 25, 2022, 29 CFR part 29 is no longer divided into subparts A and B because subpart B (Industry Recognized Apprenticeship Programs) was rescinded in a final rule published on September 26, 2022 (87 FR 58269). On January 17, 2024, the DOL released a notice of proposed rulemaking that would once again place apprenticeship standards in subpart A of part 29. *See* 89 FR 3118.

of section 45(b)(7)(A) and (8) is a facility eligible for the increased credit amount in section 45(b)(6). On November 30, 2022, the Department of the Treasury (Treasury Department) and the IRS published Notice 2022-61 in the ***Federal Register*** (87 FR 73580, *corrected in* 87 FR 75141 (Dec. 7, 2022)), providing guidance with respect to the PWA requirements in section 45(b)(7) and (8), including initial guidance for determining the beginning of construction under section 45 and other credits and the beginning of installation under section 179D. Therefore, if a taxpayer began construction or installation of a facility[5] before January 29, 2023, then the taxpayer is eligible for the increased amount of credit or deduction without satisfying the PWA requirements, provided the taxpayer is otherwise eligible for the credit or deduction. Similar exceptions apply under sections 30C, 45Q, 45V, 45Y, 48, 48E, and 179D.

For purposes of determining when construction or installation begins, Notice 2022-61 incorporates by reference the notices issued under sections 45,[6] 45Q,[7] and 48[8] (collectively, IRS Notices). The IRS Notices describe two methods of establishing that construction of a facility has begun: (i) starting physical work of a significant nature (Physical Work Test), and (ii) paying or incurring five percent or more of the total cost of the facility (Five Percent Safe Harbor).

The IRS Notices provide that for purposes of the Physical Work Test and Five Percent Safe Harbor, taxpayers must demonstrate either continuous construction or continuous efforts (Continuity Requirement) regardless of whether the Physical Work Test or the Five Percent Safe Harbor was used to establish the beginning of construction. Whether a taxpayer meets the Continuity Requirement under either test is determined by the relevant facts and circumstances.

The IRS Notices also provide for a Continuity Safe Harbor under which a taxpayer will be deemed to satisfy the Continuity Requirement provided a qualified facility is placed in service no more than four calendar years after the calendar year during which construction of the qualified facility began for purposes of sections 45 and 48, and no more than six calendar years after the calendar year during which construction of the qualified facility or carbon capture equipment began for purposes of section 45Q. For purposes of the Continuity Safe Harbor, certain offshore projects and projects built on Federal land under sections 45 and 48 satisfy the Continuity Requirement if such a project is placed into service no more than ten calendar years after the calendar year during which construction of the project began.

Until the Treasury Department and the IRS issue further guidance on determining when construction or installation begins, taxpayers may continue to rely on the guidance provided in Notice 2022-61 and the IRS Notices. Specifically, to determine when construction begins for purposes of sections 30C, 45V, 45Y, and 48E, principles similar to those under Notice 2013-29 regarding the Physical Work Test and Five Percent Safe Harbor apply, and taxpayers satisfying either test will be considered to have begun construction. In addition, principles similar to those provided in the IRS Notices regarding the Continuity Requirement for purposes of sections 30C, 45V, 45Y, and 48E apply. Whether a taxpayer meets the Continuity Requirement under either test is determined by the relevant facts and circumstances. Similar principles to those under section 3 of Notice 2016-31 regarding the Continuity Safe Harbor also apply for purposes of sections 30C, 45V, 45Y, and 48E. Taxpayers may rely on the Continuity Safe Harbor with respect to those sections, provided the facility is placed in service no more than four calendar years after the calendar year during which construction began.

For purposes of section 179D, installation of energy efficient commercial building property, energy efficient building retrofit property, or property installed pursuant to a qualified retrofit plan has begun if a taxpayer generally satisfies principles similar to the Physical Work Test and the Five Percent Safe Harbor described in section 2.02 of Notice 2022-61 regarding the beginning of construction under Notice 2013-29. The relevant facts and circumstances will ultimately determine whether a taxpayer has begun installation.

For purposes of sections 45, 45Q, and 48, the IRS Notices will continue to apply under each respective Code section, including application of the Physical Work Test and Five Percent Safe Harbor, and the rules regarding the Continuity Requirement and Continuity Safe Harbors.

B. *One Megawatt Exception*

Under the One Megawatt Exception in section 45(b)(6)(B)(i), a qualified facility that has a maximum net output of less than one megawatt (as measured in alternating current) is a facility eligible for the increased credit amount. Similar exceptions apply for a qualified facility with a maximum net output of less than one megawatt (as measured in alternating current) under sections 45Y(a)(2)(B)(i) and 48E(a)(2)(A)(ii)(I); an energy project with a maximum net output of less than one megawatt of electrical (as measured in alternating current) or thermal energy under section 48(a)(9)(B)(i); and energy storage technology with a capacity of less than one megawatt under section 48E(a)(2)(B)(ii)(I).

IV. *Prior Guidance*

On October 24, 2022, the Treasury Department and the IRS published Notice 2022-51, 2022-43 I.R.B. 331, requesting comments on aspects of the increased amounts of credit and deduction enacted or amended by the IRA, including the PWA provisions. On November 30, 2022, the Treasury Department and the IRS published Notice 2022-61. Notice 2022-61 provided guidance on the PWA

[5] Notice 2022-61 defines facility as qualified facility, property, project, or equipment.

[6] Notice 2013–29, 2013–20 I.R.B. 1085; *clarified by* Notice 2013–60, 2013–44 I.R.B. 431; *clarified and modified by* Notice 2014–46, 2014–36 I.R.B. 520; *updated by* Notice 2015–25, 2015–13 I.R.B. 814; *clarified and modified by* Notice 2016–31, 2016–23 I.R.B. 1025; *updated, clarified, and modified by* Notice 2017–04, 2017–4 I.R.B. 541; Notice 2018–59, 2018–28 I.R.B. 196; *modified by* Notice 2019–43, 2019–31 I.R.B. 487; *modified by* Notice 2020–41, 2020–25 I.R.B. 954; *clarified and modified by* Notice 2021–5, 2021–3 I.R.B. 479; *clarified and modified by* Notice 2021–41, 2021–29 I.R.B. 17.

[7] Notice 2020–12, 2020–11 I.R.B. 495.

[8] Notice 2018–59; *modified by* Notice 2019–43; *modified by* Notice 2020–41; *clarified and modified by* Notice 2021–5; *clarified and modified by* Notice 2021–41.

requirements that generally apply under sections 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E, and 179D. Additionally, as discussed in Section III.A. of this Background, Notice 2022-61 established the 60-day period described in sections 30C(g)(1)(C)(i), 45(b)(6)(B)(ii), 45Q(h)(2), 45V(e)(2)(A)(i), 45Y(a)(2)(B)(ii), 48(a)(9)(B)(ii), 48E(a)(2)(A)(ii)(II) and (a)(2)(B)(ii)(II), and 179D(b)(3)(B)(i) for purposes of the BOC Exception. Finally, Notice 2022-61 provided guidance for determining the beginning of construction under sections 30C, 45, 45Q, 45V, 45Y, 48, and 48E, and the beginning of installation under section 179D.

On August 30, 2023, the Treasury Department and the IRS published a notice of proposed rulemaking and a notice of public hearing (REG-100908-23) in the ***Federal Register*** (88 FR 60018), *corrected in* 88 FR 73807 (Oct. 27, 2023), and 89 FR 25550 (April 11, 2024), providing guidance on the PWA requirements under sections 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E, and 179D (Proposed Regulations). The provisions of the Proposed Regulations are explained in greater detail in the preamble to the Proposed Regulations.

On November 22, 2023, the Treasury Department and the IRS published a notice of proposed rulemaking and a notice of public hearing (REG- 132569-17) in the ***Federal Register*** (88 FR 82188), providing guidance under section 48. Among other matters, the proposed regulations under section 48 (Section 48 Proposed Regulations) withdrew and reproposed the regulations in §1.48-13 regarding the PWA requirements under section 48, the One Megawatt Exception under section 48(a)(9)(B)(i), and the recapture rules under section 48(a)(10)(C) related to the Prevailing Wage Requirements. These final regulations do not include final regulations under section 48. Additionally, because proposed §1.48E-3 would have incorporated the rules of proposed §1.48-13 by cross-reference, these final regulations do not include final regulations under section 48E. The Treasury Department and the IRS intend to issue final regulations with respect to the PWA Requirements in proposed §1.48-13 and proposed §1.48E-3 in future Treasury decisions.

The Proposed Regulations provided that taxpayers may rely on proposed §1.48E-3 with respect to construction of a qualified facility on or after January 29, 2023, and on or before the date proposed §1.48E-3 publishes as a final regulation in the ***Federal Register***, provided, that beginning after the date that is 60 days after August 29, 2023, taxpayers follow the proposed regulations in their entirety and in a consistent manner. The Section 48 Proposed Regulations similarly provided that taxpayers may rely on proposed §1.48-13 with respect to construction of a property or project beginning on or after January 29, 2023, and on or before the date proposed §1.48-13 publishes as a final regulation in the ***Federal Register***, provided, that beginning after the date that is 60 days after August 29, 2023, taxpayers follow proposed §1.48-13 in its entirety and in a consistent manner. These final regulations do not change the reliance provided with respect to proposed §1.48-13 and proposed §1.48E-3.

Comments received regarding the specific PWA requirements under sections 48 and 48E, the One Megawatt Exception under sections 48 and 48E, and the recapture rules contained in section 48(a)(10)(C), all whether in response to the Proposed Regulations or the Section 48 Proposed Regulations, will be addressed in the future Treasury decision adopting those rules as final regulations. Other comments on the PWA requirements (including comments that referenced section 48 or section 48E, but addressed the PWA requirements more generally) were considered in the drafting of these final regulations and are discussed herein.

On June 3, 2024, the Treasury Department and the IRS published a notice of proposed rulemaking and a notice of public hearing (REG-119283-23) in the ***Federal Register*** (89 FR 47792), proposing guidance under sections 45Y and 48E (Section 45Y/48E Proposed Regulations). In the Section 45Y/48E Proposed Regulations, the Treasury Department and the IRS requested comments on the proposed definition of a qualified facility with a maximum net output of less than one megawatt (as measured in alternating current) for purposes of the One Megawatt Exception under section 45Y(a)(2)(B)(i). All comments received pertaining to the One Megawatt Exception under section 45Y(a)(2)(B)(i), whether in response to the Proposed Regulations or the Section 45Y/48E Proposed Regulations, will be addressed in future guidance under section 45Y finalizing those rules. General PWA comments that were received in response to the Proposed Regulations and that referenced section 45Y are discussed throughout this Summary of Comments and Explanation of Revisions because they were considered in the drafting of these final regulations.

Summary of Comments and Explanation of Revisions

This Summary of Comments and Explanation of Revisions summarizes the Proposed Regulations, all the substantive comments submitted in response to the Proposed Regulations, and revisions adopted by these final regulations. The Treasury Department and the IRS received 342 written comments in response to the Proposed Regulations. The comments are available for public inspection at https://www.regulations.gov or upon request. After full consideration of the comments received, these final regulations adopt the Proposed Regulations with modifications in response to such comments as described in this Summary of Comments and Explanation of Revisions.

Most comments addressed the PWA requirements in general, without identifying a specific Code section. These comments are primarily addressed in Sections I. through VIII. of this Summary of Comments and Explanation of Revisions, and revisions that have been made in response to these comments are also typically described in general terms, or by reference to section 45, which sets forth the principal PWA requirements. Thus, the terms qualified facility and facility as used in Sections I. through VIII. of this Summary of Comments and Explanation of Revisions generally includes qualified equipment, qualified residence, qualified project, and qualified property for purposes of sections 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48C, and 179D, as applicable. References to an increased credit amount in Sections I. through VIII. of this Summary of Comments and Explanation of Revisions include the increased deduction amount

available under section 179D, as applicable. Comments specifically addressing the PWA requirements in sections 30C, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48C, and 179D are described in Section IX. of this Summary of Comments and Explanation of Revisions.

Comments summarizing the statute or the Proposed Regulations, recommending statutory revisions, and addressing issues that are outside the scope of this rulemaking (such as revising other Federal regulations and recommending changes to IRS forms) are generally not addressed in this Summary of Comments and Explanation of Revisions or adopted in these final regulations. Some commenters requested additional time to submit comments. The Proposed Regulations required all comments to be received by October 30, 2023; however, comments received by April 25, 2024, were considered in drafting these final regulations. In addition to addressing the comments received in response to the Proposed Regulations, the final regulations also include non-substantive grammatical and stylistic changes to the Proposed Regulations.

I. *Pre-Filing Activities*

A. *Applicability of the Davis-Bacon Act in general*[9]

Under section 45(b)(7)(A), the increased credit amount provided by section 45(b)(6) is available with respect to a qualified facility if, among other requirements, a taxpayer ensures that laborers and mechanics are, "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 DBA. As explained in the preamble to the Proposed Regulations, the phrase "in accordance with" means "in agreement or harmony with; in conformity to; according to."[10] In interpreting the "in accordance with" language, the preamble to the Proposed Regulations explained that the Treasury Department and the IRS proposed to incorporate those requirements of the DBA that are relevant for the purposes of section 45(b)(7)(A) and the intent of the IRA, and that are necessary for, and consistent with, sound tax administration.

Under the DBA, the DOL determines the wage rates that are "prevailing" for each classification of covered laborers and mechanics in the geographic area in which work is to be performed and publishes general wage determinations providing that information to the public. Under the DBA, Federal contracting agencies follow specified procedures for incorporating DBA requirements and wage determinations into covered contracts. Pursuant to the Copeland Act, contractors are required to submit certified weekly payroll records to the contracting agency. Under the DBA regulations, the contracting agency and the DOL WHD have responsibility to ensure compliance with prevailing wage requirements by engaging in periodic audits or investigations of contracts, including examination of payroll data.

The Proposed Regulations would have largely adopted DBA guidance relating to applicable wage rates and wage determinations and the meaning of pertinent terms such as "laborer" and "mechanic"; "construction, alteration, or repair"; "wages"; and "employed." The Proposed Regulations would not have incorporated the DBA (or Copeland Act) guidance regarding provisions required to be included in contracts, those provisions related to the reporting of certified weekly payroll records by contractors to contracting agencies, and the various enforcement processes that are available to the DOL and the contracting agencies to address DBA noncompliance.

As explained in the preamble to the Proposed Regulations, this approach was intended to reflect the substantive differences between the DBA and the Code. Under the DBA, a contractor is required to pay prevailing wages as a condition of a Federal contract award. Under section 45, although the requirement to ensure the payment of wages at rates not less than the prevailing rates is generally triggered when construction of a facility begins, that requirement becomes legally binding only if a tax return claiming the increased credit amount is filed. The Code does not require taxpayers who do not seek an increased credit amount under section 45(b)(6) to ensure the payment of prevailing wages at the beginning of construction, alteration, or repair of a facility. Furthermore, under the correction and penalty provisions in section 45(b)(7)(B)(i)(I) and 45(b)(7)(B)(i)(II), taxpayers may remedy prior failures to pay wages at rates not less than the prevailing rates, even after a return is filed, and still be eligible for the increased credit amount. In addition, a taxpayer that satisfies the BOC Exception or the One Megawatt Exception, if applicable, may generally claim the increased credit amount regardless of whether laborers and mechanics were paid prevailing wages.

Several commenters suggested that the final regulations should incorporate additional requirements from the DBA, instead of limiting the incorporation to those that the Treasury Department and the IRS determine are relevant for purposes of claiming the increased credit amount and that are necessary for, and consistent with, sound tax administration. Some commenters asserted that not incorporating all elements of the DBA framework was arbitrary and capricious and contrary to the statute. Some commenters alleged that the Proposed Regulations failed to adequately address the increased chance of improperly claimed credits by relying too heavily on post-filing enforcement. One commenter stated that post-filing enforcement by the IRS does not guarantee workers' rights, including notice of entitlement to the prevailing wage, a complaint procedure to report noncompliance, protections against retaliation, or a requirement that workers be guaranteed any wage by an enforceable contract. The commenters also stated that the reliance on post-filing compliance was

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[9] All references to the DBA regulations throughout this Summary of Comments and Explanation of Revisions include updates to the DBA regulations published in a final rule on August 23, 2023 (88 FR 57526).

[10] *In accordance with*, Oxford English Dictionary,

inconsistent with the DBA and would lead to fraud, noncompliance, and evasion of the tax rules. At least one commenter suggested that incorporating all of the DBA requirements is necessary to more generally address issues of fraud in the construction industry. One commenter opined that although the IRA differed from traditional Davis-Bacon Related Acts that expressly adopt the DOL's existing implementation framework and confer primary enforcement authority upon the DOL, this was because the IRA was enacted through reconciliation. The commenter stated that this should not impact the implementation of the prevailing wage provisions.

Although several commenters supported a more expansive incorporation of the DBA, many other commenters stated that the Proposed Regulations took the correct approach regarding incorporation of the DBA. One commenter suggested that given the unique challenges of applying a system arising in Federal contracting to the IRA's tax credit regime, Congress did not limit the Treasury Department and the IRS to adopting the DBA requirements and enforcement scheme word-for-word and without modification. Many commenters acknowledged the need for the Treasury Department and the IRS to take a reasonable approach to interpret a Code provision that references a Federal law applicable to Federal contracts.

These final regulations do not alter the general approach taken in the Proposed Regulations of incorporating DBA guidance for purposes of the PWA requirements only if it is relevant for the purposes of section 45(b)(7)(A) and the intent of the IRA, and necessary for, and consistent with, sound tax administration. The Treasury Department and the IRS recognize the importance of ensuring compliance with the statute such that workers benefit from the payment of prevailing wages on projects for which the increased amount of credit is claimed and find that the general approach in the Proposed Regulations promotes that goal within the constraints of the statute and in furtherance of sound tax administration. Consistent with this framework, the final regulations encourage taxpayers to adopt certain practices for ensuring compliance in the interest of fulfilling statutory intent and furthering sound tax administration.

The Treasury Department and the IRS disagree with the assertion that the Proposed Regulations were arbitrary and capricious. This Summary of Comments and Explanation of Revisions reiterates and expands upon the rationale for applying the DBA provisions that are relevant for purposes of claiming the increased tax credit and consistent with sound tax administration. If Congress intended for the same DBA requirements to apply under the IRA, it would have so provided. The Treasury Department and the IRS are required to implement statutory language as enacted, regardless of the procedure under which the legislation was passed (for example, reconciliation). As enacted, the statute does not indicate that the regulations setting forth the PWA requirements must mirror the DBA in every instance. As noted in the preamble to the Proposed Regulations, "in accordance with" means "in agreement or harmony with; in conformity to; according to." This does not require exact duplication or incorporation. The differences in statutory language and context reflect the very significant differences between the administration of the wage provisions of Federal contracts and the administration of the tax system, and the statute provides flexibility for the IRS to incorporate the requirements from the DBA that are appropriate for tax administration purposes.

The IRS's authority to determine a taxpayer's compliance with the PWA requirements generally arises after the taxpayer files a claim for the increased tax credit. Because taxpayers may choose not to claim the increased credit amount, the IRS cannot determine a taxpayer's compliance or engage in enforcement activities before the taxpayer files a tax return claiming the increased credit amount. Imposing pre-filing requirements through regulations would not be a reasonable interpretation of the statutory language and would not permit the IRS to enforce the PWA requirements in advance of filing. Many of the DBA requirements (for example, certified weekly payroll, public notice of wage classifications and wage rates, required contract provisions) are either statutorily required under the DBA (or a related act) or designed to apply to all Federal construction contracts with certainty at the time of contract award (that is, in advance of work being performed). Those same pre-filing requirements are not prescribed in the Code.

As acknowledged by many commenters, the Treasury Department and the IRS need to take a reasonable approach to interpret a Code provision that references a Federal law applicable to Federal contracts (a system that applies with certainty in the case of a Federal contracting agency that solicits bids for a contract) in the context of Federal taxes (a system designed to function with a compliance and enforcement framework that follows only after the filing of tax returns).

Many commenters recognized that the PWA requirements are not binding until the tax return claiming the credit is filed, yet they still requested that the IRS impose several additional reporting, notice, and other requirements in advance of filing for the credit. As the requirement to pay prevailing wages does not become binding until a taxpayer files a claim for the increased amount of credit, and the IRS has a well-established record of effective post-filing enforcement, the final regulations do not adopt these requests. The Treasury Department and the IRS have also determined that imposing additional pre-filing requirements on taxpayers could discourage taxpayers from seeking the increased amount of credit available under the IRA, resulting in fewer workers receiving prevailing wages. The Treasury Department and the IRS will not impose pre-filing requirements that unnecessarily raise compliance costs, especially for small businesses, and provide no meaningful benefit to the IRS in administering the tax system.

In reviewing the public comments, the Treasury Department and the IRS have decided to adopt key aspects of the Proposed Regulations and have also determined that certain changes to the Proposed Regulations would be appropriate to support compliance with the PWA requirements, and to encourage taxpayers to adopt certain practices. The Treasury Department and the IRS have made these determinations after consultation with the DOL WHD and OA. Those changes are discussed throughout this Summary of Comments and Explanation of Revisions. Accordingly, as discussed in Section VII.D.3. of this Summary of Comments

and Explanation of Revisions, in cases in which it is necessary for and consistent with sound tax administration, these final regulations expand on the factors demonstrating intentional disregard to reflect the value of these practices. These additional factors incorporate the spirit and rationale of commenters' suggestions by addressing whether a taxpayer has (among other actions): (i) conducted regular reviews of the applicable prevailing wage rate that must be paid to laborers and mechanics and the appropriate classification of such laborers and mechanics based on actual job duties; (ii) investigated complaints of retaliation or adverse action resulting from reports of suspected failures to pay prevailing wages and/or classify workers in accordance with applicable wage determinations, and taken appropriate actions to remedy any retaliation or adverse action and prevent it from reoccurring; and (iii) provided laborers and mechanics with paystubs (or access to individual payroll records) reflecting the amount being paid per pay period (including the specific hourly rate and all deductions from wages).

B. *Specific pre-filing activities required under the DBA*

Some commenters requested that the final regulations incorporate certain pre-filing requirements in line with DBA requirements, to prevent fraud and ensure that workers are paid wages at rates not less than the prevailing rates to which they are entitled. Specifically, commenters recommended that the final regulations require: (i) the submission of certified weekly or monthly payroll records or other compliance reports and the government's regular review and verification of those submitted records through job site visits and interviews with workers, and (ii) that taxpayers, contractors, and subcontractors include DBA provisions in contracts and post applicable wage rates on job sites in prominent and accessible locations.

1. Certified Payroll Records, Other Compliance Reporting, and Government Review of this Reporting

Some commenters suggested that requiring the submission of weekly or monthly certified payroll records to the IRS or the DOL would allow the IRS to monitor compliance with the PWA requirements. Other commenters similarly suggested that the final regulations require the submission of sworn monthly compliance reports to the IRS to allow for effective monitoring of compliance with the statute prior to filing. One commenter suggested that the IRS should regularly review the certified payroll records submitted by contractors and subcontractors, conduct job site visits, and interview workers to ensure that the information reported in the certified payroll records is accurate, and provides taxpayers with an opportunity to correct any failures in advance of filing. This commenter acknowledged that the IRS would not be able to withhold funds or assess penalties in connection with any pre-filing review, because the requirement to pay prevailing wages is not binding until the taxpayer files a tax return claiming the increased credit amount. One commenter stated that a requirement to regularly certify payroll will deter bad actors and preclude falsified payroll records.

Several commenters supported the approach in the Proposed Regulations to not require the regular submission of payroll records. One commenter stated that the submission of weekly certified payroll records would not assist the IRS with efficient administration of the increased credit amount provisions. Additionally, several other commenters stated that the requirement to submit certified weekly payroll records would be burdensome on taxpayers. Finally, one commenter agreed that submission of certified weekly payroll to the IRS would not be in furtherance of sound tax administration, but the commenter requested that contractors and subcontractors be required to submit certified weekly payroll to taxpayers. The commenter asserted that this could be a good way for taxpayers to monitor the activities of contractors and subcontractors.

Applying the principle outlined in Section I.A. of this Summary of Comments and Explanation of Revisions to incorporate only the DBA requirements that are relevant for claiming the increased credit amount and consistent with sound tax administration, the comments requesting that the final regulations require the submission of pre-filing certified payroll records or other sworn reports, the pre-filing review of submitted payroll records, job site visits by the IRS, and interviews of workers regarding the accuracy of submitted information are not adopted. While these comments are not adopted, in the context of an examination, the IRS routinely engages in activities such as review of payroll records, site visits, and taxpayer interviews.

The comments requesting that the final regulations require the submission of pre-filing payroll information or sworn compliance reports appear to assert that the IRS would be able to easily discern noncompliance on the face of payroll records or other sworn reports submitted in advance of a taxpayer filing any claim for a related tax credit. To the contrary, the requirement to pay prevailing wages becomes binding only if a tax return claiming the increased credit amount is filed. Payroll records or other sworn reports relating to the payment of wages before a return claiming the actual increased credit amount is filed would provide minimal benefit to the IRS's enforcement actions, and would impose considerable administrative work on taxpayers, including those who may not eventually claim the increased credit amount. Many commenters acknowledge that this information would not be used until the increased credit amount is claimed. The Treasury Department and the IRS decline to impose these additional administrative tasks on taxpayers because the information would provide minimal benefit to the IRS in advance of a taxpayer filing a return claiming the credit.

However, the Treasury Department and the IRS agree that there may be advantages in taxpayers obtaining regular payroll records from contractors and subcontractors. Accordingly, these final regulations add as a factor for intentional disregard whether a taxpayer (or a third party acting on behalf of the taxpayer) has regularly reviewed payroll information of its contractors and subcontractors or has required its contractors or subcontractors to regularly provide payroll information to the taxpayer (or a third party acting on behalf of the taxpayer). Furthermore, as discussed in Section X.A. of this Summary of Comments and Explanation of Revisions, these final regulations adopt

and expand upon the recordkeeping requirements in the Proposed Regulations and clarify that the DOL Form WH-347 may be used to satisfy some of the recordkeeping requirements.

2. Mandatory Incorporation of DBA Contract Requirements and Posting of Applicable Prevailing Wage Determinations

The Proposed Regulations would have encouraged certain behaviors that are very similar to those required of contractors under the DBA as factors considered for intentional disregard. These behaviors, which the Treasury Department and the IRS view as indicative of an intent to comply with the Prevailing Wage Requirements, would have included incorporating provisions in any contracts entered with contractors that require payment by the contractors and any subcontractors of wages at rates not less than the prevailing rates and posting the applicable prevailing wage rates in a prominent place for the duration of the construction, alteration, or repair of the facility or otherwise notifying employees of the applicable prevailing wage rates.

Some commenters suggested that taxpayers should be required to include certain contract provisions required by section 3142(c) of the DBA in their contracts with contractors and subcontractors. Some commenters recommended the final regulations mandate specific contract terms, including the taxpayer's intent to claim the credit, the expected wage classifications of laborers and mechanics who will work on the project, estimates of apprenticeship hours, and flow-down responsibility clauses requiring compliance with the PWA requirements by all contractors and subcontractors. Additionally, commenters suggested that all solicitations, contracts, and subcontracts include clauses committing to the proper hiring and involvement of qualified apprentices under the Apprenticeship Requirements.

Commenters also recommended that the final regulations adopt the requirement in section 3142(c)(2) of the DBA that prevailing wage rates must be posted by employers on the job site in a prominent and accessible location where they can be easily seen by workers. The Proposed Regulations would have included as a factor to be considered in the determination of whether a failure to satisfy the Prevailing Wage Requirements was due to intentional disregard, whether the taxpayer posted in a prominent place at the facility or otherwise provided written notice to laborers and mechanics during the construction, alteration, or repair of the facility, of the applicable wage rate(s) as determined by the DOL for all classifications of work to be performed for the construction, alteration, or repair of the facility, and that in order to be eligible to claim certain tax benefits, employers must ensure that laborers and mechanics are paid wages at rates not less than such wage rates. Although commenters were supportive of this factor, some commenters were critical of the fact that the information proposed for the notice leaves open the question of whether the worker is actually entitled to prevailing wages because the worker may not know whether an increased credit amount is being claimed with respect to the work they are performing. One commenter further requested that the poster include language regarding the right to be properly classified as an employee, the right to be free from retaliation related to immigration status, and information regarding how to contact the IRS. One commenter suggested requiring each contractor and subcontractor employing workers on projects for which an increased credit amount could be claimed to provide each worker with an individualized written notice identifying their respective classification and the prevailing wage rate to which they are entitled. The commenter suggested requiring notice to be made no later than when construction, alteration, or repair begins, and delivering the suggested notice along with workers' paychecks.

Although both contract language and the posting of the applicable prevailing wage rates is required by the DBA, no similar provision exists in section 45(b)(7) of the Code that would require taxpayers to include specific terms in a contract or post prevailing wage rates during construction. Applying the principle outlined in Section I.A. of this Summary of Comments and Explanation of Revisions to incorporate only the DBA requirements that are relevant for claiming the increased credit amount and consistent with sound tax administration, the Treasury Department and the IRS have decided not to require specific DBA or other PWA-related provisions in private commercial contracts. These agreements are executed well before a tax return claiming the credit is filed. Similarly, the final regulations do not require the posting of applicable wage rates, because a taxpayer may decide to claim the increased credit amount after construction has started. Requests regarding the posting of information related to general rights of workers under State labor laws or other Federal laws are outside the scope of these final regulations. For these reasons, the comments requesting that the final regulations require the incorporation of DBA-contract provisions and the posting of applicable prevailing wage rates are not adopted.

However, there is likely a benefit to taxpayers seeking to comply with the PWA requirements if the requirement to pay prevailing wages and hire qualified apprentices is incorporated in the terms of any contract with respect to the construction, alteration, or repair of a facility, including lower-tier agreements between contractors and subcontractors, and if the laborers and mechanics who are employed in the construction of a facility are informed of the applicable prevailing wage rates that would be required if the taxpayer claims the increased credit amount. The Proposed Regulations would have encouraged this behavior from taxpayers who know they are going to claim the increased credit amount, and the final regulations incorporate and expand upon the list of factors that may be considered by the IRS for purposes of determining if a failure to satisfy the PWA requirements was due to intentional disregard.

C. *Including other conditions as a prerequisite for claiming the increased amount of credit*

Some commenters suggested that the final regulations should require taxpayers to provide advance notice to the IRS, the DOL, potential employees, and the general public of their intent to claim the increased credit amount by satisfying the PWA requirements to provide clarity to workers. Specifically, one commenter suggested requiring taxpayers to file a

statement of intent to claim the increased credit amount with the DOL WHD, which would then be available for public review to enable interested parties to monitor projects that may be subject to the PWA requirements. Another commenter recommended requiring taxpayers to provide notice to workers, before the start of any project for which an increased credit amount could be claimed, of their intention to claim the increased credit amount by satisfying the PWA requirements.

Consistent with the principles outlined in Section I.A. of this Summary of Comments and Explanation of Revisions, the final regulations do not adopt these suggestions. Requiring taxpayers to declare an intent to claim an increased credit amount would provide no meaningful benefit for the IRS's administration of the PWA requirements, and would impose additional pre-filing requirements on taxpayers. Section 45(b)(6) does not require taxpayers to declare an intent to claim the increased credit amount. However, as noted previously, posting or otherwise providing general information about applicable wage rates is a good practice for taxpayers to incorporate if the taxpayer is planning to claim the increased credit amount. The final regulations retain these practices as a factor that may be considered by the IRS for purposes of determining if a failure to satisfy the Prevailing Wage Requirements was due to intentional disregard.

Commenters also asked that the final regulations require a pre-filing registration or reporting system, similar to that provided for under sections 6417 and 6418, applicable to taxpayers intending to claim the increased credit amount for satisfying the PWA requirements. Commenters alleged that since many of the credits covered by sections 6417 and 6418 also contain PWA requirements, the language in sections 6417 and 6418 requiring information or registration can be applied to require pre-filing registration of the intent to claim the increased credit amount.

Section 6418(g)(1) provides that as a "condition of, and prior to, any transfer of any portion of an eligible credit" under section 6418, the Secretary of the Treasury or her delegate (Secretary) "may require such information (including, in such form or manner as is determined appropriate by the Secretary, such information returns) or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments." Section 6417(d)(5) provides the Secretary with similar discretion to implement a registration requirement. The authority to implement a pre-filing registration requirement provided in sections 6417 and 6418 is statutorily created and intended to address different underlying circumstances. Sections 6417(d)(5) and 6418(g) address the use of a registration system as a condition of and prior to certain events, specifically, prior to the amounts being treated as payments made by applicable entities or prior to transferring a credit.

There is no analogous statutory language in section 45 or elsewhere in the Code related to the PWA requirements. Moreover, the registration requirements for sections 6417 and 6418 serve the specific purposes of preventing duplication, fraud, improper payments, or excessive payments. Those concerns are largely unique to the elective pay and credit transfer opportunities created by sections 6417 and 6418. In the context of sections 6417 and 6418, the IRS implemented the registration portal to prevent fraud and duplicate or improper payments, by providing the IRS with basic information that will facilitate processing and improve the administration of the credits. A pre-filing registration or reporting mechanism in the PWA context would not provide the IRS with actionable information for purposes of enforcing the PWA requirements. For these reasons, the comments requesting that the IRS establish a PWA registration system similar to that used for sections 6417 and 6418 are not adopted.

D. *Other comments regarding pre-filing activities and IRS enforcement procedures*

1. Organizational Changes to the IRS and General Tax Administration

Several commenters suggested that the final regulations implement organizational changes to the IRS. For example, one commenter recommended that the regulations create a dedicated office of labor standards enforcement to enforce the PWA provisions. An additional commenter requested that the Treasury Department establish a dedicated compliance and enforcement office. The commenter also encouraged the Treasury Department to review State requirements for disclosures, proof of payment, and affirmation, and adopt models that best effectuate compliance. One commenter suggested that the Treasury Department and the IRS create an interagency office with the DOL to facilitate the receipt of contemporaneous reporting from taxpayers.

Another commenter suggested the creation of a digital platform to be used by taxpayers to submit PWA documentation that would be accessible by businesses, the DOL, and local apprenticeship programs. Several commenters recommended that the Treasury Department and the IRS partner with the DOL and applicable State agencies in the enforcement of PWA requirements. Additional commenters requested that the Treasury Department and the IRS establish formal partnerships with fair contracting organizations, labor unions, and other workers' rights organizations in order to expand the capacity to monitor jobsites. A commenter stated that such third-party partnerships – known as Joint Labor Compliance Monitoring Programs – have been successfully implemented across the country as a method of improving working conditions for workers and ensuring that projects are completed responsibly and on time.

A few commenters suggested the final regulations prescribe specific actions regarding IRS enforcement, compliance, and general tax administration. For example, one commenter recommended that any IRS audit of increased credit amounts verify and cross-reference State labor materials to ensure prevailing wage and apprenticeship standards are met. A commenter stated that States such as California, Washington, and Wyoming have implemented State level apprenticeship utilization provisions and that the States have developed user friendly systems for contractors to report apprentice and journeyworker hours. At least one commenter also requested that the Treasury Department ensure that audit processes and other enforcement mechanisms are done in a transparent, accessible manner and with close engagement with other agencies.

Several commenters provided recommendations regarding information that should be reported on IRS forms claiming the increased credit amount. A commenter suggested that the IRS implement a cross-withholding mechanism, modeled after that used by the DOL under the DBA, whereby a taxpayer engaged in two or more separate projects who is found to violate the PWA requirements on one project is then denied the increased credit amount with respect to any additional projects.

Comments regarding the IRS's organizational structure, coordination with other agencies and States, how the IRS conducts audits, and changes to IRS forms are outside the scope of these final regulations. Therefore, the changes suggested by the comments are not adopted. In developing the Proposed Regulations and these final regulations, the Treasury Department and the IRS consulted extensively with the DOL and will continue to consult with the DOL as appropriate to assist in the administration of the PWA requirements.

2. Requests for Private Letter Rulings

One commenter recommended that the IRS permit taxpayers to submit requests for Private Letter Rulings (PLRs) regarding compliance with the PWA requirements. Whenever appropriate in the interest of sound tax administration, it is the policy of the IRS to answer inquiries of individuals and organizations regarding their status for tax purposes and the tax effects of their acts or transactions, prior to the filing of returns or reports that are required by the revenue laws. Revenue Procedure 2024-1, 2024-01 I.R.B. 1, is updated each year and contains the general procedures for requests for PLRs. There are, however, certain areas in which the IRS will not issue rulings or determination letters, including areas in which the IRS is temporarily not issuing rulings or determination letters because those matters are under study. These no-rule issues are set forth in Revenue Procedure 2024-3, 2024-01 I.R.B. 143, which is also updated annually. Issues pertaining to the application of the IRA currently are identified in Revenue Procedure 2024-3 as matters under study by the IRS and thus are not currently subject to PLRs, but this position is subject to change. Updates to the no-rule issues are outside the scope of these final regulations.

3. Complaint Procedures for Underpayment of Applicable Prevailing Wage Rates and the Failure to Hire Qualified Apprentices

The Proposed Regulations would have included whether the taxpayer had in place procedures whereby laborers and mechanics could report suspected failures to pay prevailing wages and/or suspected failures to classify workers correctly in accordance with the applicable wage determination to appropriate personnel departments or managers without retaliation or other adverse action as a factor to be considered in the determination of intentional disregard.

Many commenters requested that the final regulations prescribe the process through which a worker can complain about being underpaid. Commenters suggested that the process for complaints should be available to all interested parties, and that any person should be able to submit complaints to the government, preferably through the IRS website, without fear of retaliation by their employers or others. A commenter urged the IRS to develop and inform stakeholders and the public on complaint and enforcement procedures and provide contact information for the IRS office that will accept and investigate complaints. Another commenter recommended that the Treasury Department and the IRS create a complaint mechanism with both a telephone hotline and an online portal, and available in English and Spanish, to file complaints.

Commenters acknowledged that unlike under the DBA, if the Treasury Department and the IRS are informed of violations or irregularities before the increased credit is claimed, the agencies would not be able to immediately assess fines or mandate that taxpayers issue corrective payments. A commenter acknowledged that there are limitations on the IRS's remedial authority, but suggested that the Treasury Department and the IRS have a compelling interest in instituting a complaint mechanism to obtain vital information that they can use in determining which taxpayers to audit. One commenter suggested permitting registered apprenticeship programs to petition the Treasury Department if they believe that a taxpayer is falsely claiming that the program is unable to meet the taxpayer's request for qualified apprentices.

While the IRS takes information it receives regarding alleged tax violations very seriously, the comments requesting that the final regulations require a specific process regarding complaints are not adopted. Similar to the comments addressed in Section I.D.1. of this Summary of Comments and Explanation of Revisions regarding overall IRS administration, the comments concerning how the IRS should address reports of alleged tax violations are outside the scope of these final regulations. Additionally, the commenters overstate the usefulness of such information in the pre-filing context with respect to the PWA requirements. A laborer or mechanic might be paid wages at rates less than the applicable prevailing wage rates would require for such work, but that does not mean the laborer or mechanic was underpaid for purposes of section 45(b)(7)(A), unless and until a tax return claiming the increased credit amount is filed. The PWA requirements apply to the taxpayer, and the taxpayer must ensure that laborers and mechanics are paid wages at rates not less than the applicable prevailing wage rates for construction, alteration, or repair of a qualified facility. If a taxpayer, contractor, or subcontractor underpays a laborer or mechanic and does not subsequently correct the underpayment with the appropriate backpay and interest and pay the penalty amount, then the increased credit amount will be disallowed by the IRS.

However, the Treasury Department and the IRS acknowledge the value in encouraging internal complaint and anti-retaliation procedures on facilities for which taxpayers acknowledge they anticipate claiming an increased credit amount by satisfying the PWA requirements. As discussed in Section VII.D.3. of this Summary of Comments and Explanation of Revisions, the final regulations include the existence of these procedures as a factor in determining whether a failure to satisfy the PWA requirements was due to intentional disregard. Further, these final regulations add as factors in determining

intentional disregard whether the taxpayer posted information on how to contact the appropriate office to report suspected failures and whether in response to any complaint, the taxpayer investigated the complaint and took appropriate action to remedy the situation.

Additional commenters proposed that the Treasury Department and the IRS clarify that workers who report PWA violations are protected by the anti-retaliation framework enacted under the Taxpayer First Act (26 U.S.C. 7623 *et seq*.) (TFA). Commenters raised that section 7623(d)(1) states that no employer, contractor, or subcontractor may "discharge, demote, suspend, threaten, harass, or in any other manner discriminate" against an employee who has provided information or assisted in "an investigation regarding underpayment of tax or any conduct which the employee reasonably believes constitutes a violation of the Internal Revenue laws or any provision of Federal law relating to tax fraud." Commenters stated that the TFA's anti-retaliation provisions under section 7623(d)(1) cover reporting to the Treasury Department, IRS, and related agencies, as well as internal reporting by a worker to their supervisors. Commenters emphasized that section 7623(d)(2)(A) also provides the right to file a complaint with the Secretary of Labor with respect to any reprisals and provides for a private right of action in district court in the event that the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint.

The application of section 7623, including the anti-retaliation provision enacted under the TFA, is outside the scope of these final regulations. However, whether laborers and mechanics were provided with a written notice of the rights conferred by the TFA is included as a factor the IRS will consider in determining if a failure to comply with the PWA requirements was due to intentional disregard. Additionally, IRS Form 3949-A, *Information Referral*, may be submitted by anyone with information about an alleged tax violation. The ability of any individual or organization to notify the IRS of specific and credible suspected tax violations serves as a powerful deterrent that supports voluntary compliance and has the potential to provide the IRS with information to identify and address noncompliance.

Commenters acknowledge that at any point before the tax return is filed, it is within the taxpayer's discretion to refrain from claiming the increased credit amount and avoid the responsibility to make any related payments. Even so, commenters stated that the IRS is not limited in imposing conditions that the taxpayer must meet at the time of the construction, alteration, or repair to later claim the increased credit amount. The Treasury Department and the IRS agree that for those taxpayers that claim the increased credit amount on a return, the obligation to pay prevailing wages attaches as of the time that the work was performed. The final regulations prescribe correction procedures that apply on a retroactive basis, including interest accruing on any correction amounts from the date of the failure, to account for past failures that occurred at the time the construction, alteration, or repair work was performed.

II. *PWA Transition Rule*

Under the BOC Exception in sections 30C, 45, 45Q, 45V, 45Y, and 179D, taxpayers may claim the amount of the increased credit or deduction without satisfying the PWA requirements if construction (or installation with respect to section 179D) "begins prior to the date that is 60 days after the Secretary publishes guidance with respect to the [PWA requirements]." The Treasury Department and the IRS published Notice 2022-61 on November 30, 2022, providing initial guidance with respect to the PWA requirements and starting the 60-day period described in those sections. Unless the One Megawatt Exception applies, taxpayers who do not meet the BOC Exception under these Code sections would need to satisfy the applicable PWA requirements to claim the increased amount of credit or deduction. Under sections 45L, 45U, 45Z, and 48C, there is no BOC Exception or One Megawatt Exception, so taxpayers need to satisfy the applicable PWA requirements to claim the increased credit amount regardless of when construction began or how small the facility (or respective underlying creditable activity) may be.

As enacted or amended by the IRA, the sections containing PWA provisions have various statutory effective dates. The PWA provisions in section 30C apply to property placed in service after December 31, 2022.[11] The PWA provisions in section 45 apply to facilities placed in service after December 31, 2021.[12] The PWA provisions in section 45L apply to dwelling units acquired after December 31, 2022.[13] The PWA provisions in section 45Q apply to facilities or equipment placed in service after December 31, 2022.[14] Section 45Y applies to facilities placed in service after December 31, 2024.[15] In contrast, the effective dates of the PWA provisions in sections 45U, 45V, and 45Z are stated in relation to when the respective electricity, hydrogen, or transportation fuel is produced. Section 45U applies to electricity produced and sold after December 31, 2023, in taxable years beginning after such date.[16] Section 45V applies to hydrogen produced after December 31, 2022.[17] And Section 45Z applies to transportation fuel produced after December 31, 2024,[18] but includes a special rule (described in Section IX.G. of this Summary of Comments and Explanation of Revisions) with respect to the Prevailing Wage Requirements if a facility is placed in service before January 1, 2025. The new allocation amounts available under section 48C(e) are effective on January 1, 2023.[19] The amendments to section 179D apply to

[11] IRA §13404(f).
[12] IRA §13101(k).
[13] IRA §13304(f).
[14] IRA §13104(i)(1). The amendments made to the definition of a qualified section 45Q facility apply to facilities or equipment the construction of which begins after the date of enactment of the IRA (that is, after August 16, 2022).
[15] IRA §13701(c).
[16] IRA §13105(c).
[17] IRA §13204(a)(5).
[18] IRA §13704(c).
[19] IRA §13501(e).

taxable years beginning after December 31, 2022.[20]

Several commenters requested that the final regulations clarify whether the PWA requirements apply to work performed before January 29, 2023, both with respect to Code sections with a BOC Exception and those without a BOC Exception. Commenters stated that it would be unfair to require taxpayers to comply with the PWA requirements with respect to these activities. Several commenters stated that the BOC Exception was intended to ensure that the PWA requirements are not applied retroactively and asked for a uniform rule applicable to all increased credit amount provisions that the PWA requirements do not apply before the BOC Exception trigger date. Other commenters asked that activities that occurred before the IRS issued Notice 2022-61 (November 30, 2022) be excluded from the PWA requirements. Some commenters stated that significant preliminary activities may have occurred prior to the enactment of the IRA, and they asked that the final regulations clarify that the PWA requirements do not apply to these activities, regardless of whether a BOC Exception may apply. One commenter suggested that the PWA requirements apply only after these final regulations are issued.

The Treasury Department and the IRS have determined that given the complexity of the PWA requirements, the uncertainty regarding the potential retroactive effects of the PWA requirements, and the benefits to tax administration gained with consistency across the various Code sections containing PWA requirements, that a transition rule is appropriate.

The final regulations provide that any work performed before January 29, 2023 (the date that is 60 days after the publication of Notice 2022-61) is not subject to the PWA requirements, regardless of whether there is an applicable BOC Exception. Thus, with respect to sections 45L, 45Z, and 48C, although there is no applicable BOC Exception and regardless of when construction began, taxpayers must only comply with the PWA requirements for the construction, alteration, or repair work (as applicable) occurring on or after January 29, 2023. Section 45U is not subject to the transition rule because, as described in Section IX.D. of this Summary of Comments and Explanation of Revisions, the Prevailing Wage Requirements of section 45U only apply to alterations or repairs of a qualified nuclear power facility that occur after December 31, 2023.

The transition rule also applies for taxpayers that may initially satisfy the BOC Exception, but later fail to meet the BOC Exception (for example, failing to meet the Continuity Requirement). These taxpayers must satisfy the PWA requirements for construction, alteration, or repair (as applicable) that occurs on or after January 29, 2023, but do not need to meet the PWA requirements for work that occurred prior to that date.

III. *Beginning of Construction*

A. *Beginning of Construction under the IRS Notices*

The IRS Notices describe two methods of establishing that construction of a facility has begun: (i) starting physical work of a significant nature (Physical Work Test), and (ii) paying or incurring five percent or more of the total cost of the facility (Five Percent Safe Harbor).

Physical work of a significant nature can include both on-site and offsite work. Notice 2013-29 describes that in the case of a wind turbine, on-site physical work of a significant nature begins with the beginning of the excavation for the foundation, the setting of anchor bolts into the ground, or the pouring of the concrete pads of the foundation. Physical work of a significant nature does not include preliminary activities such as planning or designing, securing financing, exploring, researching, obtaining permits, licensing, conducting surveys, environmental and engineering studies, clearing a site, test drilling of a geothermal deposit, test drilling to determine soil condition, or excavation to change the contour of the land. Notice 2013-29 explains that removal of existing turbines and towers is considered preliminary work and not physical work of a significant nature.

Under the Five Percent Safe Harbor, if a taxpayer has paid or incurred five percent or more of the total cost of the facility and thereafter the taxpayer makes continuous effort to advance towards completion of the facility, then the construction of the facility will be considered to have begun. All costs properly included in the depreciable basis of the facility are taken into account but the cost of land or any property not integral to the facility is not included. Taxpayers can generally choose to structure their business affairs to meet either the Physical Work Test or the Five Percent Safe Harbor. However, once a taxpayer meets either method, beginning of construction is established and a taxpayer may not alternate between methods.

B. *Beginning of construction and the BOC Exception under Notice 2022-61 and the Proposed Regulations*

Absent an exception, the PWA requirements apply with respect to the construction, alteration, or repair of a qualified facility. For purposes of the Prevailing Wage Requirements, section 45(b)(7)(A) provides that the taxpayer must ensure the payment of prevailing wages to laborers and mechanics employed in: (i) the “construction” of the qualified facility, and (ii) for “the alteration or repair” of the qualified facility during the 10-year period after the facility is placed in service. For purposes of the Apprenticeship Requirements, section 45(b)(8) provides that the taxpayer must satisfy the Labor Hours Requirement “with respect to the construction of any qualified facility.”

For purposes of determining when construction or installation begins under the BOC Exception, Notice 2022-61 incorporates by reference the IRS Notices. While Notice 2022-61 served to define the beginning of construction under the BOC Exception, Notice 2022-61 also states generally that it provides “guidance for determining the beginning of construction” under sections 30C, 45, 45Q, 45V, 45Y, 48, and 48E, and the beginning of installation under section 179D solely for purposes of section 179D(b)(3)(B)(i). The preamble to the Proposed Regulations

[20] IRA§13303(d).

explained that until further guidance is issued on determining when construction begins under the applicable Code sections, taxpayers may continue to rely on the guidance provided in Notice 2022–61 and principles similar to those under the IRS Notices for purposes of determining when construction begins.

Section 3 of Notice 2022-61 contains guidance with respect to the Prevailing Wage Requirements. Section 3.03(4) of Notice 2022-61 provides that "'construction, alteration, or repair' means 'construction, prosecution, completion, or repair' as defined under 29 CFR 5.2(j)." In proposing rules under section 45(b)(7)(A), the Treasury Department and the IRS sought to incorporate those rules of the DBA regime relevant to the intent of the PWA requirements and useful for tax administration. Thus, consistent with Notice 2022-61, proposed §1.45-7(d)(2)(i) would have provided that the "term construction, alteration, or repair generally means construction, prosecution, completion, or repair as defined in 29 CFR 5.2" of the DBA regulations.

In general, the DBA applies to contracts for construction, alteration or repair of public buildings and public works and requires payment of prevailing wages with respect to all mechanics and laborers employed directly on the site of the work.[21] Under 29 CFR 5.2, construction, alteration, or repair is defined expansively to include all types of work done on a particular building or work at the site of the work, as defined in 29 CFR 5.2, by laborers and mechanics employed by a contractor or subcontractor. This work includes, but is not limited to, altering, remodeling, installing of items fabricated offsite, painting and decorating, manufacturing, or furnishing of materials, articles, and supplies or equipment on the site of the building or work, and certain demolition or removal activities.

Notice 2022-61 and proposed §1.45-7(d)(2)(i) would have defined construction, alteration, or repair by reference to the DBA. This means that the activity triggering the PWA requirements for a facility subject to the PWA requirements is determined by reference to activities that constitute construction under the DBA. A taxpayer must begin to satisfy the PWA requirements once construction, alteration, or repair activities occur if those activities are described in 29 CFR 5.2. Under this definition, construction, alteration, or repair would mean all types of work performed at the location of the qualified facility.

C. *Comments on determining the beginning of construction for PWA purposes*

Several commenters requested clarification concerning when the obligation to comply with the PWA requirements arises in the lifespan of a construction project apart from satisfying the BOC Exception, including what methods may be relied upon (the Physical Work Test or Five Percent Safe Harbor) and the Continuity Requirement. Another commenter suggested that the final regulations incorporate the tests from the IRS Notices into the final regulations. Commenters indicated that there is confusion regarding the precise scope of the PWA requirements because the word "construction" has different meanings under the DBA and the IRS Notices. One commenter stated that the preamble's use of both "beginning of construction" and "start of construction" was confusing.

Several commenters requested clarification on when construction begins for purposes of the PWA requirements, noting that initial activities that constitute construction under 29 CFR 5.2 and would be subject to prevailing wage requirements under the DBA may not be the same activities that constitute the beginning of construction under the IRS Notices. A commenter also requested that the final regulations provide an exception from the PWA requirements for work subject to an agreement entered into prior to January 29, 2023, or give taxpayers who are a party to such agreements one year from the date the final regulations are published to comply with the PWA requirements. Further, commenters requested that the final regulations clarify that the beginning of construction is determined under existing tax principles and that preliminary activities, such as demolition or land clearing included under the DBA as work, do not count as the beginning of construction for PWA purposes. A commenter requested that the final regulations confirm that the end of construction corresponds to when an asset is placed in service and that activities afterward are not subject to the PWA requirements unless they are a covered alteration or repair.

A commenter contended that the BOC Exception is anti-competitive and places an undue burden on new projects, as compared to projects that meet the BOC Exception, because projects meeting the BOC Exception will receive all the benefits of meeting Prevailing Wage Requirements without having to incur any of the associated costs. The commenter emphasized the importance of promoting a level playing field for all taxpayers interested in qualifying for increased credit amounts across clean energy industries.

D. *Beginning of construction for purposes of the BOC Exception and the PWA requirements in general*

The Treasury Department and the IRS understand commenters' concerns and the potential for confusion in determining the beginning of construction for purposes of the BOC Exception and the PWA requirements. While the Physical Work Test is very similar to the definition of construction under the DBA, certain preliminary activities are treated differently. Some activities constituting construction under the DBA definition would not constitute construction activities under the Physical Work Test. For instance, under the Physical Work Test, the demolition and removal of an existing structure would be considered a preliminary activity, not the "beginning of construction." However, under the DBA definition, the same activity would constitute construction. The Five Percent Safe Harbor, which has no equivalent under the DBA, looks solely at incurred costs in determining whether construction has begun. Under all three tests, once construction begins a taxpayer must satisfy the PWA requirements with respect

[21] 40 U.S.C. 3142(a) and (c).

to all construction, alteration, or repair as defined in proposed §1.45-7(d)(2) by reference to 29 CFR 5.2.

The Treasury Department and the IRS have determined that using the DBA definition of construction to define the activities that mark the start of the obligation to comply with the PWA requirements for a qualified facility subject to the requirements provides a uniform rule across all the relevant Code sections. This is also consistent with the general approach in the Proposed Regulations and Section I.A. of this Summary of Comments and Explanation of Revisions of adopting DBA concepts when they are relevant to sound tax administration. Using the DBA definition of construction as the triggering activity provides a clear and uniform rule for taxpayers to determine when the obligation to comply with the PWA requirements begins. Thus, comments proposing use of the IRS Notices to determine the beginning of construction for purposes of the PWA requirements are not adopted. Providing a uniform rule that is generally applicable across all of the PWA provisions provides the necessary clarity sought by commenters. The final regulations provide that the activities that mark the start of the obligation to comply with the PWA requirements is any activity that constitutes construction (as defined in §1.45-7(d)(3)) of a qualified facility.

Unless an exception applies, taxpayers are required to comply with the PWA requirements once a laborer or mechanic performs any work that is considered construction, alteration, or repair of the qualified facility (including work on the qualified facility that occurs at a secondary site). Thereafter, all work with respect to the construction (or alteration or repair), as defined in §1.45-7(d)(3) (by cross-reference to 29 CFR 5.2), of the qualified facility is subject to the applicable PWA requirements. The beginning of construction, for purposes of satisfying the BOC Exception, will continue to be determined under the IRS Notices.

In light of the differences between the tests, and because Notice 2022-61 as well as the Proposed Regulations indicated that taxpayers could rely on the IRS Notices for determining when construction begins, the final regulations provide transition relief for taxpayers who applied the definitions in the IRS Notices for purposes of determining those activities that were considered construction, alteration, or repair of the facility subject to the PWA requirements in the initial stages of construction. The final regulations waive penalties for taxpayers who applied the IRS Notices for determining when the obligation to pay prevailing wages began, provided the taxpayer makes the appropriate correction payments to the impacted workers within 180 days of the publication of the final regulations. As part of the transition relief, the final regulations also allow taxpayers to use the IRS Notices for determining when construction begins under section 45(b)(8)(A) to determine the applicable percentage of labor hours performed by qualified apprentices required in satisfying the Labor Hours Requirement.

IV. *One Megawatt Exception*

Under the One Megawatt Exception in section 45(b)(6)(B)(i), a qualified facility that has a maximum net output of less than one megawatt (as measured in alternating current) is eligible for the increased credit amount. The preamble to the Proposed Regulations would have provided that a qualified facility's nameplate capacity determines whether the facility meets the One Megawatt Exception. Similar exceptions apply for a qualified facility with a maximum net output of less than one megawatt (as measured in alternating current) under sections 45Y(a)(2)(B)(i) and 48E(a)(2)(A)(ii)(I); an energy project with a maximum net output of less than one megawatt of electrical (as measured in alternating current) or thermal energy under section 48(a)(9)(B)(i); and energy storage technology with a capacity of less than one megawatt under section 48E(a)(2)(B)(ii)(I).

Proposed §1.45-6(c) would have provided that nameplate capacity for an electrical generating unit means the maximum electrical generating output in megawatts that the unit is capable of producing on a steady state basis and during continuous operation under standard conditions, as measured by the manufacturer and consistent with the definition provided in 40 CFR 96.202. If applicable, the International Standard Organization (ISO) conditions are used to measure the maximum electrical generating output or usable energy capacity.

Commenters stated that the term "maximum net output" is ambiguous and that no method is provided for determining such output. A few commenters also supported the Proposed Regulation's definition of maximum net output and suggested carrying the nameplate capacity definition of maximum net output forward into its final rule. One commenter raised that for inverter-based resources, like solar and storage facilities, maximum net output could be determined at different stages. For such facilities, the commenter recommended clarifying that only post-inverter maximum electrical generating output qualifies as maximum net output. The final regulations do not adopt these changes because the definition in proposed §1.45-6(c) contained testing methodologies and conditions and the statute already requires the measurement be in alternating current. The final regulations adopt the definition without change.

Another commenter suggested clarifying when multiple energy projects constitute a single facility for purposes of the One Megawatt Exception under section 45. One commenter suggested adopting the eight factors of a single project determination listed in Notice 2013-29 and Notice 2018-59, to determine when multiple energy projects constitute a single facility for purposes of the One Megawatt Exception. The commenter stated that it could be difficult, such as for solar arrays constructed on multiple buildings, to determine when multiple projects may constitute a single facility. Another commenter stated that taxpayers should not be permitted to subdivide projects and construction contracts in an effort to evade the Prevailing Wage Requirements using the One Megawatt Exception. The commenter stated that to prevent taxpayers from manipulating the One Megawatt Exception, the Treasury Department should evaluate whether facilities will be using the same transmission lines or connecting to the same powerhouse. One commenter recommended using certain factors, including ownership, proximity, and connection to transmission lines or powerhouse, to determine whether multiple energy projects may be deemed to constitute one facility.

The definition of a qualified facility, energy project, or energy storage technology under the respective Code section controls for purposes of the One Megawatt Exception. Therefore, the definition of a qualified facility under section 45 governs for purposes of the One Megawatt Exception under section 45(b)(6)(B)(i). Accordingly, the application of the aggregation principles issued under Notice 2013-29 and Notice 2018-59 is outside the scope of these final regulations. Further, the Section 48 Proposed Regulations would provide guidance for taxpayers regarding the definition of an energy project. The Section 48 Proposed Regulations would provide rules for purposes of the One Megawatt Exception as well as other IRA bonus provisions for domestic content and energy communities. As noted previously, comments pertaining to the 48 Proposed Regulations will be addressed in a future Treasury decision. The applicable scope of the PWA requirements is further discussed in Section VI. of this Summary of Comments and Explanation of Revisions.

V. *Application to the Taxpayer*

A. *Definition of taxpayer, contractor, and subcontractor*

Generally, the Proposed Regulations would have defined the term taxpayer to mean any taxpayer as defined in section 7701(a)(14), including applicable entities described in section 6417(d)(1)(A). This generally will be the entity that claims the credit (as increased under section 45(b)(6)) or makes an election under section 6417 with respect to such credit amount on a Federal income tax return.

The Proposed Regulations would have provided that in order to earn the increased credit amount under section 45(b)(6) by satisfying the PWA requirements, the taxpayer would be solely responsible for: (i) ensuring that the relevant laborers and mechanics are paid wages not less than the prevailing rate whether employed directly by the taxpayer, or by a contractor, or a subcontractor, and (ii) ensuring that the Apprenticeship Requirements are satisfied. The Proposed Regulations also would have provided that the taxpayer would be solely responsible for the PWA recordkeeping requirements, the correction and penalty provisions under the Prevailing Wage Requirements, and the Good Faith Effort Exception and Apprenticeship Cure Provision under the Apprenticeship Requirements. However, nothing in the Proposed Regulations was intended to supersede requirements that might otherwise apply to a taxpayer, contractor, or subcontractor under State or Federal law.

Commenters requested guidance concerning whether the taxpayer is responsible for ensuring the compliance with the PWA requirements by contractors and subcontractors if the taxpayer may not be in privity of contract with all contractors and subcontractors. Commenters noted that proposed §1.45-7(d)(3) would have defined a contractor as any person that enters into a contract with the taxpayer for the construction, alteration, or repair of a qualified facility. However, commenters stated that the taxpayer is not always in privity of contract with each contractor and subcontractor. Similarly, another commenter suggested that the definition of contractor be revised to address situations in which the taxpayer is not in privity of contract with the contractors, because the sponsor or developer of the facility assumes responsibility for construction of the facility. The final regulations clarify that the definition of contractor applies to those situations. Additionally, a commenter stated that DOL guidance under 29 CFR 5.5(a)(6) provides that prime contractors have the responsibility for the compliance of all the subcontractors on a covered prime contract, whereas the Proposed Regulations state that the taxpayer is solely responsible for PWA compliance. The final regulations retain the requirements in the Proposed Regulations that the taxpayer is solely responsible for the PWA requirements, including ensuring that the relevant laborers and mechanics are paid wages at rates not less than the prevailing rates whether employed directly by the taxpayer, a contractor, or a subcontractor and ensuring that the Apprenticeship Requirements are satisfied.

A commenter suggested that the final regulations adopt a safe harbor allowing taxpayers to avoid corrections and penalty payments if the taxpayer contracted with a third party to ensure compliance with relevant PWA requirements. Section 45(b)(7)(A) requires that the taxpayer ensures that laborers and mechanics are paid wages at rates not less than the applicable prevailing wage rates with respect to the construction, alteration, or repair of a qualified facility and under section 45(b)(8)(A), that the required number of labor hours with respect to the construction of a qualified facility are performed by qualified apprentices. The burden to ensure that these requirements are met falls with the taxpayer. The final regulations do not adopt the suggestion to incorporate a safe harbor, but the penalty waiver in §1.45-7(c)(6) and described in Section VII.D.4. of this Summary of Comments and Explanation of Revisions provides an appropriately limited exception to corrections and penalty payments in the case of inadvertent errors.

Similarly, one commenter requested that the final regulations permit contractors or subcontractors to make corrective payments on behalf of the taxpayer directly to laborers or mechanics. The correction and penalty provision in section 45(b)(7)(B)(i) requires that the taxpayer makes payment to the laborer or mechanic of the correction amount. The Treasury Department and the IRS appreciate commenters' suggestions to encourage methods that result in prompt correction payments to laborers and mechanics. Although the statute requires that the correction payment be made by the taxpayer to the laborers and mechanics, it does not prescribe the method by which the taxpayer must make payment. The final regulations similarly do not prescribe a specific method of payment and adopt the proposed rule without change. Regardless of how payments are made, taxpayers must maintain records demonstrating when and how correction payments were made.

A few commenters suggested that the final regulations clarify the requirement that the taxpayer ensure that all laborers and mechanics employed by the taxpayer, or any contractor or subcontractor, are paid wages at rates not less than the prevailing rates applies to all subcontractors. Specifically, taxpayers stated that the DBA definition of subcontractor indicates that a subcontractor includes subcontractors of any tier, and suggested that the final regulations use the same term in the definition of subcontractor. The definition of subcontractor in the final regulations

clarifies that the requirement applies to all subcontractors, including those who contract with other subcontractors.

Another commenter suggested that the use of subcontractor labor providers, such as labor brokers, should be explicitly discouraged because of the risk of fraud. This suggestion is overbroad and inconsistent with the plain language of section 45, which anticipates the use of contractors and subcontractors. This suggestion is not adopted.

B. *Transferability pursuant to section 6418*

The Treasury Department and the IRS requested comments on the application of the PWA correction and penalty provisions in the context of transferred credits. The credit available under section 45, including the increased credit amount available under section 45(b)(6), is an eligible credit subject to section 6418. Proposed §1.45-7(c)(1)(iv) and proposed §1.45-8(e)(2)(iv) would have provided that to the extent an eligible taxpayer, as defined in section 6418(f)(2), has determined an increased credit amount under section 45(b)(6) and transferred such increased credit amount as part of a specified credit portion pursuant to section 6418(a), the obligation to make correction and penalty payments under proposed §1.45-7(c)(1)(i) and (ii) and the penalty payment under proposed §1.45-8(e)(2)(i) remains with the eligible taxpayer. No commenters disagreed with having the eligible taxpayer remain responsible for the PWA correction and penalty provisions under proposed §1.45-7(c)(1)(iv) or proposed §1.45-8(e)(2)(iv). Consequently, these final regulations adopt proposed §1.45-7(c)(1)(iv) and proposed §1.45-8(e)(2)(iv) without change. However, commenters raised other issues related to the PWA provisions in the context of a transfer pursuant to section 6418, which are addressed in the following paragraphs.

Under proposed §1.45-7(c)(1)(iv) and proposed §1.45-8(e)(2)(iv), to the extent an eligible taxpayer transfers a credit increased pursuant to the PWA requirements, the obligation to satisfy the PWA requirements becomes binding upon the earlier of the filing of the eligible taxpayer's return for the taxable year for which the specified credit portion is determined with respect to the eligible taxpayer or the filing of the return of the transferee taxpayer for the year in which the specified credit portion is taken into account. One commenter stated that if the eligible taxpayer is a calendar year taxpayer and the transferee taxpayer is a fiscal year taxpayer, then the ability of the eligible taxpayer to make any correction or penalty payments may be shortened.

Section 6418 and the final regulations thereunder (TD 9993) published in the ***Federal Register*** (89 FR 34770) on April 30, 2024 (6418 Final Regulations), provide that the transferee taxpayer takes into account the transferred credit in the first taxable year ending on or after the taxable year of the eligible taxpayer with respect to which the credit was determined. Consequently, if an eligible taxpayer has a calendar year taxable year and the transferee taxpayer has a fiscal year taxable year, the transferee taxpayer's return due date generally will be after the eligible taxpayer's return due date. In the event a transferee taxpayer files a return that claims an increased credit amount transferred from an eligible taxpayer prior to the eligible taxpayer filing its return, the obligation to have satisfied the PWA requirements becomes legally binding upon the filing of the return of the transferee taxpayer. However, in any scenario, eligible taxpayers will have the ability to make any required correction and penalty payments as provided under section 45(b)(7)(B)(iv), which allows such payments to be made within 180 days of a determination by the IRS with respect to a failure regarding prevailing wages, or under section 45(b)(8)(D)(i) with respect to apprenticeship failures. The transferee taxpayer filing its tax return before the eligible taxpayer does not shorten this period. Further, the eligible taxpayer and the transferee taxpayer are required to attach a transfer election statement describing specific details relating to the transaction, including any increased credit amounts, and prior to filing any tax returns, the parties should have verified eligibility under the PWA provisions. Therefore, the Treasury Department and the IRS did not revise the proposed rule in these final regulations.

Commenters recommended specifying that if a credit amount increased pursuant to the PWA requirements is transferred to multiple transferee taxpayers, the responsibility to make correction and penalty payments remains indivisible with the eligible taxpayer. This comment is consistent with the Proposed Regulations, which did not distinguish between situations with one or multiple transferee taxpayers. These final regulations adopt the proposed rule without change.

One commenter recommended that transferee taxpayers being transferred an eligible credit increased pursuant to the PWA requirements should be secondarily liable for any correction and penalty payments. The commenter stated that if the transferee taxpayer is not secondarily liable, then the amounts may not be paid because the eligible taxpayer will have already received the consideration from the transfer of the tax credit. Further, the commenter suggested that the transferee taxpayer should be required to keep the same records as the eligible taxpayer in order to demonstrate reasonable cause with respect to excessive credit transfers and should also be required to contractually bind the eligible taxpayer to meet the PWA requirements, indemnifying the transferee taxpayer for any such payments it is secondarily required to make.

The Treasury Department and the IRS do not adopt these changes. As explained in the preamble to the Proposed Regulations, credit amounts increased pursuant to the PWA requirements are part of determining the eligible credit by the eligible taxpayer. The 6418 Final Regulations confirm that any specified credit portion is a proportionate share of the entire eligible credit, including any increases pursuant to the PWA requirements. Therefore, it is part of the eligible taxpayer's responsibility to satisfy the PWA requirements and requiring the eligible taxpayer to make any correction or penalty payments remains appropriate. Requiring the transferee taxpayer to be secondarily liable may inappropriately shift the responsibility to satisfy the PWA requirements. It is the responsibility of the transferee taxpayer under section 6418 and the 6418 Final Regulations to perform due diligence to show reasonable cause in the event of an excessive credit transfer, but changes to those rules are outside the scope of these final regulations. Additionally, specific

recordkeeping requirements for the eligible taxpayer and transferee taxpayer(s) under section 6418 are addressed in the 6418 Final Regulations and are outside the scope of these final regulations.

A commenter recommended that a transferee taxpayer should be able to rely on assurances from the eligible taxpayer that all covered work was performed under the terms of a qualifying project labor agreement (discussed in Section V.D. of this Summary of Comments and Explanation of Revisions) to demonstrate "reasonable cause" in the context of an excessive credit transfer relating to the PWA requirements. These final regulations do not adopt this suggestion as excessive credit transfers are outside the scope of these final regulations and are addressed in the 6418 Final Regulations.

C. *Application to Indian Tribal governments and the Tennessee Valley Authority*

The preamble to the Proposed Regulations explained that the statutory language of the IRA does not reflect any intent to include exceptions from the PWA requirements other than the BOC Exception and the One Megawatt Exception. Consequently, the Proposed Regulations would not have included a rule that would exempt Indian Tribal governments or the Tennessee Valley Authority (TVA) from the PWA requirements. The Treasury Department and the IRS requested comments on the need for any exceptions, including for Indian Tribal governments or the TVA, from the PWA requirements in addition to those expressly described in the statute.

1. Indian Tribal Governments

In accordance with Executive Order 13175 (Consultation and Coordination with Indian Tribal governments) and Executive Order 14112 (Reforming Federal Funding and Support for Tribal Nations To Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination), the Treasury Department and the IRS support the right of Indian Tribes to self-govern and recognize that Indian Tribes exercise inherent sovereign powers over their members and territory. The Treasury Department and the IRS are guided by the fundamental principles in Executive Orders 13175 and 14112. Under those principles, the Treasury Department and the IRS have an obligation to consider the concerns raised by Tribes and, to the extent permitted by law, address those concerns in the final regulations.

On September 25, 2023, the Treasury Department and the IRS held a Tribal consultation with Tribal leaders requesting assistance in addressing questions related to the PWA requirements in the Proposed Regulations. Through consultation and in response to the Proposed Regulations, the Treasury Department and the IRS received numerous comments regarding an exception to the PWA requirements for projects constructed by Indian Tribal governments. A number of commenters recommended that Indian Tribal governments should not be exempted from the PWA requirements and cited to the lack of statutory basis to grant an exception. In contrast, other commenters supported an exception to the PWA requirements for Indian Tribal governments.

A. Prevailing Wage Requirements and Indian Tribal governments

With respect to the Prevailing Wage Requirements, commenters suggested that requiring projects located on Tribal lands to comply with wage standards set by the DOL undermines Tribal sovereignty. Some commenters stated that the DOL provides an exception from the DOL prevailing wage rates for work done by Indian Tribal governments using their own employees, and advocated that the final regulations, at a minimum, contain a similar rule under the IRA.

Commenters also stated that the DOL prevailing wage rates often are defined at the county level, which may include higher cost urban areas and could negatively impact projects on Tribal lands that often occur in the rural portions of such counties. These commenters stated that complying with wage standards set by the DOL for IRA projects could place additional administrative burdens on Tribes by requiring Tribes to administer two sets of prevailing wages (DOL prevailing wage standards for IRA projects and Tribal prevailing wage standards for other projects). As an alternative to permitting Indian Tribal governments to set their own prevailing wage rates for IRA projects, commenters suggested defining the term locality to include Tribal lands as a separate category to allow Tribes to submit a request to the DOL for a supplemental wage determination for that specific Tribal locality.

With respect to the Prevailing Wage Requirements, the Treasury Department and the IRS continue to understand the statutory language of the Code as not reflecting an intent to entirely exempt Indian Tribal governments from the PWA requirements. The statutory language also does not reflect an intent to allow Indian Tribal governments to substitute their own prevailing wage rates for those generally required under the DBA.

However, in accordance with Executive Order 14112, the final regulations provide two special rules that apply to Indian Tribal governments (including a subdivision, agency, or instrumentality of an Indian Tribal government). First, the final regulations provide that an Indian Tribal government, as defined in section 30D(g)(9) of the Code, is excepted from the Prevailing Wage Requirements under the IRA with respect to laborers and mechanics that are employees, within the meaning of section 3121(d)(2), of the Indian Tribal government. This rule also applies to joint ownership arrangements that involve an Indian Tribal government (including a subdivision, agency, or instrumentality of an Indian Tribal government), but only with respect to the employees, within the meaning of section 3121(d)(2), of the Indian Tribal government. As stated in some comments from Tribes, the DOL provides an exception from the DOL prevailing wage rates for work done by Tribal governments using their own employees. Specifically, under the DBA, a government agency may perform construction work in-house with its own employees rather than contract out the work. Work performed by these employees generally is not subject to the DBA requirements because governmental agencies are not considered contractors or subcontractors under the DBA. This is known as the force account exception. The DOL has explained that in cases in which an Indian

Tribal government performs work with its own employees, the force account exception to the DBA generally applies and the Tribal government is not required to pay DOL-determined prevailing wages for work done by its own employees. Tribes historically have relied on this exception. Under these final regulations, Tribes may continue that practice for purposes of the Prevailing Wage Requirements under the IRA.

Second, the Treasury Department and the IRS recognize that Tribal lands generally are not coextensive with a single geographic area for which the DOL may have made an applicable wage determination. Comments from Tribes requested that the final regulations define the term "locality" to include Tribal lands as a separate category to allow Tribes to submit a request to the DOL for a supplemental wage determination for specified Tribal lands. However, defining locality in this way would require that the DOL establish a new administrative process to implement a unique wage determination for Tribal lands; that process is outside of the authority of the Treasury Department and the IRS. Thus, these final regulations do not change the definition of locality to include Tribal lands as a separate category.

However, recognizing that Tribal lands are sovereign territories that may encompass or overlap with numerous geographic areas, the final regulations provide a special rule for Indian Tribal governments that perform construction, alteration, or repair of a facility on Indian land, as that term is defined in 25 U.S.C. 3501(2). Specifically, if the Indian land encompasses or overlaps more than one geographic area with respect to which the DOL has made an applicable wage determination, then the Indian Tribal government may choose the applicable wage determination for any one of those geographical areas and apply that applicable wage determination for work performed on any qualified facility that is located on the Indian land. If the Indian Tribal government chooses to use this alternative applicable wage determination, it must maintain and preserve records sufficient to document the applicable prevailing wage for each laborer or mechanic with respect to each qualified facility on Indian land. This rule applies to a qualified facility that is subject to joint ownership arrangements that involve an Indian Tribal government (including a subdivision, agency, or instrumentality of an Indian Tribal government). This rule is intended to ease the administrative burden on Indian Tribal governments because they can use a single applicable wage determination for all projects on Indian land.

b. Apprenticeship Requirements and Indian Tribal governments

Regarding the Apprenticeship Requirements, some commenters supported an exception for Indian Tribal governments and stated that Tribes may have limited access to registered apprenticeship programs. These commenters stated that Tribal members may face burdens associated with participating in existing State registered apprenticeship programs that are located many miles away. A commenter requested clarification regarding whether Tribes, like States, have the sovereign and jurisdictional authority to develop and certify their own apprenticeship programs rather than being required to use the DOL approval process. The same commenter requested that the Treasury Department and the IRS review and report on any barriers that may disproportionately prevent Tribes from fulfilling the Apprenticeship Requirements. Commenters suggested that if Indian Tribal governments do not have authority to certify their own programs, then the Apprenticeship Requirements could force Tribal governments to rely on State or Federal apprenticeship programs, which may frustrate Indian Tribal governments' efforts to develop their Tribal workforce.

Commenters supporting an Indian Tribal government exception to the Apprenticeship Requirements also stated that the Good Faith Effort Exception places too much onus on Indian Tribal governments to obtain qualified apprentices. These commenters suggested that Indian Tribal governments could need to submit multiple requests to multiple apprenticeship programs and that Indian Tribal governments could need to search across non-Tribal areas to meet the Good Faith Effort Exception. These commenters suggested that the statute did not require this level of apprenticeship coverage. Commenters also stated that the Good Faith Effort Exception may not be met if a registered apprenticeship program can meet some, but not all of the requests for qualified apprentices, and suggested that the Good Faith Effort Exception should be satisfied if a registered apprenticeship program could not fulfill more than 50 percent of a taxpayer, contractor, or subcontractor's request. These commenters also suggested that the Good Faith Effort Exception should be satisfied if a local registered apprenticeship program cannot provide more than 50 percent of the requested qualified apprentices. Commenters also stated that the Good Faith Effort Exception is unreasonable for Indian Tribal governments in rural areas because of the limited access to registered apprenticeship programs. Finally, another commenter suggested creating a database for taxpayers to find Tribal apprenticeship programs within their State.

With respect to the Apprenticeship Requirements, the Treasury Department and the IRS recognize that there may be a limited number of registered apprenticeship programs with an area of operation that includes the geographic location of a facility located on Tribal lands. As explained in Section VIII.B.1.f. of this Summary of Comments and Explanation of Revisions, the final regulations clarify the scope of the Good Faith Effort Exception with respect to situations in which only part of the request is denied. The final regulations confirm that if there is no registered apprenticeship program with a geographic area of operation that includes the location of the facility, taxpayers will be deemed to satisfy the Good Faith Effort Exception for the qualified apprentices they (or the contractor or subcontractor) would have requested for that occupation and location.

Indian Tribal governments may also consider sponsoring their own registered apprenticeship programs to satisfy the Apprenticeship Requirements. The National Apprenticeship Act (NAA) of 1937 (29 U.S.C. 50) authorizes the Secretary of Labor to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices. The Treasury Department and the IRS have consulted with the DOL OA and

understand based on that discussion that although neither the text of the NAA, nor the content of the NAA's implementing regulations at 29 CFR parts 29 and 30, explicitly addresses Indian Tribes, Indian Tribal governments may sponsor registered apprenticeship programs and obtain registration of such a Tribal apprenticeship program by a State or Federal governmental agency that has been designated for that purpose.

Federal apprenticeship regulations (*see* 29 CFR part 29) authorize the DOL to grant recognition, for Federal purposes, to State apprenticeship agencies for the purpose of registering and overseeing apprenticeship programs that operate within their respective jurisdictions, provided that such State apprenticeship agencies operate in accordance with the minimum standards for State apprenticeship agencies that are established by Federal apprenticeship regulations. Nevertheless, the DOL retains the authority under Federal apprenticeship regulations to register any apprenticeship program that operates within the territory of the United States, provided that, as a general matter, the sponsor's proposed program and standards of apprenticeship satisfy the minimum requirements stipulated in 29 CFR parts 29 and 30.

Accordingly, Indian Tribal governments may register their own apprenticeship programs through the DOL OA or with a recognized State apprenticeship agency. In recognition of the unique trust and treaty responsibilities of the Federal Government to Tribal Nations, respect for Tribal sovereignty, and the nation-to-nation relationship between the Federal Government and Indian Tribes, Indian Tribal governments (including a subdivision, agency, or instrumentality of the Indian Tribal government) are encouraged but not required to register programs with the DOL OA. Taxpayers, contractors, and subcontractors can find more information on guidance issued by the DOL OA at *https://www.apprenticeship.gov/about-us/legislation-regulations-guidance*. For an updated map depicting the most recent information regarding registration agencies between the DOL OA and State apprenticeship agencies, please visit: *https://www.apprenticeship.gov/about-us/apprenticeship-system*.

2. Tennessee Valley Authority

Several commenters requested that the final regulations not provide an exception from the PWA requirements for the TVA, citing the lack of statutory authority for such an exception. The Treasury Department and the IRS agree. The final regulations do not create an exception to the PWA requirements for the TVA.

D. *Project Labor Agreements*

The preamble to the Proposed Regulations explained that pre-hire project labor agreements (PLAs) may be used to incentivize stronger labor standards and worker protections in the types of construction projects for which taxpayers may seek the increased credit amount, and having a PLA in place may help ensure compliance with PWA requirements. For these reasons, the Proposed Regulations would have provided that the penalty payment requirements would not apply with respect to a laborer or mechanic employed under a "qualifying project labor agreement" if any correction payment owed to the laborer or mechanic is paid on or before a return is filed claiming an increased credit amount. The Proposed Regulations would have defined qualifying project labor agreement as "a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project." Proposed §1.45-7(c)(6)(ii) would have provided that in order to be considered a qualifying project labor agreement, such agreement must at a minimum: (i) bind all contractors and subcontractors on the construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents; (ii) contain guarantees against strikes, lockouts, and similar job disruptions; (iii) set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement; (iv) contain provisions to pay prevailing wages; (v) contain provisions for referring and using qualified apprentices consistent with section 45(b)(8)(A) through (C) and guidance issued thereunder; and (vi) be a collective bargaining agreement with one or more labor organizations (as defined in 29 U.S.C. 152(5)) of which building and construction employees are members, as described in 29 U.S.C. 158(f).

The Treasury Department and the IRS requested comments on the proposed treatment of PLAs, other ways taxpayers might use PLAs to meet the PWA requirements, and the proposed definition of a qualifying project labor agreement. Several comments were received addressing the proposed treatment of PLAs under the Proposed Regulations.

Several commenters asserted that the Treasury Department and the IRS should not exempt taxpayers using PLAs from the penalty payment requirements. Commenters stated that the proposed rule violates the plain text of the IRA, which includes no PLA provision and does not authorize the 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. Several commenters stated that the IRS should not incentivize or coerce the use of PLAs through a penalty waiver or other benefit. Commenters suggested that PLAs will discourage taxpayers from using their existing workforce. Commenters were also concerned with PLAs increasing the cost of construction. Another commenter suggested that PLA mandates would likely lead to a decrease in hiring of local, minority, women, veteran, and other potentially disadvantaged groups. Other commenters stated that encouraging labor unions was not the intent of the IRA. A commenter also asserted that PLAs force contractors to replace employees with workers from unions, undermine workforce development strategies, force contractors to follow inefficient union work rules, expose workers to wage theft, and expose employers to multiemployer pension plan liabilities. The commenter also asserted that PLA mandates force employees to join a union and pay dues and discourage competition from nonunionized contractors. The commenter claimed that strikes have occurred on PLA projects and that PLAs will not improve efficiency in terms of safety, quality, or project delivery.

In contrast, other commenters asserted that PLAs help ensure compliance with

the PWA requirements. Several commenters requested that taxpayers certifying that construction of a facility is subject to a PLA or a collective bargaining agreement should be entitled to a safe harbor or a rebuttable presumption of compliance with the PWA requirements. Commenters asserted that such a presumption would be warranted because PLAs provide assurances of compliance and contractors operating under PLAs typically pay wages at rates that are at or above the prevailing wage rates. At least one commenter suggested that the final regulations should clarify that a taxpayer is deemed to have satisfied the PWA requirements, including recordkeeping requirements, if the taxpayer can provide proof of a valid PLA.

Other commenters suggested that the final regulations create a two-tier compliance structure under which participants with PLAs are awarded a presumption of compliance on several requirements (or limited review by the IRS on examination) while other taxpayers not participating in PLAs should be subjected to heightened scrutiny by the IRS. A commenter stated that, in the absence of a PLA, violations of PWA requirements would be more prevalent. Therefore, the commenter suggested increasing the oversight and noncompliance penalties for non-PLA projects, mandating robust recordkeeping requirements for non-PLA projects (including the filing of certain documents with the DOL), and creating flexible ratio requirements for PLA projects. Another commenter suggested that taxpayers who are parties to both a collective bargaining agreement and PLA should automatically qualify for the Good Faith Effort Exception.

Some commenters stated that PLAs can help taxpayers ensure payment of prevailing wages, because PLAs will: (i) require employers to provide workers with notice of their pay rates; (ii) include integrated, enforceable grievance and dispute resolution procedures; and (iii) be administered and enforced by unions that are parties to PLAs. Another commenter stated that PLAs typically establish payments to third-party benefit trusts, and that IRS research shows that third-party information can help promote tax compliance. Additionally, another commenter stated that entitling taxpayers to a presumption of compliance if their construction project is subject to a PLA would mitigate enforcement work and therefore preserve IRS resources.

Further, several commenters stated that PLAs help promote the IRA's goals by improving efficiency, coordination, and consistency; reducing administrative costs; preventing increased costs and project delays; providing a steady supply of highly skilled labor; and preventing labor disputes. Some commenters recommended that taxpayers implementing PLAs be exempt from a determination that they intentionally disregarded the PWA requirements.

The Treasury Department and the IRS disagree with commenters asserting that the Proposed Regulation's provisions regarding qualifying project labor agreements are unwarranted, coercive, and would increase costs. For example, studies show that PLAs in general do not lead to a statistically significant increase in construction costs.[22] If a taxpayer believes that a particular PLA would significantly raise the cost of constructing a facility, a taxpayer may choose not to enter into a PLA. In response to concerns about hiring of local, minority, women, veteran, and other potentially disadvantaged groups, the Treasury Department and the IRS note that PLAs often include provisions that create or strengthen equitable paths to construction jobs for underserved workers, including local hire requirements, equitable recruitment goals, and community engagement requirements. Contrary to some commenters' concerns, the final regulations do not require non-union employees to join a union or to pay union dues. The National Labor Relations Act permits employees to choose not to join a union in their workplace. 29 U.S.C. 157. Non-members may choose not to pay union dues and instead pay agency fees that cover only the share of dues used directly for representation, such as for collective bargaining or grievance procedures. Moreover, the final regulations do not require any taxpayer to sign a PLA.

The Treasury Department and the IRS agree with commenters that qualifying project labor agreements can help ensure compliance with the PWA requirements. Under the final regulations, qualifying project labor agreements will be required to include provisions requiring the payment of wages at rates that are not less than the prevailing rates, include contract provisions complying with the Apprenticeship Requirements, and establish mechanisms for workers, labor organizations, and taxpayers to correct any underpayments. These requirements will help ensure that qualifying project labor agreements support compliance with the PWA requirements. The requirements in PLAs, including ongoing monitoring and administration by union officials, enforceable grievance and dispute resolution mechanisms, and notice of pay rates, will also help ensure compliance with the PWA requirements for claiming the increased credit amount. For example, the final regulations require that qualifying project labor agreements must include effective grievance and dispute resolution provisions that would provide workers and unions an independent mechanism for enforcing the PWA requirements included in a qualifying project labor agreement. Grievance and dispute resolution provisions allow workers to resolve disputes about the payment of prevailing wages and other violations of the qualifying project labor agreement before a taxpayer claims the increased credit amount, assisting taxpayers in complying with the final regulations.

Regarding commenters' requests for deemed compliance or a rebuttable presumption of compliance, the final regulations do not adopt these comments. Tax jurisprudence requires taxpayers claiming a tax credit to demonstrate that they have met the statutory requirements and can substantiate their claim. The final regulations provide that the penalties do not apply if a taxpayer uses a qualifying

[22] Emma Waitzman & Peter Philips, UC Berkeley Labor Ctr., Project Labor Agreements and Bidding Outcomes: The Case of Community College Construction in California 3,51 (2017) ((finding no statistically significant difference in costs between PLA and non-PLA projects); Peter Philips & Scott Littlehale, *Did PLAs on LA Affordable Housing Projects Raise Construction Costs?* (Univ. of Utah Dep't of Econ., Working Paper No. 2015-03, 2015) (finding no statistically significant difference in costs between PLA projects and non-PLA projects); Cong. Research Serv., R41310, Project Labor Agreements at 9 (2012) (surveying the empirical literature about the effects of PLAs on costs and finding that it was inconclusive).

project labor agreement and makes the required correction payments before filing a return claiming the credit. The Treasury Department and the IRS have determined that other safe harbors for PLAs or an exemption from a finding of intentional disregard with respect to correction payments would not strengthen compliance and understand this approach to strike the appropriate balance between recognizing PLA benefits for improving compliance with the PWA requirements and maintaining long-standing tax principles.

As the Treasury Department and the IRS noted in the preamble to the Proposed Regulations, pre-hire project labor agreements may be used by a taxpayer to incentivize stronger labor standards and worker protections on a construction project, and having a PLA in place may also help ensure compliance with PWA requirements for claiming the increased credit amount. Accordingly, the IRS would take into account on examination whether a taxpayer has a qualifying project labor agreement in place and would consider books and records substantiating that a qualifying project labor agreement is being complied with as an indication of compliance with the PWA requirements. For example, records that would support substantiating PWA compliance could include attestations by all counterparties that a taxpayer is in compliance with the terms of the qualifying project labor agreement, including the provisions requiring the payment of prevailing wages and the provisions for referring and using qualified apprentices consistent with section 45(b)(8)(A) through (C) and guidance issued thereunder.

Several commenters suggested additions or revisions to the proposed definition of a qualifying project labor agreement and requested clarifications. For instance, a commenter suggested clarifying that proposed §1.45-7(c)(6)(ii) applies to both base penalty amounts and any enhanced penalty due to intentional disregard. Similarly, commenters requested clarifying the impact of using a PLA on any required correction payments. Commenters also asked for the final PWA rules to clarify that the agreed-upon wages under a PLA are prevailing wages for the purposes of PWA requirements. At least one commenter asked whether agreed-upon wages under a PLA or a collective bargaining agreement could be treated as the prevailing wage for PWA purposes. Another commenter explained that generally, under a PLA, the taxpayer must pay the wage rates negotiated with the union, which are often higher than the prevailing wage rates set forth in DOL wage determinations, but under the Proposed Regulations, taxpayers must pay the prevailing wage rate, even if that is lower. Another commenter stated that asking contractors to comply with prevailing wage rates, which may be based on union work rates contained in collective bargaining agreements not publicly available, could add risk for contractors and reduce competition, especially from small businesses.

Additional commenters requested permitting taxpayers to satisfy the Apprenticeship Requirements in the case of a PLA that includes a preference to use qualified apprentices, even if the PLA does not require compliance with all the Apprenticeship Requirements under section 45(b)(8). A commenter asserted that the criteria that the PLA must contain provisions for referring and using qualified apprentices consistent with section 45(b)(8)(A) through (C) and guidance issued thereunder was circular and did not align with PLAs generally. The commenter explained that the requirement that the PLA incorporate the IRA apprenticeship rules undercuts the PLA exception and makes it superfluous. An additional commenter suggested clarifying that a PLA for PWA purposes should allow taxpayers to use both union and non-union registered apprenticeship programs. A commenter also suggested revising the definition of a PLA to include a requirement for referring and using qualified journeyworkers. Similarly, a commenter asked whether a taxpayer may use the journeyworker-to-apprentice ratio under a PLA or a collective bargaining agreement for PWA purposes.

Some commenters requested that the final regulations provide that PLA provisions regarding hiring union workers be optional and that exceptions be explicitly provided for circumstances in which union labor is not available. Commenters suggested that the final regulations should permit contractors who sign a PLA to use their own work rules independent of union collective bargaining agreements. One commenter stated that PLAs must not require payment into union benefit funds as long as contractors have bona fide benefits and are satisfying DBA standards. Similarly, a commenter recommended that the final regulations provide that PLAs can only require the payment of union dues and fringe benefits for the duration of the contract.

A commenter requested that the final regulations adopt the definition for a qualifying project labor organization, largely based in Executive Order 14063 (Use of Project Labor Agreements for Federal Construction Projects), and permit contractors and subcontractors to compete for contracts and subcontracts regardless of whether they are a party to a collective bargaining agreement. The commenter also suggested revising the definition of labor organizations to require some affiliation with a registered apprenticeship program.

A commenter recommended incentivizing taxpayers using a PLA to comply with all of the PLA's provisions, not just PWA-related provisions. The commenter stated that a subset of PLAs (known as community workforce agreements) include provisions beyond the elements defined in the Proposed Regulations. Additionally, a commenter recommended requiring service maintenance workers, like custodians, be included and covered under PLAs used for PWA purposes.

Further, a commenter suggested that recordkeeping related to PLAs be limited to producing a valid PLA covering all laborers and mechanics at the site of work. The commenter also stated that it would be helpful to clarify the role of collective bargaining agreements and a master agreement, as well as the eligible status, if any, of PLAs entered and covering periods before the publication of the proposed rules in the ***Federal Register***. The commenter also requested guidance concerning whether the PLA exception still applies if some, but not all, contractors are able to meet the PLA requirements.

Additionally, a commenter suggested that the PWA rules align the criteria for PLAs with the provisions of commonly used PLA templates or that the final regulations adopt a new template. The commenter stated that the proposed rules presented six criteria for qualifying PLAs,

but many widely used PLA templates do not meet all six criteria.

The Treasury Department and the IRS agree with the comment to clarify that proposed §1.45-7(c)(6)(ii) applies to both the $5,000 penalty and the $10,000 enhanced penalty (for the Prevailing Wage Requirements) and proposed §1.45-8(e)(2)(v) applies to both the $50 penalty and the $500 enhanced penalty (for the Apprenticeship Requirements) due to intentional disregard. Under the Proposed Regulations, the penalty payment requirement would not have applied with respect to a laborer or mechanic employed under a qualifying project labor agreement if any correction payment owed to the laborer or mechanic is paid on or before a return is filed claiming an increased credit amount. The proposed rule was intended to apply to both penalty amounts and requires the taxpayer to make any correction payment owed to any laborer or mechanic on or before the date on which the increased credit amount is claimed. The final regulations provide this clarification with respect to both the Prevailing Wage Requirements and the Apprenticeship Requirements.

The proposed definition of qualifying project labor agreement contains six requirements, including that it must contain provisions to pay prevailing wages. The Treasury Department and the IRS agree with commenters that the definition of the term prevailing wages, for the purposes of a qualifying project labor agreement, requires clarification. The final regulations clarify the definition of qualifying project labor agreement to provide that it must contain provisions to pay wages at rates not less than the prevailing wage rates in accordance with subchapter IV of chapter 31 of title 40 of the United States Code. This clarification aligns with the statutory requirements regarding prevailing wage rates and maintains a clear standard for taxpayers and tax administration. Commenters raised that PLAs often require the payment of wages higher than prevailing wages under the DBA. A qualifying project labor agreement may require the payment of wages at rates that are higher than the wage rates that are required by section 45(b)(7)(A).

The proposed definition of qualifying project labor agreement also would have provided that it must contain provisions for referring and using qualified apprentices consistent with section 45(b)(8)(A) through (C) and guidance issued thereunder. The statute defines qualified apprentice and provides the Apprenticeship Requirements. Accordingly, the final regulations do not adopt comments to modify the Apprenticeship Requirements for a qualifying project labor agreement.

Regarding additions to the proposed definition of qualifying project labor agreement, the Treasury Department and the IRS considered these comments and have not adopted these comments in the final regulations. Specific requirements or contractual language in a PLA may arbitrarily exclude many PLAs from the proposed definition of a qualifying project labor agreement for reasons unrelated to ensuring compliance with the PWA requirements. A PLA is a negotiated contract and parties must have the appropriate flexibility to negotiate provisions. Nothing in the final regulations precludes parties from negotiating additional local hire, equity, or community engagement provisions in a PLA. Since each PLA is negotiated in response to unique project needs and labor market conditions, the Treasury Department and the IRS do not adopt the comment to require a PLA template.

Specific to the nuclear industry, a few commenters proposed that PLA provisions in PWA rules be expanded to include collective bargaining agreements negotiated by nuclear operators and unions covering their direct employees. A commenter suggested also recognizing that such collective bargaining agreements establish the prevailing wages for their unique classification of nuclear employees that perform alterations or repairs. The commenter stated that there are significant differences in the collective bargaining and benefit practices between the construction and nuclear industries. A few commenters suggested amending the rules to permit wages paid pursuant to collective bargaining agreements to qualify as payment of prevailing wages under section 45U(d)(2). One commenter stated that at a minimum, wages paid pursuant to already-existing collective bargaining agreements should be accepted as payment of prevailing wages. Similarly, solely for purposes of section 45U, one commenter requested that wages and benefits paid to non-unionized direct employees be accepted as payment of prevailing wages, if the sum is equal to the collectively-bargained wages and benefits paid to geographically proximate direct employees of a qualified nuclear facility. The commenter also suggested that provisions regarding PLAs in the Proposed Regulations be revised to include taxpayers that have a collective bargaining agreement covering their own employees that perform alteration and repair on facilities eligible for the section 45U credit. The commenter also suggested that existing collective bargaining agreements be deemed to satisfy section 45U(d)(2)(A). One commenter requested that wages and benefits paid pursuant to a collective bargaining agreement negotiated between a taxpayer and a union recognized as the workers' bargaining representative by the National Labor Relations Board, be deemed to comply with prevailing wage rules under section 45U.

A commenter requested a prevailing wage safe harbor for section 45U to recognize the unique characteristics of nuclear power facilities. Another commenter requested permitting, solely for purposes of section 45U, qualified nuclear power facilities that do not directly employ collectively-bargained laborers and mechanics to benchmark themselves against other similar qualified nuclear power facilities that do directly employ collectively-bargained laborers and mechanics for purposes of determining whether the facility is deemed to pay prevailing wages to its directly employed employees. The commenter stated that even if not unionized, a nuclear operator's craft employees perform the same work under the same conditions as unionized employees and receive generally equivalent wages, participate in the same employer-sponsored benefit plans, and receive benefits equivalent to if not identical to unionized employees.

The Treasury Department and the IRS recognize the nuclear power industry's unique circumstances and that nuclear operators cannot enter into qualifying project labor agreements as they would have been defined under the Proposed Regulations. The section 45U credit has Prevailing Wage Requirements for alteration or repair work of a qualified nuclear power facility, but not during construction. For taxpayers seeking the section 45U

credit, a collective bargaining agreement provides workers conducting an alteration or repair the same assurances of up-front compliance that a PLA would, including union oversight and private enforcement. A taxpayer that has a collective bargaining agreement for a qualified nuclear facility that meets minimum requirements analogous to the minimum requirements for a qualifying project labor agreement should also benefit from the rule that penalties do not apply if any correction payment owed to a laborer or mechanic is paid before the increased credit amount is claimed. In response to the comments, the final regulations modify the definition of qualifying project labor agreement for section 45U. For purposes of section 45U, in order to be a qualifying project labor agreement, such agreement must, at a minimum: (i) be a collective bargaining agreement with one or more labor organizations (as defined in 29 U.S.C. 152(5)) of which employees of the qualified nuclear power facility are members and such agreement establishes the terms and conditions of employment at the qualified nuclear power facility; (ii) contain guarantees against strikes, lockouts, and similar job disruptions; (iii) set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the collective bargaining agreement; and (iv) contain provisions to pay wages at rates not less than the prevailing rates in accordance with subchapter IV of chapter 31 of title 40 of the United States Code.

VI. *Applicable Scope of the PWA Requirements*

Section 45(b)(7)(A) provides that with respect to any qualified facility, the taxpayer must ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in "the construction of such facility" and for the 10-year period after the facility is placed in service, "the alteration or repair of such facility" are paid wages at rates not less than the applicable prevailing wage rates. Under section 45(b)(7)(A)(ii), the prevailing wage rates that are required to be paid with respect to such construction, alteration, or repair are determined by reference to the prevailing rates for construction, alteration, or repair of a similar character in the locality in which such facility is located.

Section 45(b)(8) sets forth the Apprenticeship Requirements that apply "with respect to the construction of any qualified facility." Under the Labor Hours Requirement, section 45(b)(8)(A)(i) provides that taxpayers must ensure "with respect to the construction of any qualified facility" that the applicable percentage of the total labor hours is performed by qualified apprentices. Under the Participation Requirement, 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 the construction of a qualified facility" must employ one or more qualified apprentices.

The Proposed Regulations would have defined the scope of taxpayers' obligation to comply with the PWA requirements consistent with this statutory language. Under the Proposed Regulations, taxpayers would have been required to comply generally with respect to the construction of a qualified facility. The Proposed Regulations did not define the meaning of construction of a qualified facility for purposes of either the Prevailing Wage Requirements or the Apprenticeship Requirements.

Proposed §1.45-7(d)(2)(i) would have defined "construction, alteration, or repair" to mean construction, prosecution, completion, or repair as defined in 29 CFR 5.2. Under 29 CFR 5.2, construction, prosecution, completion, or repair is defined expansively to include "all types of work" done on a particular building or work at the site of the work, as defined in 29 CFR 5.2, by laborers and mechanics employed by a contractor or subcontractor. This work includes altering, remodeling, installing of items fabricated offsite; painting and decorating; manufacturing or furnishing of materials, articles, and supplies or equipment on the site of the work; and certain demolition or removal activities.

Under the Proposed Regulations, the scope of the requirement to pay wages at rates not less than the prevailing rates would be clarified by the "site of the work" definition under the DBA. Under the DBA, the requirement to pay prevailing wages is limited by statute to work performed "directly on the site of the work."[23] Under the DBA, secondary construction sites are considered part of the site of the work if a significant portion of a building or work is constructed at the secondary site for specific use in the designated building or work and the site either was established specifically for the performance of the covered contract or project or dedicated exclusively, or nearly so, to the covered contract or project for a specific period of time. By comparison, section 45(b)(7)(A)(i) and (ii) requires the payment of prevailing wages generally in the construction of a qualified facility and the alteration or repair of such facility. As explained in the preamble to the Proposed Regulations, the language of section 45(b)(7)(A) could be, but does not need to be, interpreted to support an expansive reading of construction such that all construction of a qualified facility, wherever located and however small, would be subject to the Prevailing Wage Requirements, resulting in a significantly broader scope under section 45(b)(7) than under the DBA. The Proposed Regulations would have taken a less expansive reading and applied the scope of the Prevailing Wage Requirements to the site of the work, consistent with the DBA rules.

The Treasury Department and the IRS understood the DBA approach to the site of the work as providing useful guidance for balancing the requirements to pay wages at rates not less than prevailing rates with respect to the construction of a qualified facility and existing construction practices in cases in which some construction activities related to a facility may occur in multiple locations. This approach is also consistent with the principle outlined in Section I.A. of this Summary of Comments and Explanation of Revisions to incorporate the DBA requirements that are relevant for claiming the increased credit amount and consistent with sound tax administration. The Proposed Regulations would have largely adopted the DBA approach (including rules relating to secondary

[23] 40 U.S.C. 3142(c)(1).

sites) for purposes of defining the scope of the Prevailing Wage Requirements in proposed §1.45-7(d)(6). Under proposed §1.45-7(d)(6), taxpayers would have been subject to the requirement to ensure that laborers and mechanics are paid wages at rates not less than prevailing wage rates with respect to the construction, alteration, or repair at the locality in which the facility is located, which is defined to include any secondary sites where a significant portion of the construction, alteration, or repair of the facility occurs, provided that the secondary site either was established specifically for, or dedicated exclusively for a specific period of time to, the construction, alteration, or repair of the facility.

Many commenters requested clarification of how the definition and the site of the work DBA-concept applies across the various Code sections for purposes of determining what work performed in the construction, alteration, or repair of a qualified facility is subject to the Prevailing Wage Requirements. Commenters also emphasized that the site of work definition must reflect the expanded realities of modern construction practices, under which a large and growing percentage of construction, alteration, and repair work is performed offsite through either prefabrication, modularization, or both. A commenter recommended that the site of work definition account for recent technological developments in which the COVID-19 pandemic magnified the need to build spaces that can be rapidly adjusted. A commenter stated that a number of legal challenges to newly added provisions to the regulations under the DBA are expected to be filed, creating ambiguity and a lack of reliability. Commenters also suggested providing specific examples relevant to clean energy projects.

Commenters requested that the site of work for PWA purposes no longer incorporate the DOL definition, based on the DBA. Commenters opined that site of the work for PWA purposes should not be based on the scope of the DBA and should not extend to offsite or secondary construction sites, including manufacturing sites, access roads, substations, buildings, and similar property. Commenters argued that incorporating the DOL definition of site of the work leads to an overly broad application of the PWA requirements to such activities as offsite manufacturing facilities, dedicated production lines, or modular facilities that service multiple projects but that may service a single large project for an extended period of time – which is not uncommon in the clean energy industry. Commenters also sought guidance concerning the treatment of property such as access roads and substations that may not be eligible property associated with a qualified facility resulting in a scope of the PWA requirements reaching beyond the qualified facility that is eligible for the increased credit amount. One commenter stated that the incorporation of the site of work may subject some taxpayers to different enforcement schemes because the projects may be subject to State or local prevailing wage laws.

Commenters also suggested that if the DBA approach is adopted in the final rule, that any discussion of secondary manufacturing facilities distinguish with examples between genuine offsite manufacturing activities and those that the newly expanded DBA definition would include. Commenters requested that the Prevailing Wage Requirements not apply to manufacturing facilities, dedicated production lines, prefabrication facilities, laydown yards, or "mod-yard" locations that generally service multiple projects and customers. A commenter requested that the final regulations clarify that structures established prior to the start of construction of the qualified facility are not covered by the phrase "site of the work" irrespective of their adjacency or dedication to that site. The commenter also suggested that adjacent or virtually adjacent locations should not be covered by the PWA requirements if they exceed a 2-mile perimeter.

In contrast, other commenters urged the Treasury Department and the IRS to use the DBA site of work definition for the PWA requirements, including secondary sites that are established specifically for the performance of the covered contract or project or dedicated exclusively, or nearly so, to the covered contract or project for a specific period of time. These commenters emphasized the lack of statutory language in the IRA limiting the application of prevailing wage rules based on where work in furtherance of the project is performed and also suggested defining site of work to cover all locations where construction of a covered project is performed. Another commenter claimed that Congress deliberately chose to draft section 45(b)(7)(A) in broader terms than the DBA and recommended that the final regulations apply to all construction sites where integral components of the facility are constructed and dedicated support sites. Commenters recommended that the IRS follow DBA court decisions and mirror the considerations of DBA regulations.

The Treasury Department and the IRS agree with commenters that additional clarity is warranted with respect to defining the scope of the PWA requirements. The Prevailing Wage Requirements apply with respect to the construction of a facility and with respect to the alteration or repair of a facility. The Apprenticeship Requirements apply with respect to construction of a facility. While the terms construction, alteration, and repair draw meaning from the DBA, Congress did not qualify the scope of such activities by the site of the work rule found explicitly in the DBA in defining the scope of the PWA requirements under the IRA. Instead, section 45(b)(7) and (8) limit the scope of construction, alteration, or repair to those activities occurring with respect to a qualified facility. The term qualified facility (as described in section 45 and guidance thereunder) has specific meaning for tax purposes.[24]

The final regulations clarify that the PWA requirements apply with respect to a qualified facility within the meaning of section 45. The Treasury Department and the IRS recognize that only a portion of a construction project may be used to produce energy covered by the IRA tax credits. Under the general rule provided for in the final regulations, the PWA requirements apply to the portion of the activity that is creditable or deductible per

[24] *See, e.g.,* Rev. Rul. 94-31, 1994-1 C.B. 16.

the Code under the respective underlying section.[25]

As discussed elsewhere in this preamble, the Treasury Department and the IRS have incorporated DBA rules if relevant and helpful for tax administration. Despite the differing statutory language with respect to scope, the DOL approach to site of the work under the DBA regulations is instructive for application of the PWA requirements with respect to activities that may occur at locations other than the location of the facility. Accordingly, the final regulations continue to use the DBA concept of site of the work with respect to secondary sites to define the scope of the PWA requirements for work that occurs at secondary locations.

The Treasury Department and the IRS also agree with the concerns raised by the commenters on how the secondary site rule could impact manufacturing activities that occur at offsite locations and are performed by unrelated parties. The final regulations clarify that adoption of the site of the work concept is designed to define the scope of the PWA requirements and prevent an application of the rules that would result in all work on a facility, wherever performed and however small, being subject to the requirements. Under the final regulation, unrelated third-party manufacturers who produce materials, supplies, equipment, and prefabricated components for multiple customers or the general public would not be subject to the PWA requirements.

VII. *Prevailing Wage Requirements*

A. *In general*

Section 45(b)(7)(A)(i) requires that with respect to a qualified facility, taxpayers who are seeking an increased credit amount ensure that laborers and mechanics employed by the taxpayer, or any contractor or subcontractor in the construction of such facility are paid wages at rates not less than the prevailing rates determined by the DOL in accordance with the DBA. Section 45(b)(7)(A)(ii) further requires that prevailing wages are paid with respect to alteration or repair of a qualified facility for any portion of a taxable year that is within the 10-year period beginning on the date the qualified facility was placed in service. Proposed §1.45-7(a) generally would have provided that a taxpayer claiming or transferring (under section 6418) the increased credit amount under section 45(b)(6)(B)(iii) with respect to any qualified facility must satisfy the requirements of section 45(b)(7) and proposed §1.45-7. Proposed §1.45-7(b)(1) would have provided that a taxpayer needs to ensure that the wages paid to laborers and mechanics employed by the taxpayer, contractor, or subcontractor in the construction, alteration, or repair of the facility must be not less than the prevailing rates in the geographic area in which such facility is located. Proposed §1.45-7(b)(6) would have provided that all laborers and mechanics working on a qualified facility must be paid in the time and manner consistent with the regular payroll practices of the taxpayer, contractor, or subcontractor.

A few commenters requested that the final regulations require taxpayers, contractors, and subcontractors to adopt weekly payroll practices, as is required for DBA-covered contracts. The commenters stated that requiring weekly payroll would deter fraud and enable taxpayers to ensure that contractors and subcontractors comply with PWA requirements. Many other commenters supported the payment of prevailing wages consistent with the taxpayer's regular payroll practices. The commenters supported the flexibility of the proposed rule and stated that a weekly payroll requirement would not assist the IRS in administering the PWA requirements.

Section 45(b)(7) requires that laborers and mechanics be paid wages at rates not less than the prevailing rates; there is no statutory requirement that laborers and mechanics must be paid on a weekly basis. As several commenters stated, taxpayers, contractors, and subcontractors should have the flexibility to pay their workers in accordance with their ordinary payroll schedules. For these reasons, these final regulations adopt the proposed rule requiring payment in the time and manner consistent with the regular payroll practices without change.

A commenter requested that the final regulations provide an exception for effective compliance with the Prevailing Wage Requirements. The limited penalty waiver in §1.45-7(c)(6) and described in Section VII.D.4. of this Summary of Comments and Explanation of Revisions provides sufficient relief for inadvertent, minor errors. Another commenter suggested clarifying whether a taxpayer would be deemed to satisfy the Prevailing Wage Requirements for a given year after a facility is placed in service if neither alterations nor repairs were performed during that year. The final regulations clarify that after a facility is placed in service, taxpayers are only required to meet the Prevailing Wage Requirements with respect to alterations and repairs if alterations or repairs are actually performed during the relevant period.[26] The final regulations also provide that if there is no alteration or repair that occurs during the relevant year, the taxpayer is deemed to satisfy the Prevailing Wage Requirements with respect to that year.

Commenters asked that the final regulations clarify whether the applicable prevailing wage rate is based on where

[25] Accordingly, as applicable, the PWA requirements apply under section 30C with respect to a qualified alternative fuel vehicle refueling project described in section 30C(g)(1)(B) (consisting of one or more qualified properties within the meaning of section 30C(c) that are part of a single project); under section 45L with respect to a qualifying residence described in section 45L(a)(2)(B) (that meets the requirements of section 45L(c)(1)(A) or (B), as applicable); under section 45Q, with respect to a qualified facility and any carbon capture equipment placed in service at that facility within the meaning of section 45Q(d); under section 45U with respect to a qualified nuclear power facility within the meaning of section 45U(b); under section 45V with respect to a qualified clean hydrogen production facility within the meaning of section 45V(c)(3); under section 45Y with respect to a qualified facility within the meaning of section 45Y(b); under section 45Z, with respect to a qualified facility within the meaning of section 45Z(d)(4) producing transportation fuel (as defined in section 45Z(d)(5)) or sustainable aviation fuel (as defined in section 45Z(a)(3)(B)); under section 48C, with respect to a qualified investment (as defined in section 48C(b)) in a qualifying advanced energy project within the meaning of section 48C(c)(1)(A); and under section 179D, with respect to energy efficient commercial building property within the meaning of section 179D(c)(1), and energy efficient building retrofit property pursuant to a qualified retrofit within the meaning of section 179D(f); and in each case including any guidance issued thereunder the relevant Code section.

[26] This rule does not apply with respect to sections 30C, 45L, 48C, and 179D as those Code sections do not include a continuing obligation for the payment of prevailing wages with respect to any alterations or repairs that occur after the placed in service date.

the project is being constructed or where the contractor is performing their work. Another commenter stated that in most cases the wages paid are based on the local market where the contractor or subcontractor obtains their labor. Section 45(b)(7)(A) provides that the prevailing wage rate is based on the locality of the facility that is being constructed. The Proposed Regulations similarly would have provided that the wage rates must be not less than the prevailing rates in the geographic area in which such facility is located. The final regulations continue to use the DBA concept of site of the work to address construction of a qualified facility that occurs at one or more secondary locations. The applicable prevailing wage rate that must be paid to laborers and mechanics is determined by the location of the work performed, which may be the location of the qualified facility or any secondary locations.

The Proposed Regulations would have provided a special rule for qualified facilities located offshore so taxpayers would not need to request a supplemental wage determination for offshore facilities. Under the Proposed Regulations, in lieu of requesting a supplemental wage determination for a facility located in an offshore area within the outer continental shelf of the United States, a taxpayer, contractor, or subcontractor would be permitted to rely on the general wage determination for the relevant category of construction that is applicable in the geographic area closest to the area in which the qualified facility will be located. To the extent that the PWA requirements apply to onshore activities related to an offshore wind facility, one commenter suggested clarifying that the locality in which such onshore activities occur, and not where the offshore wind facility is located, would determine prevailing wage rates for those activities. A commenter expressed their support for permitting offshore facilities to use the general wage determination applicable to the closest onshore area to the facility. The proposed rule is adopted without change. Onshore activities that are also considered construction of a facility within the scope of the PWA requirements must pay wages at rates not less than the applicable prevailing rates for the location of the work performed.

B. *Determining the applicable prevailing wage rate*

1. General Wage Determinations

Section 45(b)(7)(A) requires that with respect to a qualified facility, taxpayers who are seeking an increased credit amount ensure that laborers and mechanics employed by the taxpayer, or any contractor or subcontractor, in the construction, alteration, or repair of such facility are paid wages at rates not less than the prevailing rates as most recently determined by the DOL in accordance with the DBA. As stated in the preamble to the Proposed Regulations, prevailing wage rates are those determined to be prevailing for laborers and mechanics for the various classifications of work performed with respect to a specified type of construction in a geographic area. Under the Proposed Regulations, prevailing wage rates would be determined by the DOL in accordance with the DBA if they are issued and published by the DOL as a general wage determination or if issued to a taxpayer as part of a supplemental wage determination or pursuant to a request for a wage rate for an additional classification.

With respect to the proper timing of a wage determination, proposed §1.45-7(b)(5) would have provided that the applicable prevailing wage rates on a general wage determination are those in effect at the time construction, alteration, or repair of the facility begins, and generally remain valid for the duration of the work performed with respect to the construction, alteration, or repair of the facility by the taxpayer, contractor, or subcontractor. Taxpayers who perform any alteration or repair of a facility after the facility is placed in service would have been required to use the applicable wage determination in effect at the time the alteration or repair work begins.

Commenters suggested aligning the timing of wage determinations with the DOL regulations under the DBA, including updates to the DBA regulations released in August of 2023, to minimize taxpayer confusion. Several commenters requested that the final regulations provide that prevailing wage rates be established for the entire project when construction contracts are executed, not when construction begins, consistent with the DBA. Commenters emphasized that prevailing wage determinations are an important factor in determining the cost of labor and that project costs need to be known ahead of time to accurately bid on contracts. Commenters asserted that waiting until construction begins to determine labor costs will lead to financial uncertainty and may discourage participation in construction projects by many contractors because contractors need to know what the prevailing wage obligations are prior to bidding for a project. The commenter stated that the need to apply new wage rates at the start of construction would be disruptive and create unnecessary financial risk for contractors after they have entered into a contract for construction of a facility.

Commenters stated that portions of the Proposed Regulations refer to a contract when referencing the timing of a DBA wage determination, while others refer to a facility, and requested clarification. Another commenter stated that the approach in the Proposed Regulations conflicts with early guidance issued by the DOL regarding IRA prevailing wage compliance.[27] A few commenters requested that the final regulations retain the rule that the wage determination be determined at the beginning of construction or revise the rule to provide for the determination of wage rates at the project level to avoid multiple wage rates for the same work. These commenters stated that because there is no analogous prime contract with a Federal agency as under the DBA, connecting the wage determination timing to the execution of a contract could be challenging. Commenters stated that determining prevailing wage rates at the project level would allow for greater consistency between contractors and subcontractors. Another commenter emphasized that each taxpayer, contractor, and subcontractor should be subject to the same

[27] U.S. Dept. of Labor, *Davis-Bacon and Related Acts (DBRA) Frequently Asked Questions*, §III.11, https://www.dol.gov/agencies/whd/government-contracts/construction/faq.

applicable wage determination. At least one commenter suggested that the final regulations should permit taxpayers to use wage determinations at the time contracts are executed or when construction begins.

The DBA framework is predicated on a Federal contract for the construction of public buildings and public works between the Federal Government and contractors. Under the DBA, every contract to perform construction, alteration, or repair to which the Federal Government is a party must contain a provision stating the prevailing wage rates to be paid to various classes of laborers and mechanics. The DBA regulations generally provide that the applicable wage rates for a contract are those in effect at the time the prime contract is awarded by the Federal contracting agency.[28] By contrast, under the PWA requirements, there is no contracting party directly analogous to the Federal Government. Under the Prevailing Wage Requirements, taxpayers are required to ensure the payment of at least prevailing wages, but they may do so through the execution of multiple contracts and subcontracts or may perform the work with their own employees.

Because of the perceived difficulty in assigning a fixed time to establish the applicable prevailing wage rates based on the execution of contracts, the proposed rules would have provided that the applicable prevailing rates are determined at the beginning of construction. However, the Treasury Department and the IRS understand the need for taxpayers to reduce uncertainty and determine expected labor costs prior to entering into contracts for the construction of a facility. Additionally, the Treasury Department and the IRS agree that the "in accordance with" language in section 45(b)(7) supports drawing from the DBA rules to determine the appropriate timing for establishing the applicable wage rates. Accordingly, the final regulations are revised to provide that the applicable prevailing rates are determined at the time the contract for the construction, alteration, or repair of the facility is executed by the taxpayer (or the taxpayer's designee, assignee, or agent) and a contractor. The prevailing wage rates at the time such contract is executed apply to all subcontractors of that contractor. In circumstances in which a taxpayer (or the taxpayer's designee, assignee, or agent) executes separate contracts with more than one contractor, then for each such contract, the applicable prevailing rates with respect to any work performed by the contractor (and all subcontractors of the contractor) are determined at the time the contract is executed by the taxpayer (or the taxpayer's designee, assignee, or agent) and the contractor. In the absence of a contract, or if a contractor or subcontractor is unable to determine the date of execution of the contract, the final regulations provide that the applicable wage determinations are those in effect at the time construction starts.

These revisions address commenters' practical business concerns regarding costs and financing and provide greater consistency with how the applicable wage rates are established under the DBA. The final regulations address the concern of commenters that various wage rates would apply, or that costs will not be able to be determined up front, because they apply the rate at the time the contract is executed between the taxpayer and a contractor to all subsequent contracts that flow from such contract. Thus, consistent with the DBA, the final regulations allow for more than one wage determination to apply with respect to the construction, alteration, or repair of a facility in cases in which a taxpayer executes separate contracts with more than one contractor, but nonetheless provide certainty for the taxpayer, contractor, and subcontractor with respect to any work performed pursuant to that contract.

The final regulations also adopt a similar framework for alterations or repairs that occur after the facility is placed in service with applicable wage determinations applying when a contract is executed between a taxpayer and contractor for the alteration or repair of a facility, or absent a contract, when the repair or alteration starts. The final regulations also add all contracts for construction, alteration, or repair to the list of records that may be necessary to demonstrate compliance with the applicable Prevailing Wage Requirements.

Under the Proposed Regulations, taxpayers generally would not have been required to update the applicable prevailing wage rates during construction of the facility in the event a new general wage determination was published by the DOL after construction of the facility begins. The preamble to the Proposed Regulations stated that a new wage determination would be required if the contract is changed to include additional, substantial construction, alteration, or repair work not within the scope of work of the original contract, or to require work to be performed for an additional time period not originally obligated, including in the case of an option to extend the term of a contract for the construction, alteration, or repair being exercised. Proposed §1.45-7(b)(5) mirrored the language in the preamble, but omitted the term substantial from the rule. The Proposed Regulations also would have provided that taxpayers would need to update the applicable wage rate(s), as necessary, with respect to any alteration or repair of a facility that begins after the facility has been placed in service. Taxpayers would do this by ensuring that wages are paid for such alteration or repair based on the general wage determination in effect when the alteration or repair begins.

Several commenters were concerned about the requirement to update prevailing wage rates during the lifespan of a construction project. Commenters suggested clarifying how to determine when, under the Proposed Regulations, an additional time period not originally obligated has occurred that necessitates obtaining a new wage determination. The commenters stated that the language with respect to an additional time period is ambiguous and could apply to ordinary delays and extensions that are common in construction projects. Commenters requested that the terms substantial and additional be defined, or a *de minimis* value be set, to better clarify the threshold of new work or additional time above which taxpayers would be required to seek a new wage determination.

[28] Under 29 CFR 5.2, the term "contract" means any prime contract that is subject wholly or in part to the labor standards provisions of any of the laws referenced by 29 CFR 5.1 and any subcontract of any tier thereunder, let under the prime contract.

The commenters recommended inclusion of language from the DBA regulations to clarify that a new wage determination is not required if additional time is given to complete the original commitment or if the additional construction, alteration, and/or repair work as part of the modification is merely incidental. Other commenters recommended the final regulations include a substantiality threshold consistent with DBA regulations. One commenter suggested the final regulations require new wage rates only if there is a cardinal change to a covered project. Another commenter suggested limiting the need for additional wage determinations to increases in the project's budget of at least 30 percent or delays of at least 120 days to the project's expected completion date. One commenter suggested that the wage determination in effect at the beginning of a taxpayer's taxable year be used for all alterations and repairs occurring in the years after a facility is placed in service.

The Treasury Department and the IRS agree that clarifications are needed and that the rules regarding when a new wage determination is required should be consistent with the rules under the DBA. Under the DBA guidance in 29 CFR 1.6, if there is additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order, or changes to require the contractor to perform work for an additional time period not originally obligated, including cases in which an option to extend the term of a contract is exercised, the contracting agency must include the most recent revision of any wage determination(s) at the time the contract is changed or the option is exercised. This does not apply if the contractor is simply given additional time to complete its original commitment or if the additional construction, alteration, and/or repair work in the modification is merely incidental. The DBA regulations also provide rules with respect to contracts for construction, alteration, or repair work over a period of time that is not tied to the completion of any specific work, such as indefinite operations and maintenance or repair contracts. The DBA regulations require contractors who are parties to these types of contracts to update the applicable wage rates for such contracts on an annual basis. The revised wage determination then applies to any alteration or repair work that begins under such a contract during the 12 months following the update until such construction work is completed, even if the completion of that work extends beyond the twelve-month period.

Accordingly, the final regulations update the proposed rule to include the substantiality requirement discussed in the preamble to the Proposed Regulations, and further clarify that the requirement to update the wage determination does not apply if the contractor is given more time to complete its original commitment or if the additional work is merely incidental. The final regulations also update the proposed rule to provide that if a taxpayer enters into a contract for alteration or repair work over an indefinite period of time that is not tied to the completion of any specific work, the applicable wage rates must be updated on an annual basis.

2. Applicable Prevailing Wage Rate for General Wage Determinations

The Proposed Regulations would have provided that a general wage determination would be one issued and published by the DOL that includes a list of wage and bona fide fringe benefit rates determined to be prevailing for laborers and mechanics for the various classifications of work performed with respect to a specified type of construction in a geographic area. As stated in the preamble to the Proposed Regulations, generally, the DOL conducts surveys to determine the prevailing rate based on wage rate data submitted by contractors, contractors' associations, labor organizations, public officials, and other interested parties. In general, the Proposed Regulations would have provided that to determine the applicable prevailing wage rates, taxpayers would need to use the general wage determination(s) published by the DOL under the DBA on a DOL approved website. The current DOL approved website for publishing general wage determinations is *https://www.sam.gov*.

Section 45(b)(7)(A) requires that taxpayers ensure the payment of prevailing wages at rates not less than the prevailing rates determined in accordance with the DBA. The Proposed Regulations would have largely incorporated the definition of wages from 29 CFR 5.2 for the Prevailing Wage Requirements. Under the Proposed Regulations, wages would be defined as the basic hourly rate of pay; any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor that may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the laborers and mechanics affected. The Proposed Regulations would have also incorporated by reference the rules set forth in 29 CFR 5.25 through 5.33 with respect to the costs for bona fide fringe benefits that may be credited for purposes of the payment of wages. The Proposed Regulations would have prescribed rules with respect to the payment of wages including that the payment of wages be made without deduction (except such payroll deductions as are required by the law or permitted by regulations issued by the Secretary of Labor) and must consist of the full amount of wages (including bona fide fringe benefits or cash equivalents thereof). Under the Proposed Regulations, whether amounts are wages for purposes of the Prevailing Wage Requirements would not be relevant in determining whether amounts are wages or compensation for other Federal tax purposes.

One commenter suggested that prevailing wage rates established by the DOL fail to take into account actual compensation to workers, including fringe benefits, in all cases. The commenter suggested that to calculate prevailing wage amounts, an employer would not be able to take credit for the cost to set up and offer medical insurance if an employee opts out of medical coverage. The commenter also stated that taxpayers who enter into a collective bargaining agreement may be disadvantaged, because the agreement could set the wages and benefits below the prevailing wage amounts for covered employees. The commenter suggested establishing a safe harbor whereby a taxpayer would be deemed to satisfy Prevailing Wage

Requirements if a substantial number – defined as 90 percent – of their employees are paid prevailing wages.

This comment appears to misstate the DBA requirements, and to the extent the comment addresses the determination of prevailing wage rates for purposes of the DBA, the comment is outside the scope of these regulations. The Proposed Regulations would have largely incorporated the definition of wages from 29 CFR 5.2 for the Prevailing Wage Requirements. Under 29 CFR 5.2 wages include any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor that may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the laborers and mechanics affected. The Proposed Regulations would have therefore included in the payment of prevailing wages, the rate of costs to an employer to provide bona fide fringe benefits. Additionally, the statute requires the payment of prevailing wages in accordance with the DBA and does not allow lower wage rates because there is a collective bargaining agreement or if 90 percent of workers have been paid the applicable wage rates. Accordingly, the changes suggested by the commenter are not incorporated.

A commenter stated that the Proposed Regulations impose no obligation on taxpayers to confirm that fringe benefit contributions by contractors are made to bona fide entities. The commenter suggested requiring taxpayers to: (i) provide notice of an enforceable commitment to provide bona fide fringe benefits, and (ii) confirm that fringe benefit contributions made on behalf of laborers and mechanics by contractors and subcontractors are made to a bona fide fringe benefit fund, plan, or program. Another commenter request that the final regulations specifically allow for the payment of non-required forms of compensation, such as paying for a portion of health insurance, to make up for any wage payments that are below the prevailing wage rate.

Consistent with the DBA, the final regulations clarify that a taxpayer may discharge its wage obligations for the payment of prevailing wages by paying the full amount in cash, by making payments to a bona fide fringe benefit provider or incurring costs for bona fide fringe benefits, or by a combination thereof. As discussed previously, wages are defined to include contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program. Failures by contractors or subcontractors to make payments to bona fide plans or programs may result in laborers and mechanics being paid wages at rates less than the required prevailing wage rates. However, there is flexibility because the taxpayer, contractor, or subcontractor can pay the entire prevailing wage amount through the basic hourly rate, including the cash equivalent of fringe benefits. They are permitted, but not required, to provide bona fide fringe benefits. If they do provide bona fide fringe benefits, the cost of those benefits is included in the prevailing wage rate. It is ultimately the taxpayer's responsibility to ensure compliance with the Prevailing Wage Requirements. These final regulations do not require any specific method for the taxpayer to ensure compliance; however, taxpayers must maintain records reflecting that compliance.

Other commenters opined that the DOL prevailing wage rates are based on unreliable methodologies and are flawed and inaccurate. A commenter stated that existing prevailing wage laws have an inflationary impact on construction costs. Similarly, a commenter suggested that the rates used for the wages are generally drawn from the nearest urban center and don't necessarily reflect local market conditions. A commenter expressed that the prevailing wage rates published by the DOL are subject to change and can vary greatly by location, category, and job type. The commenter suggested the uncertainty of prevailing wage rates will inhibit investment in clean energy projects and raise the cost and risk of such projects.

Under section 45(b)(7)(A), the increased credit amount provided by section 45(b)(6) is available with respect to a qualified facility if a taxpayer ensures that laborers and mechanics are 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 DBA. The statute mandates the use of prevailing wage rates determined by the DOL. The DOL wage determination survey process and data sufficiency are outside the scope of these final regulations.

Commenters also stated that union classifications are complex and confusing and that nonunion contractors may struggle to classify certain jobs with descriptions contained in collective bargaining agreements that are not shared publicly. The commenter raised that the DOL has applied union work rules and job descriptions to any classification for which the union rate prevails. A commenter recommended that taxpayers, contractors, and subcontractors should not be penalized for failing to conform to job descriptions that are not published by the DOL and/or the unions whose wage scales are found to be prevailing. The commenter suggested that, at a minimum, no intentional violation penalty should be assessed in the absence of publication of the job descriptions for each trade, which can be readily accomplished by posting hyperlinks to union collective bargaining agreements, or the DOL dictionary of occupation definitions.

Commenters also encouraged the Treasury Department and the IRS to recognize that new clean energy technologies require new labor classifications and suggested providing additional guidance regarding other types of professional workers unique to clean energy that should be considered distinct from laborers or mechanics. Commenters also requested that the DOL FAQs be amended to no longer preemptively declare that clean technology workers will generally be deemed covered and classified under so-called established trades, particularly with regard to solar and wind turbine industries. Commenters stated that standardization and definition regarding multiple labor categories is necessary to avoid protracted delays and confusion. Similarly, a commenter suggested that taxpayers should not be penalized for misclassifications arising from delays in the DOL determinations. Another com-

menter stated that no clear labor classifications exist for workers directly employed by nuclear power plant operators.

Other commenters recommended implementing the DOL system of trade and craft classifications under the DBA, including updates to the DBA regulations released in August of 2023. A commenter stated that the update contained specific recommendations for prevailing wage classifications, including new definitions of geographic localities and broader definitions of construction to better reflect work on clean energy projects.

The Treasury Department and the IRS appreciate commenters' concerns and suggestions regarding emerging technologies and the need for consistency and transparency in the classification process. However, revisions to the DOL regulations and other guidance regarding worker classifications for DBA purposes are outside the scope of these final regulations.

Commenters also requested that the final regulations clarify the types of construction subject to wage determinations. For purposes of determining the applicable general wage determination, the Proposed Regulations would have provided that the types of construction for which wage determinations may be issued include, but are not limited to, building, residential, heavy, and highway, which are the types of construction for which the DOL issues general wage determinations under the DBA.[29]

A commenter recommended clarifying that the DOL definition and interpretation of the types of construction should control for PWA purposes and that only those types of construction designated by the DOL as of a similar character in the locality should be permitted for IRA projects. Other commenters supported only recognizing the DOL's four major categories of construction.

The language in the Proposed Regulations was intended to align with the types of construction for which the DOL currently issues wage determinations and allow for additional or different classifications should the DOL designate additional classifications in the future. The final regulations clarify that the types of construction are those identified by the DOL and provide the flexibility for the DOL to add to or modify those categories as necessary within the DOL's existing authorities. Any decision by the DOL to add to or modify those categories is outside of the scope of these final regulations.

A commenter requested that the final regulations clarify whether the definition of wages as used in sections 45(b)(7)(A) and 45Q(h)(3) has the same meaning as wages provided by 48 CFR 22.401 and whether such wages should be computed according to 48 CFR 22.406-2. The final regulations do not adopt this comment because section 45(b)(7)(A) requires taxpayers to ensure that wages are paid at rates not less than the prevailing rates in accordance with the DBA and not the Federal Acquisition Regulations in Title 48 of the Code of Federal Regulations.

One commenter recommended expressly adopting the DBA's "30-percent rule," whereby the prevailing wage rate is defined as the rate paid to the greatest number of laborers or mechanics in the classification on similar projects in the area during the period in question, provided that the wage is paid to at least 30 percent of those employed in the classification. Section 45(b)(7)(A)(ii) requires taxpayers who are seeking an increased credit amount to ensure that laborers and mechanics are paid wages at rates that are not less than the prevailing rates "as most recently determined" by the DOL in accordance with the DBA. The Proposed Regulations would have provided for incorporation of DBA rules for determining prevailing wage rates by defining prevailing wage rates as those rates most recently determined by the DOL. Consistent with section 45(b)(7)(A)(ii), the final regulations retain the rule from the Proposed Regulations; they do not incorporate the comment to expressly adopt the 30-percent rule.

3. Supplemental Wage Determinations and Rates for Additional Classification Requests

The Proposed Regulations would have provided special procedures for the limited circumstances in which a general wage determination does not provide an applicable wage rate(s) for the work to be performed on the facility or if there is no applicable general wage determination. These circumstances would include cases in which no general wage determination has been issued for the geographic area or for the specified type of construction, or in which the DOL has issued a general wage determination for the relevant geographic area and type of construction, but one or more labor classifications necessary for the construction, alteration, or repair work that will be done on the facility is not listed as part of that determination.

The Proposed Regulations would have provided that under these circumstances, a taxpayer, contractor, or subcontractor would need to request a supplemental wage determination or request a prevailing wage rate for an additional classification from the DOL. Under the Proposed Regulations, a taxpayer, contractor, or subcontractor could have also requested a supplemental wage determination if the location of the facility involves work by covered laborers and mechanics that spans more than one contiguous geographic area. The procedures for requesting a supplemental wage determination or a prevailing wage rate for an additional classification from the DOL were intended to correspond to the provisions under the DBA that allow contracting agencies to seek a project wage determination or a conformance under 29 CFR 1.5(b) and 5.5(a)(1)(iii), respectively.

With respect to supplemental wage determination requests and requests for additional classifications and wage rates, proposed §1.45-7(b)(3)(ii)(A) would have provided that a taxpayer, contractor, or subcontractor should make such requests no more than 90 days before the beginning of construction, alteration, or repair, as appropriate. While the procedures for requesting a supplemental wage determination or rates for additional classifications would have generally been consistent with DBA rules, there is no similar timing requirement under DBA rules with respect to project wage determinations or conformances that are requested by the

[29] Dep't of Labor, ALL AGENCY MEMORANDUM NO. 130 (March 17, 1978).

contracting agency. The 90-day limitation was proposed to limit requests for hypothetical wage determinations that were not tied to actual construction projects in the final planning stages. According to the DOL, this concern is addressed in the DBA context through the involvement of the contracting agency, but there is no contracting agency involved in the construction of facilities for PWA purposes that would help avoid unnecessary and hypothetical requests.

Commenters generally expressed support of the supplemental wage determination and additional classification process. Commenters stated that the procedures were largely consistent with processes under the DBA and were necessary given the constant transformational nature of the construction industry. One commenter expressed support for the requirement that any requests for additional wage determinations bear a reasonable relationship to the established wage rates, consistent with the DBA rules. The commenter also supported the IRS's recognition that a request for a prevailing wage rate for an additional classification would not be permitted to be used to split, subdivide, or otherwise avoid application of classifications listed in a general wage determination. In addition, commenters supported adopting the DOL test for determining whether to approve a taxpayer or contractor's request to add a missing classification to a DBA wage determination. Some commenters requested that the final regulations expressly adopt the DOL three-part conformance test for adding missing classifications to wage determinations. Commenters claimed that adopting DOL regulations governing conformance requests would help protect multiskilled occupations from unscrupulous contractors inventing unnecessary subclassifications for the purpose of paying workers less. The commenters also suggested clarifying that the DOL will consider the views of construction workers to be employed in the requested classification and stakeholders, including labor unions in the affected area, with respect to the adequacy of the requested classification and/or proposed wage and fringe benefits rates.

The Treasury Department and the IRS coordinated extensively with the DOL in drafting the supplemental wage determination and additional classification process outlined in the Proposed Regulations. The procedures in proposed §1.45-7(b)(3) for requesting a supplemental wage determination or a rate for an additional classification from the DOL would have corresponded to the provisions under the DBA that allow contracting agencies to seek a project wage determination or a conformance under 29 CFR 1.5(b) and 5.5(a)(1)(iii), respectively. They would have included certain minor differences from the conformance process to account for the absence of a Federal contracting agency. The comments suggesting that the DOL should alter its underlying process and methodology for determining prevailing wages (both in the DBA and the PWA context) are not adopted. Additionally, changes to DOL procedures regarding the DBA are outside the scope of these final regulations as the DOL administers those DBA provisions.

Several commenters shared concerns with the wage determination process administered by the DOL. One commenter stated that numerous occupations in the clean energy industry are unrepresented in the general wage determinations currently offered by the DOL, such as wind technicians often relied upon for the installation and assembly of onshore and offshore wind turbines. One commenter stated that nuclear power generating facilities are different than other construction projects, including other electric generating facilities, and that the specialized roles performed by employees at nuclear facilities are not always covered by existing DOL classifications. A commenter also asked for guidance on how to categorize specific repairs or alterations of an existing nuclear facility for purposes of DOL general wage determinations. Similarly, commenters recommended providing additional guidance about multi-category projects, such as who will make the final determination on the classification of a project (for example, building or heavy), and the category a contractor should follow.

Comments requesting additional classifications and additional guidance from the DOL on the application of appropriate classifications are outside the scope of these final regulations. The procedures for requesting a supplemental wage determination or a prevailing wage rate for an additional classification from the DOL continue to apply.

Some commenters were critical of the proposed rule requiring that a taxpayer, contractor, or subcontractor request a supplemental wage determination no more than 90 days before the beginning of construction of a facility. Commenters stated that the 90-day period is too short because of the high importance of the prevailing wage determination on the cost of labor. Similar to general wage determinations, commenters stated that it is necessary to know project costs at the bidding stage, and bidding on contracts to construct a facility takes place far more than 90 days before the beginning of construction, often more than one year prior to construction beginning. Some commenters suggested the time be extended to a year before a bid is due or 24 months before the beginning of construction, asserting that this would provide all potential bidders with sufficient clarity on wage determinations and job classifications in sufficient time to make informed bids on solar and other clean energy projects. The commenter also stated that this would reduce the number of requests to the DOL, which will mitigate the burden on government regulators and allow them to process requests more efficiently.

The Treasury Department and the IRS agree with the comments seeking additional time to request supplemental wage determinations and rates for additional classifications. The commenters persuasively argued that wage determinations issued at or near the beginning of construction are not helpful for taxpayers who will likely seek to enter contracts well in advance of construction starting. Taxpayers and their contractors need certainty regarding the labor costs of a project at the time of entering contracts for work to be performed rather than when construction begins. Moreover, the 90-day period prior to construction starting lacks consistency with the rules under the DBA. The final regulations revise the Proposed Regulations to align the timing of requests for supplemental wage determinations or rates for additional classification with the contract framework adopted for general wage determinations. The final regulations update when taxpayers must request

a supplemental wage determination or rate for additional classification from the DOL to provide greater certainty for taxpayers and better align with the rules under the DBA, while also preventing an influx of hypothetical requests for supplemental wage determinations or additional classifications that would be administratively burdensome to the DOL.

Under the final regulations, requests for supplemental wage determinations cannot be made more than 90 days before the date the contract between the taxpayer (or the taxpayer's designee, assignee, or agent) and a contractor for construction, alteration, or repair of the facility is expected to be executed. The final regulations further prescribe that any supplemental wage determinations are required to be incorporated into the contract between the taxpayer and contractor within 180 days of issuance. The 180-day period for incorporation into a contract provides consistency with the DBA rules under 29 CFR 1.6(a)(3)(i).

Under the final regulations, requests for prevailing wage rates for additional classifications can be made any time after a contract for the construction, alteration, or repair of a facility has been executed between the taxpayer and a contractor. The final regulations balance the need of taxpayers for increased certainty regarding labor costs at or near the time of entering a contract with the need to limit hypothetical requests that are not tied to actual construction projects. The DOL WHD has advised the Treasury Department and the IRS that most taxpayers will likely not need to use the process for requesting a supplemental wage determination or request a rate for an additional classification because of the availability of general wage determinations.

Commenters requested that the final regulations provide that if a response from the DOL for an additional wage rate is not provided within a specific time period, such as 60 days, the prevailing wage rate requirement for that role should no longer apply. Under the Proposed Regulations, the procedures for requesting a prevailing wage rate for an additional classification from the DOL were intended to correspond to the provisions under the DBA that allow contracting agencies to seek a conformance under 29 CFR 5.5(a)(1)(iii). Section 5.5(a)(1)(iii) of the DBA regulations provides that the DOL will approve, modify, or disapprove any classification action within 30 days of receipt or advise the requesting contracting agency within the 30-day period that additional time is necessary. To retain consistency with the DBA and address the valid taxpayer and contractor concerns regarding cost certainty and preventing unreasonable delays, the final regulations adopt similar language that the DOL will resolve requests for a prevailing wage rate for an additional classification within 30 days of receipt or advise the requester within the 30-day period that additional time is necessary. The final regulations do not, however, adopt the commenters suggestion that a delay in receiving an additional wage rate excepts a taxpayer from the requirement to pay wages at rates not less than the prevailing rates for that role.

An additional commenter recommended that, in instances in which taxpayers receive a supplemental wage determination or a prevailing wage rate for an additional classification, taxpayers be provided a 30-day grace period during which to pay the affected employees the difference between the wage determination and previous wage rates. A commenter also proposed a 30-day grace period following a denial or partial-relief from an appeal with respect to wage determinations generally.

The Treasury Department and the IRS recognize the possibility that the DOL response to a request for a supplemental wage determination or additional classifications may not be issued until after laborers and mechanics have started working on the facility or project. The Proposed Regulations would have provided that the taxpayer would not be considered to have failed to meet the Prevailing Wage Requirements with respect to any mechanics or laborers whose wage rate was subject to the request and who were paid less than the prevailing wage rate before the determination by the DOL if the taxpayer requests the supplemental wage determination or prevailing wage rate for an additional classification before the beginning of construction (or as soon as practicable after the start of construction) and makes a correction payment within 30 days of the determination to each laborer or mechanic equal to the difference between the amount of wages paid to such laborer or mechanic before the determination and the amount of wages required by the Prevailing Wage Requirements to be paid to such laborer or mechanic during such period. This exception is intended to mitigate a rule that would require taxpayers to make correction and penalty payments for failures to pay a prevailing wage rate that could not be timely determined by the taxpayer. The same considerations do not apply to the request for additional time while an appeal with respect to a wage determination is pending. Therefore, the final regulations adopt the proposed rule without change.

Commenters also requested that the final regulations require consistency between who can request supplemental wage determinations or additional classifications and who can seek reconsideration of such a decision. A commenter stated that proposed §1.45-7(b)(3)(ii)(A) would have provided that a taxpayer, contractor, or subcontractor request a supplemental wage determination or additional classification and wage rate and after review, the DOL WHD will notify the taxpayer, contractor, or subcontractor as to the supplemental wage determination or the labor classifications and wage rates to be used for the type of work in question in the geographic area in which the facility is located. However, proposed §1.45-7(b)(4) would have provided that, in connection with seeking a reconsideration of a wage determination, a "taxpayer may seek reconsideration and review by the Administrator of the Wage and Hour Division of a general wage determination, or a determination issued with respect to a request for a supplemental wage determination or additional classification and wage rate." In contrast, one commenter requested that only taxpayers be permitted to request supplemental wage determinations. Under 29 CFR 1.8(a), any interested party may seek reconsideration of a wage determination.

The final regulations clarify that any supplemental wage determination or rate for additional classification request may be made by the taxpayer, contractor, or subcontractor. With respect to seeking a reconsideration of a general wage determination, or a determination issued with

respect to a request for a supplemental wage determination or rate for additional classification request, the final regulations further clarify that the taxpayer, contractor, or subcontractor may seek the reconsideration. Ultimately, the taxpayer must ensure that the PWA requirements are satisfied regardless of whether a contractor or subcontractor requested a supplemental wage determination or requested an additional classification.

4. Applicable Prevailing Wage Rate for Apprentices

With respect to the prevailing wage rates for apprentices, the Proposed Regulations would have adopted 29 CFR 5.5(a)(4)(i), allowing the payment of wages that differ from the applicable prevailing wage rate to apprentices who are participating in a registered apprenticeship program. The Proposed Regulations would have also provided that taxpayers and contractors or subcontractors who employ individuals who are not in a registered apprenticeship program or who employ apprentices in excess of applicable ratios permitted by the registered apprenticeship program would need to pay those individuals the full prevailing wage rate listed for the classification of the work performed in the applicable wage determination.

A commenter recommended increasing the rate of pay for apprentices, given the frequency at which apprentices travel for work. This comment is not adopted as the prevailing rate of pay for work performed by apprentices is determined by the DOL and is outside the scope of these final regulations. Comments concerning employing apprentices in excess of the applicable ratios are discussed in Section VIII.A.2. and employing individuals who are not apprentices because they are not participating in a registered apprenticeship program are discussed in Section VIII.A.5., of this Summary of Comments and Explanation of Revisions.

The Proposed Regulations would have provided a reciprocity rule. Under the proposed reciprocity rule, if the construction is occurring in a geographic area other than the geographic area in which an apprenticeship program is registered, the ratio applicable within the geographic area where the construction is being performed would apply. If there is no applicable ratio for the geographic area of the facility, the ratio specified in the registered apprenticeship program standard would apply.

Commenters requested clarification on the applicable apprentice-to-journeyworker ratio if work is performed outside of the geographic area in which the apprenticeship program typically operates. A few commenters suggested that the final regulations adopt a reciprocity standard that would permit taxpayers to apply either the apprenticeship-to-journeyworker ratio set by the registered apprenticeship program or the State where the construction is being performed. Another commenter recommended giving taxpayers flexibility to determine the appropriate ratio and wage rates if the taxpayer, contractor, or subcontractor is performing covered work in a geographic area other than that in which the apprenticeship program is registered.

The Treasury Department and the IRS appreciate commenters' requested clarification on the proposed reciprocity rule and work that is performed outside of the geographic area in which the apprenticeship program is registered. The proposed reciprocity rule would have largely followed the rule in 29 CFR 5.5(a)(4)(i)(D) regarding the payment of prevailing wages to apprentices. Based on consultations with the DOL, the Treasury Department and the IRS understand that this rule is intended to apply in cases in which the ratio requirement of the State where the construction occurs is stricter than that of the registered apprenticeship program. The final regulations largely adopt the proposed rule, and also clarify that if more than one apprentice-to-journeyworker ratio could apply because the construction work is occurring in a geographic area where the registered apprenticeship program is not registered, the taxpayer must comply with the apprentice-to-journeyworker ratio set for the geographic area where the construction occurs. Thus, if the geographic area in which the construction is occurring requires a higher number of journeyworkers per apprentices than the ratio required by the registered apprenticeship program, then the taxpayer, contractor, or subcontractor must follow the stricter ratio. The final regulations also adopt the proposed rule that the wage rates (expressed in percentage of the journeyworker hourly rate) applicable in the geographic area in which the construction, alteration, or repair work is performed must be observed.

A commenter requested guidance for determining the apprentice or apprentices that must be paid not less than the full prevailing wage rate for their hours if the daily ratio requirement is not satisfied. The final regulations clarify that the taxpayer, contractor, or subcontractor, as applicable, has the discretion to determine which apprentice(s) must receive the full prevailing wage rate for hours worked if there is a failure to satisfy the Ratio Requirement.

At least one commenter recommended that the final regulations not require taxpayers to pay at least the full prevailing wage rate to apprentices in excess of the applicable ratio. Under the DBA, any apprentice performing work on the job site in excess of the ratio permitted under the registered program or the ratio applicable to the geographic area of the facility pursuant to 29 CFR 5.5(a)(4)(i) must be paid not less than the full applicable prevailing wage rate on the wage determination for the work actually performed. The Proposed Regulations would have provided that the calculation of the prevailing wage rate for the work of apprentices would be in accordance with the DBA rules. The proposed rule is adopted as final.

A commenter raised that the Proposed Regulations appear to limit the number of apprentices that can be paid the apprenticeship rate to the number of apprentices required by the regulation. The commenter stated that limiting the number of apprentices that can be paid the apprenticeship rate to the number of apprentices required by the regulation discourages the use of a larger number of apprentices and would seem to violate the policy objectives of the requirements to use apprentices. On the other hand, a commenter recommended adopting the DOL oversight and quality control standards, including apprentice-to-journeyworker ratios, to help ensure safe training of apprentices.

Apprentice-to-journeyworker ratios prescribe the minimum number of journeyworkers required for each apprentice that is on a job site on a given day to ensure the appropriate training and supervision of apprentices and to maintain workplace safety. The apprentice-to-journeyworker ratio does not impose a cap on the total

number of apprentices that can be paid the apprentice rate. For example, a taxpayer may satisfy a 1:1 ratio by hiring one journeyworker and one apprentice or by hiring 20 journeyworkers and 20 apprentices. The prescribed ratio does not restrict the total number of individuals that are hired.

C. *Definitions*

Commenters suggested clarifying the extent to which the relevant definitions under proposed §1.45-7(d) for the Prevailing Wage Requirements apply to the proposed §1.45-8(f) definitions for the Apprenticeship Requirements. The final regulations align the relevant definitions for the Prevailing Wage Requirements in §1.45-7(d) with the Apprenticeship Requirements in §1.45-8(g).

1. Laborer and Mechanic

Proposed §1.45-7(d)(7) would have defined the terms laborer and mechanic consistent with the definition under the DBA as those individuals whose duties are manual or physical in nature (including those individuals who use tools or who are performing the work of a trade). Under the Proposed Regulations, laborers and mechanics would not have included individuals whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR part 541 would not be deemed to be laborers or mechanics. These individuals are generally exempt under the Fair Labor Standards Act and are not labors or mechanics for purposes of the DBA. Consistent with the DBA, working forepersons who devote more than 20 percent of their time during a workweek to laborer or mechanic duties, and who do not meet the criteria for exemption under 29 CFR part 541, also would be considered laborers and mechanics for the time spent conducting laborer and mechanic duties. Under the Proposed Regulations, laborers and mechanics would have included apprentices and helpers. The Treasury Department and the IRS requested comments on the treatment of working forepersons or owners performing the duties of laborers and mechanics under certain circumstances, and other executive or administrative personnel who also perform duties of a manual or physical nature, in the construction, alteration, or repair of a qualified facility.

At least one commenter requested that the Treasury Department and the IRS confirm that the terms laborer and mechanic are defined as under the DBA to include individuals whose duties are manual or physical in nature rather than primarily administrative, executive, or clerical. Commenters also requested that the final regulations exclude certain owners and specialized employees from the definitions of laborer and mechanic, such as engineers, architects, inspectors, testers, and troubleshooters; wind or solar commissioning technicians; workers involved in tie-ins and other commissioning, testing, and troubleshooting of grid-connected facilities after mechanical completion; workers associated with initial energization, testing, and synchronization of installed equipment; wind turbine commissioners; and other similar professionals. In requesting these exclusions from the definition of laborer or mechanic, commenters analogized work described in the DOL Field Operations Handbook (FOH)[30] that is not covered under the DBA unless those individuals are performing the duties of a laborer or mechanic.

Commenters generally supported the working foreperson rule, but some sought additional guidance regarding whether the 20-percent threshold applies to professional workers other than working forepersons. Some commenters requested clarifying that any foreperson, owner, or administrative, executive, or clerical personnel contributing more than 20 percent of their time during a workweek to laborer or mechanic duties be considered laborers and mechanics for the time spent conducting laborer and mechanic duties, even if they are exempt under 29 CFR part 541. Other commenters suggested limiting the application of the 20-percent threshold to these other individuals, but only if they are not exempt under 29 CFR part 541. A few commenters suggested that individuals who own at least a 20 percent equity interest and work on a construction project, should also be excluded from the PWA requirements, because they are not subject to DBA requirements to receive prevailing wages. One commenter asked if non-exempt individuals (other than working forepersons) who devote 20 percent or less of their time to laborer and mechanic duties are laborers and mechanics. One commenter stated that it would be difficult for taxpayers and contractors to bifurcate supervisory and direct time for a working foreperson in determining the 20-percent threshold.

The final regulations incorporate the definitions of laborer and mechanic from the Proposed Regulations, which is largely consistent with the definition of those terms for DBA purposes. The Treasury Department and the IRS have determined that providing an exhaustive list of those specialized employees who are not laborers or mechanics or defining laborers and mechanics on an industry-by-industry basis is not practical and does not provide the necessary flexibility for future industry developments. Although the DOL FOH may provide some guidance to taxpayers, whether an individual is a laborer or mechanic will depend on the specific job duties and the relevant facts and circumstances. The final regulations also adopt the rule that persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR part 541 are not deemed to be laborers or mechanics and the working foreperson rule as proposed. The final regulations do not extend the working forepersons rule to other working professionals or adopt any exceptions from the proposed rule for owners.

2. Employed

Consistent with the DBA, proposed §1.45-7(d)(4) would have provided that the definition of employed means "performing the duties of a laborer or

[30] The DOL Field Operations Handbook for administering the DBA can be found at https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-15.

mechanic for the taxpayer, contractor, or subcontractor (as applicable), regardless of whether the individual would be characterized as an employee or an independent contractor for other Federal tax purposes." For purposes of the Prevailing Wage Requirements, this definition would generally be different and broader than the definition used elsewhere in the Code, for example with respect to employment taxes, as well as the associated reporting and withholding obligations. Laborers and mechanics who are independent contractors for employment tax purposes may be considered employed for purposes of the Prevailing Wage Requirements.

Commenters supported the Proposed Regulation's definition of "employed." The commenters stated that the application of prevailing wages to all workers, even if they are non-employees, aligns with the DBA. The Treasury Department and the IRS agree, and the proposed definition is adopted without change.

3. Construction, Alteration, or Repair

Proposed §1.45-7(d)(2)(i) would have provided that the term construction, alteration, or repair generally means "construction, prosecution, completion, or repair" as defined in 29 CFR 5.2 of the DBA regulations. In general, 29 CFR 5.2 defines construction, prosecution, completion, or repair as all types of work done on a particular building or work at the site of the work. Proposed §1.45-7(d)(2)(i) would have also clarified that construction, alteration, or repair for purposes of the PWA requirements has no bearing on any other sections of the Code, including any determination of construction, alteration, repair, or maintenance under section 162 or 263 of the Code.

Some commenters requested clarification on the definition of construction, alteration, or repair of a facility. Commenters also requested clarification that alteration or repair means construction-like or construction-type activities. One commenter suggested clarifying the differences between construction and alteration or repair so that a taxpayer may determine those activities that constitute construction and those that are alteration or repair. Commenters also recommended clarifying whether, as under the DBA, the PWA requirements do not apply to installation work related to supply or service contracts, unless such installation involves substantial construction work distinct and separable from the non-construction aspects of the contract. One commenter requested clarifying that the work of material suppliers is not considered construction consistent with the DBA. Another commenter requested that the final regulations clarify that certain preliminary work that is not considered construction for DBA purposes (such as exploratory drilling), is not considered construction for PWA purposes.

In response to comments the final regulations clarify that "construction, alteration, or repair" means the same activities that are covered by the DBA definition of construction, prosecution, completion, or repair under 29 CFR 5.2 that are performed with respect to a facility. Activities that are excluded from the DBA definition of construction, prosecution, completion, or repair under 29 CFR 5.2 are similarly excluded under the final regulations. This definition of construction, alteration, or repair covers some activities that occur during the construction of a facility before it is placed in service as well as activities that take place after placed in service as alterations or repairs. Further, specific installation work (as applicable) that occurs during the construction of a facility would be subject to PWA requirements consistent with 29 CFR 5.2. As discussed in Section VI. of this Summary of Comments and Explanation of Revisions, the final regulations clarify that construction of a facility is interpreted consistent with the underlying definition of a facility for tax purposes.

4. Maintenance

Proposed §1.45-7(d)(2)(i) would have provided that the term construction, alteration, or repair generally excludes maintenance work that occurs after a facility is placed in service. The preamble to the Proposed Regulations stated that maintenance would be work that is ordinary and regular in nature and designed to maintain existing functionality of a facility as opposed to an isolated or infrequent repair of a facility to restore specific functionality or adapt the facility for a different or improved use.

Under the Proposed Regulations, work designed to maintain and preserve functionality of a facility after it is placed in service would have included basic maintenance such as regular inspections of the facility, regular cleaning and janitorial work, replacing materials with limited lifespans such as filters and light bulbs, and the calibration of any equipment. Proposed §1.45-7(d)(2)(i) would have provided that maintenance work that occurs before the facility is placed in service may constitute construction for which prevailing wages must be paid in order to claim the increased credit amount. Under the Proposed Regulations, maintenance would not have included work that improves a facility, adapts it for a different use, or restores functionality as a result of inoperability. Proposed §1.45-7(d)(2)(ii) would have also included an example.

Commenters requested additional guidance on how to determine whether work performed after a facility is placed in service is alteration or repair work or maintenance work. One commenter requested clarification on how to distinguish between work that restores functionality and work designed to maintain and preserve existing functionalities. Commenters also suggested clarifying whether work performed before or after a facility is placed in service impacts whether it would be considered maintenance work.

One commenter suggested that the final regulations provide that maintenance work includes the standard replacement of equipment and parts (including with functionally similar, yet improved parts), minor or incidental repair or installation work, and routine tasks preventing failure or decline. Another commenter requested that the final regulations define maintenance to exclude work that is extended in nature, involves a major replacement, or is otherwise not regular and customary for the applicable type of project. Several commenters also requested that the final regulations define maintenance to include reactive maintenance, isolated or infrequent repair to restore specific functionality; troubleshooting; activities related to operations (operations and maintenance or O&M work); and work performed by welders, winders, or machinists to address

a customer service outage. Another commenter suggested that work performed under a construction contract warranty after a facility is placed in service should be treated as maintenance work.

A few commenters suggested that the final regulations incorporate a *de minimis* threshold to distinguish between maintenance and alteration or repair work based on either a specified dollar amount and/or a percentage of the original capitalized cost of the qualified facility. Other commenters suggested that the term maintenance in the Proposed Regulations be revised to mirror descriptions of maintenance work in DBA sub-regulatory guidance, the Service Contract Act (SCA), nuclear industry maintenance standards, or regulations and case law related to sections 162 and 263.

Commenters stated that the example provided under proposed §1.45-7(d)(2)(ii) may have unintentionally suggested a broader definition of alteration or repair than anticipated, because the example described the replacement of a part in an inverter as a rare occurrence although it may be a regular occurrence at a solar farm. A few commenters suggested that the final regulations incorporate additional examples of basic maintenance, and alteration or repair activities, as applied to specific facilities or properties, including alternative fuel infrastructure, solar farms, biogas systems, ethanol facilities, nuclear facilities, and offshore wind facilities.

In the Proposed Regulations, the Treasury Department and the IRS sought to distinguish between alteration and repair work (for which payment of prevailing wages is required whether the work occurs before or after the qualified facility is placed in service) and maintenance work (for which payment of prevailing wages is required only if the work occurs before a qualified facility is placed in service), consistent with the DBA and DOL sub-regulatory guidance contained in the Prevailing Wage Resource Book (PWRB).[31]

While 29 CFR 5.2 includes various activities that fall within the definition of construction, including altering, remodeling, some installation work, and painting and decorating, it does not specifically address maintenance work. However, the DOL PWRB compares servicing and maintenance work typically covered by the SCA and construction activities of all types that are covered by the DBA.

The DOL PWRB describes maintenance work that would be covered by the SCA, and not the DBA, as work that is routinely scheduled and continuous or recurring. According to the PWRB, SCA-covered maintenance work typically includes: (i) work that is needed to keep the building or work in its current condition so that it may continue to be used; (ii) work that does not improve the current condition or function of the building or work; or (iii) work that may be completed relatively quickly. Additionally, according to the PWRB, SCA-covered maintenance work uses skills that are not typical of the construction trade. By contrast, the PWRB states that DBA-covered repair work typically includes activities such as the restoration or improvement of a building or work by replacement, overhaul, or reprocessing of constituent parts or materials. According to the PWRB, DBA-covered repair work includes an activity that: (i) generally improves the building or work, either by fixing something that is not functioning properly or by improving upon the building or work's existing condition; (ii) is not continuous or recurring, but involves the correction of individual problems or defects as separate and segregable incidents; (iii) improves the building or work's structural strength, stability, safety, capacity, efficiency, or usefulness; or (iv) takes more time to complete. Finally, according to the PWRB, DBA-covered repair work uses skills that are typical of the construction trades.

The DOL PWRB also states that an important factor in determining coverage under the SCA or the DBA is whether the activity is undertaken as part of a construction project prior to its completion. For example, the DBA applies if cleanup, landscaping, carpet laying, and drapery installation activities are undertaken as an integral part of or in conjunction with new construction, such as under a construction contract under which such activities preceded and are conditional to acceptance of a building or public work by the owner. The SCA, however, applies if the same activities are performed after construction and after contractors and subcontractors have finished and left the site, and after the contracting agency has accepted the building.

The Proposed Regulations would have distilled the guidance in 29 CFR 5.2 and the guidance in the DOL PWRB[32] to provide that work designed to maintain and preserve functionality of a facility after it is placed in service would not be subject to the Prevailing Wage Requirements. Work designed to maintain and preserve functionality of a facility after it is placed in service would have included basic maintenance such as regular inspections of the facility, regular cleaning and janitorial work, replacing materials with limited lifespans such as filters and light bulbs, and the calibration of any equipment. However, paying prevailing wages would be required for work that improves a facility, adapts it for a different use, or restores functionality as a result of inoperability.

The Treasury Department and the IRS agree that additional clarification on the distinction between alteration and repair work and maintenance work is needed. Accordingly, the final regulations revise the Proposed Regulations to more closely align with 29 CFR 5.2 and DOL sub-regulatory guidance in the PWRB.

Specifically, the final regulations provide that maintenance work is work that is routinely scheduled and continuous or recurring. The final regulations explain that maintenance normally involves the activity of keeping the facility in its current condition so that it may continue to be used. The final regulations include additional clarifying criteria that repair work normally includes an activity that: (i) improves the facility, either by fixing something that is not functioning properly or by improving upon the facility's existing condition; (ii) involves the correction of individual problems or defects as separate and segregable inci-

[31] The DOL Prevailing Wage Resource Book can be found at https://www.dol.gov/agencies/whd/government-contracts/prevailing-wage-resource-book/determining-which-labor-standards-apply#_SCA-covered_maintenance_work.

[32] The Proposed Regulations relied on a prior version of the PWRB. These final regulations reflect updates to the PWRB made in April of 2024.

dents and is not continuous or recurring; or (iii) improves the facility's structural strength, stability, safety, capacity, efficiency, or usefulness. The final regulations retain the proposed rule that maintenance work that occurs before the qualified facility is placed in service generally constitutes construction work for which wages at rates not less than the prevailing rates must be paid.

As stated by many commenters, and several administrative decisions involving the application of the DBA or the SCA,[33] the determination of whether work is properly viewed as maintenance or as an alteration or repair is dependent on the specific facts and circumstances of the work. The final regulations clarify that the facts and circumstances are ultimately determinative.

Because of the highly factual nature of the determination regarding whether an activity is maintenance or alteration or repair work, the final regulations do not adopt suggestions to include additional examples distinguishing between maintenance and alteration or repair. Additionally, the example in proposed §1.45-7(d)(2)(ii) has been removed. Providing industry-by-industry examples is not practicable and may imply an inconsistent application of the general rule. As stated in the comments, for example, the proposed example was not indicative of ordinary practices in the solar industry. The Treasury Department and the IRS understand that taxpayers may encounter difficulties in distinguishing maintenance from alterations or repairs; however, the additional information contained in the final regulations provides taxpayers with sufficient guidance to help differentiate their activities based on the taxpayer's relevant facts and circumstances. Additionally, the Treasury Department and the IRS decline, at this time, to provide a *de minimis* threshold or safe harbor distinguishing between maintenance work and alteration or repair work.

D. *Correction and penalty procedures*

1. In General

Section 45(b)(7)(B)(i) provides that if a taxpayer fails to satisfy the Prevailing Wage requirements, the taxpayer "shall be deemed to have satisfied such requirement under such subparagraph with respect to such facility for any year if, with respect to any laborer or mechanic who was paid wages at a rate below the [prevailing rate] for any period during such year," the taxpayer makes the applicable correction payments and pays the penalty. Under section 45(b)(7)(B)(i)(II), the amount of the penalty is $5,000 multiplied by the total number of laborers and mechanics who were paid wages at a rate below the required prevailing rates. Section 45(b)(7)(B)(iii) provides that if the failure to ensure that the laborers and mechanics are paid wages at rates not less than the prevailing rates is found to be due to intentional disregard, then the amount of the correction payment is tripled and the amount of the penalty payment is doubled.

The Proposed Regulations would have required the payment of wages at rates not less than the prevailing wage rates at the time work is performed with respect to the construction, alteration, or repair of a facility in order to claim the increased credit amount. The Proposed Regulations would have also provided that the requirement to pay not less than the prevailing wage rates becomes binding only if the increased credit amount is claimed on a return, and that the obligation to make correction payments and pay the penalty would not become binding until a return is filed claiming the increased credit amount.

The preamble to the Proposed Regulations stated that, in general, taxpayers would be obligated to make any necessary correction payments to any laborer and mechanic on or before the date a return is filed claiming an increased credit amount. Under the Proposed Regulations, the earliest time that a taxpayer can make a penalty payment to the IRS would have been at the time of filing a tax return claiming the increased credit amount. However, taxpayers would retain the option of making correction payments to laborers and mechanics at any time after the initial wage payments were made and in advance of the filing of a tax return claiming the increased credit amount in order to limit the amount of additional interest the taxpayer would have to pay at the elevated rates set forth in section 45(b)(7)(B)(i)(I)(bb). The Proposed Regulations would have provided that whether taxpayers make the necessary correction payments and pay the penalty amounts promptly is one of the facts and circumstances that would be considered for purposes of the enhanced penalties for intentional disregard.

Under section 45(b)(7)(B)(iv), once the IRS makes a final determination that a taxpayer has failed to satisfy the Prevailing Wage Requirements, the taxpayer must make the correction and penalty payments within 180 days after the final determination to be eligible for the increased credit. The Proposed Regulations would have also provided a deadline for a taxpayer's ability to use the correction and penalty provisions to rectify a failure to comply with the Prevailing Wage Requirements once the IRS makes a final determination that a taxpayer has failed to satisfy the Prevailing Wage Requirements. The Proposed Regulations would have clarified that this final determination would come in the form of a notice sent by the IRS.

One commenter argued that it is inequitable to permit taxpayers to receive the benefit of increased credit amounts before workers received their rightful compensation. The commenter stated that the penalty and cure provisions allow corrections after the filing of a tax return, when the credit is already claimed. The commenter suggested that the final regulations require correction no later than the earlier of the tax return filing or when the taxpayer receives an economic benefit. Another

[33] *See Norsaire Systems Inc*., WAB Case No. 94-06, 1995 WL 90009 (Feb. 28, 1995) (explaining that the distinction between covered construction work and non-covered service and maintenance work depended on using a number of nondeterminative factors to closely examine actual work performed); *see also ITT Base Services, Inc.*, B–220518.2 (Nov. 10, 1986) (noting that distinguishing between construction and maintenance activities may be difficult, and some repair activities could reasonably be categorized as either Davis-Bacon Act or Service Contract Act repair work depending upon the context in which they are performed); *Four Star Maintenance*, B–229703 (Apr. 7, 1988) (noting that the determination of whether items of work involve basic maintenance within the coverage of the Service Contract Act, or are more in the nature of construction, alteration, or repair within the scope of the Davis–Bacon Act, is largely a matter of judgment).

commenter recommended that corrective payments be required to be paid within 90 days following the year in which the original compensation should have been paid.

One commenter suggested that if the taxpayer's failure to pay prevailing wages was unintentional, the taxpayer should be given 90 days to make correction and penalty payments, but if the taxpayer acted intentionally then the taxpayer should be given 30 days to pay the penalty and two weeks to make correction payments. An additional commenter suggested extending the cure period to permit taxpayers to cure further mistakes once they become known.

The comments requesting changes to the timing of correction and penalty payments are not adopted. The prevailing wage provisions generally require compliance with the payment of applicable prevailing wage rates at the time work is performed. The final regulations reiterate the position in the Proposed Regulations that the correction and penalty provisions relate back to the time of the failure. For example, the final regulations provide that interest accrues on back wages to the time of the failure to pay wages at rates not less than the applicable prevailing rates. However, section 45(b)(7)(B)(iv) permits taxpayers to make correction and penalty payments up to 180 days after a final determination and remain eligible for the increased credit amount. These final regulations encourage the taxpayer to make correction payments sooner by waiving the penalty payment requirement if the taxpayer makes the required correction payment in a timely manner and meets additional requirements. Further, taxpayers may avoid some of the challenges in making correction payments, such as locating former employees, by addressing any failures immediately after discovering them.

Consistent with section 45(b)(7)(B)(ii), the Proposed Regulations would have provided that deficiency procedures do not apply to the assessment or collection of any penalty payment required to be made in connection with a failure to meet the Prevailing Wage Requirements. The Proposed Regulations would have clarified that although deficiency procedures would not apply to the penalty payment, deficiency procedures would apply to any determination by the IRS disallowing a taxpayer's claim for the increased credit amount (for example, because of a failure to pay prevailing wages and the correction and penalty amounts). Under the Proposed Regulations, if the taxpayer does not correct, and therefore is not subsequently granted the increased credit amount, no penalty would have been assessed under section 45(b)(7)(B).

Commenters requested that the final regulations provide guidance regarding a taxpayer's ability to contest an IRS determination that a taxpayer failed to pay prevailing wages. Commenters suggested that deficiency procedures be made available to challenge correction payment amounts due to laborers and mechanics once a final determination is made. A commenter suggested that taxpayers be provided a forum to expeditiously resolve any disputes regarding disallowed credits and all appeals of IRS determinations before such decisions become final. Commenters stated that, other than a failure to make the required correction and penalty payments, the Proposed Regulations do not specify under what circumstances there would be a determination by the IRS disallowing a claim for the increased credit amount.

The deficiency procedures are statutorily precluded and providing taxpayers prepayment forums to resolve disputes would cause unreasonable delays to workers who were entitled to correction payments from receiving the full amount of underpaid wages. Additionally, the statutory 180-day period taxpayers are allowed to cure a failure after receiving a final determination does not toll the general three-year statute of limitations for assessment under section 6501. Thus, the final regulations do not provide any additional forum for taxpayers to challenge an IRS determination. However, if a taxpayer refuses to make correction and penalty payments, the increased credit amount will be disallowed. Any disallowance of a credit, including disallowance of increased credit amounts, would be subject to deficiency procedures (including the opportunity to seek review by the IRS Independent Office of Appeals) and a taxpayer would be able to petition the U.S. Tax Court to review the underlying deficiency determination on a *de novo* basis.

A commenter appreciated the Treasury Department and the IRS's consideration of waivers for penalties and provisions for curing wage deficiencies but recommended that the taxpayer be given the opportunity to review and cure mistakes. The commenter explained that due to the complexity of the PWA requirements, the logistics of projects, and the management of people, there will be instances in which the taxpayer will not meet all of the PWA requirements perfectly. The Treasury Department and the IRS agree and have provided for a limited penalty waiver to address such circumstances as discussed in Section VII.D.4. of this Summary of Comments and Explanation of Revisions.

One commenter stated that a failure to maintain records by one or more subcontractors or a subsequent determination by the IRS that additional work, additional laborers or mechanics, or secondary construction sites are covered by the PWA requirements may create a circumstance in which the curative payment cannot be calculated because of the absence of records. The commenter suggested that the taxpayer not be disallowed the increased credit amount under such circumstances if the taxpayer is willing to make a curative payment based on a reasonable estimate of the wages that should have been paid. Commenters also suggested that the final regulations waive penalties and the requirement to make correction payments if the taxpayer hires a third-party reviewer, such as a certified public accountant, to review payroll records for compliance with the Prevailing Wage Requirements.

Permitting taxpayers to rely on a third-party reviewer to demonstrate compliance is inconsistent with the statutory requirement that the taxpayer ensure that laborers and mechanics are paid prevailing wages. Maintaining adequate records is the taxpayer's responsibility under section 6001 as explained in Section X.A. of this Summary of Comments and Explanation of Revisions. A failure to maintain adequate records, even those of lower tier subcontractors, does not excuse taxpayers from their obligations to comply with the PWA requirements.

One commenter requested that the final regulations provide that corrective payments are neither taxable income to the workers nor deductible by the payors.

The commenter stated that taxing corrective payments is unfair to the workers and argued that a taxpayer or transferee who receives the benefit of the tax credits should not be able to "double dip" and take a tax deduction for the payment of the penalty or the increased corrective payments. The determination of whether correction payments are taxable to a laborer or mechanic or deductible by the payor is governed by Federal tax law that is outside the scope of these final regulations.

Commenters stated that the preamble to the Proposed Regulations explained that the regulations would adopt, by cross-reference, the review and appeal procedures available to any interested party under the DBA with respect to wage determinations generally. Commenters explained that a DBA determination can be appealed to the DOL, a process that could take longer than the 180-day cure period under section 45(b)(7)(B)(iv). Commenters also sought clarification that the 180-day cure period would be tolled until a taxpayer has exhausted the appellate remedies with the DOL. From a practical standpoint, the commenter emphasized that once wages are paid it would be harmful to both employees and employers to attempt to claw back such payments if there is a subsequent determination by the DOL that results in the correction and penalty payments not being owed.

The final regulations do not adopt this comment to provide for tolling of the 180-day cure period if a wage determination has been appealed to the DOL. With respect to the commenter's comparison to the review and appeal procedures for wage determinations, that process is distinct from the 180-day period after an IRS determination during which a taxpayer may make correction and penalty payments to be deemed to have complied with the Prevailing Wage Requirements. The review and appeal procedures available to a taxpayer under the Proposed Regulations regarding wage determinations are with respect to the DOL's determination of an applicable prevailing wage rate. The IRS's determination of a failure to pay prevailing wage rates triggering the 180-day cure period is not subject to appeal, and thus not subject to tolling. Section 45(b)(7)(B)(ii) provides that the deficiency procedures for income, estate, gift, and certain excise taxes do not apply with respect to the assessment or collection of any penalty imposed by section 45(b)(7)(B). A taxpayer would, however, be able to appeal any disallowance of the increased credit amount after the expiration of the 180-day cure period.

Regarding the commenter's practical concern, if a taxpayer believes that the IRS incorrectly issued a final determination that the taxpayer failed to pay prevailing wages, then the taxpayer may decline to make correction and penalty payments and wait to petition an IRS deficiency determination to the U.S. Tax Court following the end of the 180-day cure period. Alternatively, after the IRS issues a final determination, the taxpayer could make correction and penalty payments and remain eligible for the increased credit amount. The taxpayer in this scenario would retain the ability to seek a refund of the penalty payments paid to the IRS.

One commenter observed that the cost of penalties is steep, given the reliance that most taxpayers will have to place on contractors and subcontractors to comply with the PWA requirements. The Treasury Department and the IRS recognize that taxpayers will have to oversee and rely on contractors and subcontractors to comply with the PWA requirements. However, the statutory text of the IRA puts the responsibility on the taxpayer to ensure that contractors and subcontractors comply with the PWA requirements, including section 45(b)(7)(B)(i)(ll), which prescribes the amount of penalty payment. Through the factors considered for purposes of intentional disregard, these regulations create a framework that encourages taxpayer practices, such as quarterly compliance reviews and flow-down contract provisions, that will assist taxpayers in complying with the Prevailing Wage Requirements. Further, these regulations reflect the Treasury Department's and the IRS's waiver authority with respect to the penalty if the failures were small in amount or occurred in a limited number of pay periods.

Additionally, a commenter requested that, specifically for the initial years following the application of the PWA requirements to the section 45Z credit, taxpayers be exempted from penalties if they make correction payments. The commenter stated that any noncompliance during initial years will more likely be a result of inexperience than intentional disregard. The Treasury Department and the IRS understand commenters' concerns regarding how the correction and penalty procedures affect each relevant industry or taxpayers claiming the increased amount of credit. A transition rule is provided for section 45Z, described in Section IX.G. of this Summary of Comments and Explanation of Revisions. The penalty waiver for inadvertent errors is described in Section VII.D.4. of this Summary of Comments and Explanation of Revisions.

2. Laborers or Mechanics Who Cannot be Located

Under section 45(b)(7)(B)(i), a taxpayer is deemed to satisfy the Prevailing Wage Requirements if, with respect to any laborer or mechanic who was paid wages at rates less than the prevailing rates for any period during that year, the taxpayer makes a correction payment to the affected laborer or mechanic and the required penalty payment to the IRS. Section 45(b)(7)(B)(i) does not except taxpayers from the requirement to make the correction payment, even if the taxpayer is unable to locate the laborer or mechanic.

The preamble to the Proposed Regulations explained that the Treasury Department and the IRS expect that taxpayers will be able to establish having made correction payments even if a former laborer or mechanic cannot be located and provided examples of how such payments could be made, such as compliance with State unclaimed property rules and withholding and information reporting obligations as means of substantiating the payments. The Treasury Department and the IRS requested comments concerning appropriate rules for situations in which laborers and mechanics who are owed wages cannot be located and how taxpayers may establish that they have made the required correction payment described in section 45(b)(7)(B)(i)(I).

A few commenters suggested that the final regulations provide additional guidance regarding situations in which correction payments are due to affected laborers or mechanics who cannot be located. A commenter suggested the formalization

of specific procedures by the Treasury Department for such circumstances and asked the Treasury Department to solicit further comments from stakeholders on this issue. One commenter suggested requiring the taxpayer to send the corrective payment amount to the State where the missing worker performed the work along with payroll information validating the payment amount, and records of attempts by the taxpayer to reach the former laborer or mechanic. One commenter stated that the final regulations should not rely on State unclaimed property laws. A commenter stated that State unclaimed property laws may impose additional burdens and complexities on taxpayers (such as requirements that due diligence efforts be undertaken by a holder of unclaimed property to find the rightful owner of such property before the property can be delivered to the State). Other commenters asked that the final regulations provide that a payment made to a State pursuant to the State's unclaimed property rules be deemed to satisfy the correction payment requirement for purposes of section 45(b)(7)(B)(i)(I).

The Treasury Department and the IRS recognize that the construction of a qualified facility may occur over the course of several years and some taxpayers who fail to meet the Prevailing Wage Requirements may be unable to locate all laborers and mechanics to which correction payments must be made. However, section 45(b)(7)(B)(i) does not excuse taxpayers from the requirement to make the correction payment, even if the taxpayer is unable to locate the laborer or mechanic. Unless another exception applies, if a taxpayer fails to make and substantiate all necessary correction payments, the taxpayer will not be eligible for the increased credit amount. Although the statute and final regulations permit corrections, contemporaneous compliance with the Prevailing Wage Requirements will likely be easier for taxpayers to administer and substantiate, because locating workers after a project has ended may be difficult and time consuming. The final regulations confirm that a taxpayer is not excused from the requirement to make the correction payment even if the taxpayer is unable to locate a laborer or mechanic.

As provided for under the Proposed Regulations, the Treasury Department and the IRS continue to expect that taxpayers will be able to substantiate having made all necessary correction payments even if a former laborer or mechanic cannot be located. In general, States have developed specific rules for the payment of wages to former laborers and mechanics who cannot be located. These rules can include diligence requirements to locate the laborer or mechanic, information reporting obligations to relevant State agencies on the unclaimed wage amounts, and requirements to remit any unclaimed wage amounts to State control as unclaimed property after defined holding periods. A taxpayer will be deemed to have paid a correction payment to a laborer or mechanic who cannot be located if the taxpayer can establish that correction payments have been made. A taxpayer may establish that correction payments have been made by demonstrating compliance with the applicable State unclaimed property law and all Federal and State withholding and information reporting requirements with respect to the payments.

3. Intentional Disregard

Section 45(b)(7)(B)(iii) provides that if the failure to ensure that the laborers and mechanics are paid wages at rates not less than the applicable prevailing wage rates is found to be due to intentional disregard, then the amount of the correction payment is tripled and the amount of the penalty payment is doubled. The Proposed Regulations would have provided that failures to meet the Prevailing Wage Requirements would be due to intentional disregard if they are knowing or willful, which is a determination that must be made by considering all relevant facts and circumstances. The Proposed Regulations would have provided a non-exhaustive list of factors that may be relevant to this determination.

Proposed §1.45-7(c)(3)(iii) provided that the relevant facts and circumstances in weighing intentional disregard would include whether a failure to satisfy the Prevailing Wage Requirements was part of a pattern of conduct that includes repeated or systemic failures to ensure that the laborers and mechanics were paid wages at or above the applicable prevailing wage rate and whether the taxpayer: (i) failed to take steps to determine the applicable classifications of laborers and mechanics; (ii) failed to take steps to determine the applicable prevailing wage rate(s) for laborers and mechanics; (iii) promptly cured any failures to ensure that laborers and mechanics were paid wages not less than the applicable prevailing rates; (iv) has been required to make a penalty payment in previous years; (v) undertook a quarterly, or more frequent, review of wages paid to mechanics and laborers to ensure that wages not less than the applicable prevailing wage rate were paid; (vi) included provisions in any contracts entered into with contractors that required the contractors and any subcontractors retained by the contractors to pay laborers and mechanics at or above the prevailing wage rates and maintain records to ensure the taxpayer's compliance with the recordkeeping requirements; (vii) posted in a prominent place at the facility or otherwise provided written notice to laborers and mechanics during the construction, alteration, or repair of the facility: (a) of the applicable wage rate(s) as determined by the DOL for all classifications of work to be performed for the construction, alteration, or repair of the facility, and (b) that in order to be eligible to claim certain tax benefits, employers must ensure that laborers and mechanics are paid wages at rates not less than such wage rates; and (viii) had in place procedures whereby laborers and mechanics could report suspected failures to pay prevailing wages and/or suspected failures to classify workers in accordance with the wage determination of workers to appropriate personnel departments or managers without retaliation or adverse action. The Treasury Department and the IRS requested comments on additional criteria that might be used as part of a facts and circumstances analysis of intentional disregard in this context.

Many commenters generally expressed support for enhanced penalties for intentional failures to comply with the PWA requirements and the factors that would be considered in the Proposed Regulations. One commenter suggested that the Treasury Department and the IRS engage in outreach to educate taxpayers about distinguishing between intentional

and unintentional violations of the PWA requirements. Some commenters recommended that the final regulations provide an inclusive and exhaustive list of practices for taxpayers to follow in order to show they acted with proper diligence and in good faith in trying to meet the PWA requirements. The final regulations do not incorporate this suggestion. Although the final regulations provide a detailed list of factors for determining intentional disregard, the list remains non-exhaustive. There may be additional factors that the IRS will consider based on the specific facts and circumstances of the failure. These final regulations provide guidance to taxpayers about the application of the PWA requirements to assist with compliance, including the numerous factors that the IRS will consider in determining whether failures to comply were the result of intentional disregard.

Commenters had the following suggestions for additional factors or modifications to the proposed factors. Several commenters suggested that the final regulations include intentional disregard factors relating to pre-filing activities that are not applicable to taxpayers claiming the increased credit amount (for example, whether a taxpayer regularly submitted certified weekly payroll records to the IRS or publicly declared the intent to claim the credit). Because those underlying pre-filing activities are not applicable, the comments suggesting factors relating to those specific actions are not included as factors demonstrating intentional disregard. However, several other commenters suggested additional factors or modifications to the proposed factors relating to other pre-filing activities, that while not required, could be relevant to a determination of intentional disregard.

Specifically, with respect to the factors in proposed §1.45-7(c)(3)(iii)(A) through (C) commenters suggested that the final regulations clarify what would constitute a pattern of conduct and a failure to take steps to determine applicable classifications and wage rates. One commenter suggested that a taxpayer's pattern of conduct include the taxpayer's conduct on non-IRA projects and violations unrelated to prevailing wage rules (including violations under DBA). Another commenter recommended that the final regulations consider the taxpayer's history of violations of any Federal, State, or local laws. The Treasury Department and the IRS agree that some additional clarification would be helpful for taxpayers and the IRS. The final regulations clarify that taking steps to determine applicable classifications and wage rates could include a quarterly or more frequent review of these actions by the taxpayer (or a third party acting on behalf of the taxpayer). The final regulations retain the factor describing a pattern of conduct and clarify that the pattern of conduct could include failures to pay prevailing wages as required under other laws. The final regulations do not specifically include all possible violations of law; although certain violations may be relevant depending on the facts and circumstances. What constitutes a pattern will depend on the facts and circumstances.

Commenters also suggested modifications to the factors in proposed §1.45-7(c)(3)(iii)(H) and (I). Specifically, commenters stated that proof, via signatures of laborers and mechanics, that covered employees have been given notice of the taxpayer's intent to pay prevailing wages should be a factor. The final regulations retain the factor from the Proposed Regulations regarding written notice to laborers and mechanics. However, this factor relates to the notice that in order to claim certain tax benefits, employers must ensure that laborers and mechanics are paid wages at rates not less than prevailing wage rates. It does not consider whether a taxpayer disclosed their intent to claim a tax benefit. In response to the comment, the final regulations further clarify that acknowledgement of the notice by the laborer or mechanic is an additional factor.

Commenters also suggested that the poster or notice to employees described in proposed §1.45-7(c)(3)(iii)(H) include instructions on how laborers and mechanics may contact the taxpayers' personnel departments or taxpayers' managers to report suspected failures to pay prevailing wages and/or suspected failures to classify workers without retaliation or adverse action. The final regulations include this additional information. At least one commenter suggested that the factor in proposed §1.45-7(c)(3)(iii)(I) regarding whether a taxpayer had in place a procedure to report suspected failures to pay prevailing wages without retaliation or adverse action be expanded to include employment tax violations or workplace standards laws. The commenter also suggested the factor be revised to also require that no actual retaliation or adverse action occurred. The final regulations incorporate the comments regarding employment tax and workplace standards violations. The final regulations also consider whether the taxpayer investigated complaints and took appropriate action.

A commenter suggested adding a factor addressing the use of debarred contractors. The commenter stated that contractors who are debarred from working on publicly funded projects for serious violations of DBA prevailing wage requirements are more likely to violate the Prevailing Wage Requirements on IRA projects. The Treasury Department and the IRS agree that knowingly contracting with debarred contractors could be a factor demonstrating intentional disregard. The final regulations reflect this comment.

Several commenters made general suggestions that the intentional disregard factors should be strengthened to encourage behaviors that will help ensure that laborers and mechanics working on projects for which an increased credit amount may be claimed are paid prevailing wages. As stated elsewhere in this preamble, the Treasury Department and the IRS agree that adding factors to encourage certain practices will further compliance with the Prevailing Wage Requirements. Accordingly, the final regulations add new factors that consider whether the taxpayer has: (i) provided or otherwise made available to laborers and mechanics paystubs or other individual payroll records reflecting the amount being paid per pay period (including the specific hourly rate and any deductions from wages); (ii) conducted investigations or otherwise reviewed complaints of retaliation or adverse actions against workers for reporting the underpayment of wages and took appropriate corrective action; (iii) provided notice regarding possible rights under the Taxpayer First Act; and (iv) whether the taxpayer failed to maintain and preserve records in accordance with §1.45-12.

Some commenters stated that considering all relevant facts and circumstances in determining whether a failure to comply with the PWA requirements was intentional would be burdensome to taxpayers who would have to investigate their contractors and subcontractors about possible failures. One commenter suggested that additional guidance consider the degrees of separation between contractual parties responsible for fulfilling the PWA requirements. The final regulations do not incorporate this suggestion. Under section 45(b)(7)(A), the taxpayer must ensure that any laborers and mechanics employed by the taxpayer, contractor, or subcontractor are paid wages at rates not less than the prevailing rates. If the taxpayer fails to do so, and that failure is due to intentional disregard, the enhanced correction and penalty payments apply. It is the obligation of the taxpayer to ensure that its contractors and subcontractors pay wages at rates not less than the applicable prevailing wage rates if the taxpayer claims the increased credit amount, regardless of the number of contracts separating the taxpayer and the subcontractor. This responsibility of the taxpayer is one reason why the final regulations include factors that help demonstrate whether a taxpayer's failure was due to intentional disregard.

One commenter requested that intentional disregard penalties be solely limited to those taxpayers who admit to intentionally failing to pay prevailing wages. The final regulations do not adopt this suggestion, as the statute does not limit the application of intentional disregard penalties to only those who admit to intentionally failing to pay prevailing wages.

The Proposed Regulations would have also provided a rebuttable presumption against a finding of intentional disregard if the taxpayer made the correction and penalty payments before receiving a notice of an examination with respect to a return that claimed the underlying increased amount of credit. This presumption of no intentional disregard is intended to encourage taxpayers who discover a failure to meet the Prevailing Wage Requirements after filing a return to promptly use the correction and penalty procedures to remedy that failure.

Some commenters supported the rebuttable presumption against intentional disregard and agreed that it would encourage taxpayers to make timely curative payments. Other commenters were critical of the presumption and suggested that it might encourage taxpayers to avoid promptly curing failures or allow taxpayers who knowingly or willfully violate the PWA requirements to avoid penalties. A few commenters suggested that the final regulations modify the presumption to apply only if the taxpayer makes the required correction and penalty payments before: (i) the earlier of the filing of the tax return claiming the credit or one year after discovering the failure, or (ii) the earlier of receiving notice of an examination from the IRS or one year after discovering the failure.

The final regulations adopt the rebuttable presumption of no intentional disregard as proposed. The Treasury Department and the IRS appreciate the concerns of commenters. However, the presumption of no intentional disregard as proposed provides a valuable incentive to encourage taxpayers to regularly review and confirm that they are complying with the PWA requirements. Additionally, the rebuttable presumption requires all correction payments (including correction payments if a former laborer or mechanic cannot be located as described in Section VII.D.2. of this Summary of Comments and Explanation of Revisions) and penalty amounts be paid before the taxpayer receives a notice of examination. If the taxpayer does not correct the failure to ensure that prevailing wages are paid (either as a precursor to the application of the rebuttable presumption or otherwise in response to an IRS determination of a failure), the taxpayer is not eligible for the increased credit amount. Taxpayers are encouraged to regularly review payroll records to ensure that workers are paid prevailing wages. Conducting reviews and curing discovered failures to pay prevailing wages several years after payments were made may be difficult, particularly if multiple contractors and subcontractors were involved in the project.

A few commenters suggested including a presumption of intentional disregard if a labor union or other worker representative reaches out to a taxpayer, project developer, or contractor and raises concerns about the PWA requirements and the project developer or taxpayer chooses to move forward without making any changes regardless of the concern that was raised. Commenters also suggested finding that taxpayers acted with intentional disregard if they did not diligently investigate their contractor and subcontractor practices. For the reasons noted herein regarding the factors for intentional disregard, the suggestions to include a new presumption of intentional disregard are not adopted. The final regulations retain the approach of providing factors that will be considered in determining whether a failure was due to intentional disregard based on all relevant facts and circumstances.

4. Penalty Waiver

In general, the IRS may exercise its discretion to waive or decline to assert penalties in the interest of sound tax administration. The Proposed Regulations would have provided limited penalty waivers for instances in which the failures to pay prevailing wages to laborers and mechanics for the construction, alteration, or repair of a facility were small in amount or occurred in a limited number of pay periods. The Proposed Regulations would have also provided that the penalty waiver cannot be used after a return has been filed claiming the increased credit amount. Finally, the Proposed Regulations would have applied the waiver authority in a manner that assists taxpayers seeking to be eligible for the increased credit amount while remaining consistent with the statutory requirement to ensure that laborers and mechanics are paid applicable prevailing wage rates. As noted in the preamble to the Proposed Regulations, the Treasury Department and the IRS understand that taxpayers intending to pay prevailing wage rates may make payroll errors or classification errors with respect to work that is performed by laborers or mechanics. The Proposed Regulations sought to account for these circumstances while continuing to ensure that laborers and mechanics are paid according to the applicable prevailing wage rates.

Proposed §1.45-7(c)(6)(i) provided that the penalty payment requirement would be waived with respect to the construction, alteration, or repair performed by a laborer or mechanic during a calendar

year if: (i) the taxpayer makes the required correction payment (back wages and interest) by the earlier of: (a) 30 days after the taxpayer became aware of the error, or (b) the date on which the tax return claiming the increased credit amount is filed; and (ii) either: (a) the laborer or mechanic is paid below the prevailing wage rate for not more than 10 percent of all pay periods of the calendar year (or part thereof) during which the laborer or mechanic worked on the construction, alteration, or repair of the facility, or (b) the difference between the amount the laborer or mechanic was paid for the calendar year (or part thereof) during which the laborer or mechanic worked on the construction, alteration, or repair of the facility and the amount required to be paid by the Prevailing Wage Requirements for the calendar year is not greater than 2.5 percent of the amount required under the Prevailing Wage Requirements. The Proposed Regulations would have used calendar years to measure any failures because taxpayers, contractors, and subcontractors performing construction may have different taxable years and laborers and mechanics are generally paid on a calendar year basis. The Treasury Department and the IRS requested comments on the proposed use of calendar years in place of taxable years for this purpose.

Many commenters were supportive of the penalty waiver, but they provided practical concerns with the 30-day correction period and the maximum underpayment period due to the short-term nature of some construction work, as well as the logistical difficulties involving multiple payroll periods and/or payroll processors used by different contractors and subcontractors. Commenters suggested increasing both the correction period and maximum underpayment period and amount to provide more time to account for these practical difficulties. Some commenters suggested increasing the correction period to 60 or 90 days. Others suggested raising the maximum underpayment period to the greater of three pay periods or 20 percent of all pay periods in a calendar year, and the maximum underpayment amount to the greater of $5,000 or five percent of all amounts required to be paid in a calendar year. Another commenter suggested removing the maximum underpayment amounts entirely. At least one commenter supported finalizing the rule as is in the Proposed Regulations, because it is sufficient to address *de minimis* payroll errors. A few commenters suggested that the waiver should not be available to a taxpayer who did not provide their workers notice of their wage rate, maintained poor records, exercised no contemporaneous monitoring or due diligence, or retaliated against workers who complained of not being paid the prevailing wage. Given the complexity of the PWA requirements, one commenter recommended limiting penalties that apply to businesses with fewer than 50 employees.

In recognition of the comments that the proposed correction period is too short to be useful, the final regulations revise the proposed penalty waiver to provide that corrections must be made by the last day of the first month following the end of the calendar quarter in which the failure occurred. The final regulations clarify that the correction must be made within the relevant time period after the failure occurred, not when the taxpayer becomes aware of the failure. This revised correction period is intended to coincide with the due date for the filing of Federal employment tax returns. The Treasury Department and the IRS expect that most employers will have conducted a review of payroll for each quarter in connection with the filing of their quarterly employment tax return, and they should be aware of failures at this time. This change will result in a correction period that generally ranges from one to three months depending on when the failure occurred.

The final regulations also modify the proposed waiver provision by increasing the maximum underpayment amount to underpayments that do not exceed five percent of all amounts required to be paid in a calendar year. The final regulations retain the maximum underpayment period as proposed to reflect the intent that this waiver provision apply only to minor errors that occur infrequently. The change to the correction period provides additional time, more certainty, and aligns with filing of the majority of employment tax returns. This change also removes the knowledge requirement, providing a more definitive correction period for taxpayer certainty and aiding IRS administration.

A few commenters indicated support of the use of calendar years for purposes of the waiver provision. No commenters suggested a different time period. Thus, the final regulations adopt calendar years as the appropriate period to measure failures for purposes of the waiver provisions.

VIII. *Apprenticeship Requirements*

A. *In general*

1. Scope

Under section 45(b)(8), in order to satisfy the Apprenticeship Requirements, certain requirements with respect to the construction of any qualified facility relating to labor hours, apprentice-to-journeyworker ratios, and participation by qualified apprentices must be satisfied. Under section 45(b)(8)(D)(i), a taxpayer is not treated as failing to satisfy the Apprenticeship Requirements in section 45(b)(8) if: (i) the taxpayer satisfies the Good Faith Effort Exception, or (ii) in the case of any failure by the taxpayer to satisfy the Labor Hours Requirement under section 45(b)(8)(A) and the Participation Requirement under section 45(b)(8)(C), the taxpayer makes a penalty payment to the IRS under the Apprenticeship Cure Provision.

Proposed §1.45-8(a) generally would have provided that a taxpayer claiming or transferring (under section 6418) the increased credit amount under section 45(b)(6)(B)(iii) with respect to any qualified facility must satisfy the requirements of section 45(b)(8) and proposed §1.45-8. Proposed §1.45-8(b), (c), and (d) would have provided the Labor Hours Requirement, the Ratio Requirement, and the Participation Requirement, respectively. Proposed §1.45-8(e) would have detailed exceptions to the Apprenticeship Requirements, enabling the taxpayer to be deemed to have satisfied the Apprenticeship Requirements if the taxpayer has either made a good faith effort to meet the Apprenticeship Requirements as described in proposed §1.45-8(e)(1) or made the penalty payment provided in proposed §1.45-8(e)(2) for any failures to which the Good Faith Effort Exception does not apply. Proposed §1.45-8(f) would have provided

additional definitions applicable to the Apprenticeship Requirements.

Section 45(b)(8) imposes the Apprenticeship Requirements with respect to the construction of any qualified facility. As discussed in Section VI. of this Summary of Comments and Explanation of Revisions, the final regulations clarify that the qualified facility for both the Prevailing Wage Requirements and the Apprenticeship Requirements is defined as a qualified facility under section 45.

Commenters asked whether the Apprenticeship Requirements applied to work performed on a qualified facility after the facility is placed in service. Commenters asserted that the statutory text supports limiting the Apprenticeship Requirements to the construction of the qualified facility. Many commenters pointed to the explicit language in section 45(b)(7)(A)(ii) applying the Prevailing Wage Requirements to alteration and repair activities in the 10-year period after a facility is placed in service, and they stated that there is no similar language in section 45(b)(8) applying the Apprenticeship Requirements to alteration and repair activities for the period after a facility is placed in service. Commenters also pointed out the impracticality of applying the Apprenticeship Requirements to alteration and repair activities after a facility is placed in service. Commenters emphasized that repairs to facilities already in service usually must be made as quickly as possible. They indicated that such repairs are often a short-term project, and requesting, hiring, and onboarding qualified apprentices consistent with the Labor Hours Requirement would cause costly delays. Commenters stated that during large power outages and other emergencies, energy-production facilities are primarily focused on returning power to customers in as timely and efficient a manner as possible.

While there is some ambiguity in the statutory text regarding whether the Apprenticeship Requirements apply to the alteration or repair of a qualified facility after it is placed in service, the more natural reading of section 45(b)(8) supports the interpretation of the commenters that the Apprenticeship Requirements only apply to the construction of a qualified facility. Under this reading, alterations and repairs occurring while a facility is being constructed would be subject to the Apprenticeship Requirements, but those occurring after the facility is placed in service would not.

Section 45(b)(7) is clear that the Prevailing Wage Requirements apply to two distinct periods with respect to the construction, alteration, or repair of a qualified facility: (i) construction under section 45(b)(7)(A)(i); and (ii) alteration or repair for any portion of a taxable year that is within the 10-year period beginning on the date the qualified facility is placed in service under section 45(b)(7)(A)(ii). Conversely, section 45(b)(8) provides requirements that apply only with respect to the construction of any qualified facility. The lack of any explicit language in section 45(b)(8) with respect to alterations or repairs during the 10-year period after a facility is placed in service, as is seen in section 45(b)(7), suggests that the Apprenticeship Requirements do not apply after a facility is placed in service.

This conclusion is also supported by the specific language in the Apprenticeship Requirements. The applicable percentage under the Labor Hours Requirement in section 45(b)(8)(A) applies to the total labor hours of the construction, alteration, or repair work performed with respect to construction of the qualified facility. This language suggests that although hours spent on alteration and repair work can be part of the calculation used to determine whether the Labor Hours Requirement is satisfied, the requirement only applies to the construction of the qualified facility and not after it is placed in service. Similar language is used in section 45(b)(8)(C) in which the Participation Requirement is limited by the phrase "with respect to the construction of the facility." Together, the language of these provisions suggests that taxpayers, contractors, and subcontractors may perform alteration and repair work that would be subject to the Apprenticeship Requirements, but that obligation only applies during construction and not after the facility is placed in service. The final regulations have been amended to confirm that the Apprenticeship Requirements apply only to the construction of the qualified facility including alteration and repair work that is performed prior to the facility being placed in service, and not to alteration or repair work occurring after the facility is placed in service.

2. Labor Hours Requirement

Section 45(b)(8)(A)(i) provides that "[t]axpayers shall ensure that, with respect to the construction of any qualified facility, not less than the applicable percentage of the total labor hours of the construction, alteration, or repair work (including such work performed by any contractor or subcontractor) with respect to such facility shall, subject to [section 45(b)(8)(B)], be performed by qualified apprentices." This rule is referred to as the Labor Hours Requirement.

For purposes of the Labor Hours Requirement, section 45(b)(8)(A)(ii) provides that the applicable percentage is: (i) 10 percent in the case of a qualified facility the construction of which begins before January 1, 2023; (ii) 12.5 percent in the case of a qualified facility the construction of which begins after December 31, 2022, and before January 1, 2024; and (iii) 15 percent in the case of a qualified facility the construction of which begins after December 31, 2023. Section 45(b)(8)(E)(i) provides that the term "labor hours" means the total number of hours devoted to the performance of construction, alteration, or repair work by any individual employed by the taxpayer or by any contractor or subcontractor, and excludes any hours worked by foremen, superintendents, owners, or persons employed in a bona fide executive, administrative, or professional capacity (within the meaning of those terms in part 541 of title 29, Code of Federal Regulations).

Commenters recommended that the final regulations clarify that there is no minimum amount of time that a qualified apprentice must be registered or employed in order to count the qualified apprentice's work towards the labor hours requirement. The statute does not impose a minimum time period, and the Treasury Department and the IRS have determined that any additional requirement would not be in furtherance of the IRA or in the interest of sound tax administration. Thus, the final regulations do not require a minimum number of hours worked before labor hours count toward the total labor hours performed by a qualified apprentice.

Commenters requested that the final regulations provide additional guidance regarding how to calculate the total labor hours and the applicable percentage. Specifically, a few commenters requested guidance on the period of time the total labor hours requirement encompasses and when the applicable percentage should be calculated. Similarly, another commenter asked whether total labor hours should be calculated on a trade-by-trade basis or by aggregating all contractors' labor hours. A commenter stated that one of the examples in the Proposed Regulations seemed to imply that the Labor Hour Requirement apply to each contractor and subcontractor involved in the construction, alteration, or repair of a covered facility, rather than the aggregate labor hours for the construction project. One commenter requested that the final regulations clarify that the labor hours calculation does not include hours worked by contractors with fewer than four employees. Another commenter asked whether on-the-job training hours worked by qualified apprentices at locations other than the location of the facility count for purposes of the Labor Hours Requirement.

Consistent with the statutory language in section 45(b)(8)(A)(i), the final regulations clarify that the Labor Hours Requirement applies to the construction of a facility, not on a contractor-by-contractor or trade-by-trade basis. The final regulations further clarify that taxpayers determine whether the Labor Hours Requirement has been satisfied by aggregating all labor hours worked by laborers and mechanics on the construction of the facility (including those hours worked by contractors with fewer than four employees), from the beginning of construction through the time the facility is placed in service and calculating whether the applicable percentage of those labor hours was worked by qualified apprentices. Accordingly, taxpayers, contractors, and subcontractors will need to keep track of labor hours from the beginning of the construction of the facility until the project or facility is placed in service. Additionally, since the statute requires not less than the applicable percentage of total labor hours of construction, alteration, or repair work with respect to the qualified facility be performed by qualified apprentices, on-the-job training hours worked by qualified apprentices at a location other than the location of the facility do not count for purposes of the Labor Hours Requirement. Training hours of qualified apprentices at the location of the facility that involve the performance of construction, alteration, or repair work with respect to the qualified facility count towards the labor hours performed by qualified apprentices for purposes of the Labor Hours Requirement. The final regulations provide examples to illustrate these calculations.

One commenter asked whether the hours worked by a working foreperson are included in the total number of labor hours in calculating the applicable percentage for purposes of the Labor Hours Requirement. One commenter requested guidance on whether a subcontractor, who only had working foremen on site to complete a project, and no qualified apprentices, would be considered to have worked zero labor hours and would not be subject to any penalties. The Proposed Regulations would have provided that working forepersons who devote more than 20 percent of their time during a workweek to laborer or mechanic duties, and who do not meet the criteria for exemption of 29 CFR part 541, are considered laborers and mechanics for the time spent conducting laborer and mechanic duties for purposes of the Prevailing Wage Requirements. As discussed in Section VII.C.1. of this Summary of Comments and Explanation of Revisions, the final regulations retain this rule. The Proposed Regulations also would have provided that the hours worked by forepersons, regardless of whether they are considered working forepersons for purposes of the Prevailing Wage Requirements are excluded from labor hours for purposes of the Labor Hours Requirement. The final regulations also retain this rule.

Commenters suggested that the regulations clarify whether the Labor Hours Requirement applies to projects with three or fewer employees. The comment seems to be asking whether the Labor Hours Requirement applies if the Participation Requirement does not apply. The two requirements are separate. Under the Participation Requirement in section 45(b)(8)(C), 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 must employ one or more qualified apprentices. There is no similar minimum threshold in the Labor Hours Requirement. To satisfy the Apprenticeship Requirements, a taxpayer needs to satisfy the Labor Hours Requirement, the Ratio Requirement, and the Participation Requirement. If the Participation Requirement does not apply, the taxpayer will still need to satisfy the Labor Hours Requirement and the Ratio Requirement.

Commenters also requested guidance on the effect of the Good Faith Effort Exception with respect to the Labor Hours Requirement. The Proposed Regulations would have provided that if a taxpayer, contractor, or subcontractor qualifies for the Good Faith Effort Exception, the number of hours that the qualified apprentices would have performed had a registered apprenticeship program supplied those qualified apprentices, would have counted towards the number of labor hours performed by qualified apprentices. The Proposed Regulations included an example illustrating the interaction between the Labor Hours Requirement and the Good Faith Effort Exception. The final regulations retain this rule and example.

Commenters also inquired whether total labor hours continue to be aggregated for all work in subsequent tax years after construction has ended, or only for those labor hours resulting from covered alteration or repair work. Another commenter requested further examples illustrating the proper calculation of labor hours for the 10-year period beginning on the date the facility was originally placed in service. Because the final regulations clarify that the Apprenticeship Requirements apply only to the construction (including alterations and repairs during construction) of the qualified facility, and not to alteration or repair work occurring after the facility is placed in service, the Labor Hours Requirement does not apply after the qualified facility has been placed in service. The final regulations incorporate additional examples clarifying this rule.

Another commenter suggested that the final regulations clarify whether the hours qualified apprentices are paid as journeyworkers as a result of failing the

daily Ratio Requirement count towards the Labor Hours Requirement as qualified apprentice hours or as journeyworker hours. Proposed §1.45-8(c)(3) would have provided that any labor hours performed by any qualified apprentice in excess of the applicable apprentice-to-journeyworker ratio may not be counted as hours performed by qualified apprentices for purpose of the Labor Hours Requirement. The final regulations retain this rule and clarify that these labor hours performed by qualified apprentices in excess of the apprentice-to-journeyworker ratio will count towards the total labor hours but will not count as hours performed by qualified apprentices for the purposes of calculating the applicable percentage.

A commenter requested additional examples addressing work performed in years after the initial year of construction. The final regulations address this comment by providing an example illustrating the calculation of the Labor Hours Requirement after the initial year of construction.

3. Ratio Requirement

Under section 45(b)(8)(B), the Labor Hours Requirement is subject to any applicable requirements for apprentice-to-journeyworker ratios of the DOL or the applicable State apprenticeship agency. Under 29 CFR part 29, registered apprenticeship programs prescribe a numeric ratio of apprentices to journeyworkers in their standards of apprenticeship.[34] This ratio is intended to ensure that there are enough journeyworkers to oversee the work of qualified apprentices, provide appropriate training, and maintain workplace safety. The Treasury Department and the IRS understand that the DOL and State apprenticeship agencies review and approve the prescribed ratio requirements. Proposed §1.45-8(c)(2), would have provided that the allowable ratio of apprentices to journeyworkers on the job site in any occupation and its corresponding classification on any day must comply with the applicable apprentice-to-journeyworker ratio of the registered apprenticeship program in accordance with 29 CFR part 29. The Treasury Department and the IRS requested comments on the application of the Ratio Requirement for purposes of satisfying the Apprenticeship Requirements. Commenters generally supported the Ratio Requirement aligning with ratio requirements set by registered apprenticeship programs.

As discussed in section VII.B.4. of this Summary of Comments and Explanation of Revisions, the Proposed Regulations would have provided a reciprocity rule for purposes of the payment of applicable prevailing wage rates for qualified apprentices. The final regulations adopt the reciprocity rule under the Prevailing Wage Requirements as proposed. The comments with respect to the reciprocity rule and the need for clarity on the ratio requirement if registered apprenticeship programs supply qualified apprentices outside of the geographic area in which the program is registered apply equally with respect to the Ratio Requirement under the Apprenticeship Requirements. Accordingly, the final regulations adopt the reciprocity rule for purposes of determining the applicable ratio of apprentices to journeyworkers under the Ratio Requirement. The final regulations clarify that if more than one apprentice-to-journeyworker ratio could apply because the construction work is occurring in a geographic area where the registered apprenticeship program is not registered, the taxpayer must comply with the apprentice-to-journeyworker ratio set for the geographic area where the construction occurs.

One commenter recommended that the final regulations clarify whether taxpayers, contractors, or subcontractors must only follow the ratio requirement of a registered apprenticeship program in those States and localities that prescribe ratio requirements for private sector projects. There is no such exception under the Ratio Requirement, and therefore the final regulations do not adopt this suggestion.

One commenter suggested that registered apprenticeship programs in some States may have a difficult time supplying enough qualified apprentices to meet the applicable apprentice-to-journeyworker ratios. The comment is inconsistent with the general application of apprenticeship ratio requirements. The Treasury Department and the IRS understand from the DOL that ratio requirements of registered apprenticeship programs that are reviewed and approved by the DOL and State apprenticeship agencies do not prescribe a certain number of qualified apprentices at a job site. Instead, they prescribe the number of journeyworkers required for each qualified apprentice that is on a job site on a given day. If on a particular day there are no qualified apprentices scheduled to work, there is no ratio requirement to adhere to. Additionally, comments regarding substantive ratio requirements set by registered apprenticeship programs and reviewed and approved by the DOL and State apprenticeship agencies are outside the scope of these final regulations.

One commenter suggested that the final regulations should incorporate the DOL regulations at 29 CFR part 29 to account for the fact that collective bargaining agreements may prohibit employers from abiding by the Ratio Requirement. The commenter was concerned that contractors may be faced with conflicting obligations and that taxpayers may be required to pay penalties as a result of negotiations outside of the taxpayer's control. The Treasury Department and the IRS understand that collective bargaining agreements may have terms that prohibit the use of apprentice-to-journeyworker ratios established as part of a registered apprenticeship program; however, section 45(b)(8)(B) provides that the Labor Hours Requirement is subject to the apprentice-to-journeyworker ratios of the DOL or the applicable State apprenticeship agency. The Treasury Department and the IRS decline to provide a rule in the final regulations that is contrary to this statutory requirement. Changes to the ratio requirements that are approved by the DOL OA or applicable State apprenticeship agencies as part of the standards for registered apprenticeship programs under 29 CFR part 29 are outside the scope of these final regulations.

[34] On January 17, 2024, the DOL published a notice of proposed rulemaking (ETA–2023–0004) in the ***Federal Register*** (89 FR 3118), to revise the regulations for registered apprenticeships. Under proposed 29 CFR 29.8(a)(19) each registered apprenticeship program must have a written set of standards of apprenticeship that includes the program's specific numeric ratio of apprentices to journeyworkers. National Apprenticeship System Enhancements, 89 FR 3118, 3279 (proposed Jan. 17, 2024).

The Proposed Regulations would have provided that the applicable ratio established by the registered apprenticeship program would need to be satisfied each day during construction, alteration, or repair of the qualified facility for which qualified apprentice labor hours are being claimed. Some commenters stated that it would be administratively challenging to comply with the Ratio Requirement each day. One commenter suggested that the apprenticeship-to-journeyworker ratio be measured over a 30-day time period. One commenter suggested providing a safe harbor for taxpayers who are able to meet the relevant apprenticeship-to-journeyworker ratio requirement for at least 90 percent of the working days of a construction project. Additionally, a commenter requested guidance on the effect on taxpayers' responsibility to meet applicable apprenticeship-to-journeyworker ratios if a registered apprenticeship program is unable to supply the necessary qualified apprentices requested by the taxpayer. At least one commenter stated that applying the Ratio Requirement on a daily basis aligns with industry custom.

The Treasury Department and the IRS recognize that there may be scheduling conflicts or other issues that may make it difficult to meet the Ratio Requirement. Under 29 CFR 29.5, registered apprenticeship programs must have a ratio requirement as part of their program standards. According to the DOL, it is industry practice for registered apprenticeship programs to set daily ratio requirements to ensure the safety and welfare of the apprentices and properly oversee the work of apprentices, and requiring different ratios under the final regulations could be administratively challenging and confusing. Additionally, a daily requirement is needed to determine whether a qualified apprentice may be paid at a rate less than the prevailing rate for work performed that day as explained in Section VII.B.4. of this Summary of Comments and Explanation of Revisions. Accordingly, the final regulations confirm that the Ratio Requirement applies each day.

One commenter requested that the final regulations require that registered apprenticeship programs identify and publish their apprentice-to-journeyworker ratios. Based on consultations with the DOL, the Treasury Department and the IRS understand that apprentice-to-journeyworker ratios of individual registered apprenticeship programs are not publicly available. However, under 29 CFR 29.5(b)(7), the ratio of apprentices to journeyworkers is a part of a registered apprenticeship program's standards of apprenticeship. A registered apprenticeship program's apprentice-to-journeyworker ratio is provided to an employer when the employer joins a registered apprenticeship program and agrees to abide by the standards of apprenticeship under 29 CFR part 29. The DOL regulates registered apprenticeship programs, and requests to impose requirements on registered apprenticeship programs is outside the scope of these final regulations.

4. Participation Requirement

Under section 45(b)(8)(C), 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 must employ one or more qualified apprentices to perform that work. The Proposed Regulations would have provided that the Participation Requirement would be satisfied as long as the taxpayer, contractor, or subcontractor employs one or more qualified apprentices to perform work on the facility and this requirement would not be a daily requirement. Additionally, the Proposed Regulations would have clarified that it would be the responsibility of the taxpayer to ensure that any contractor or subcontractor with four or more employees who perform work on the facility has hired one or more qualified apprentices. The preamble to the Proposed Regulations explained that the Treasury Department and the IRS proposed to interpret the Participation Requirement as designed to prevent taxpayers from satisfying the Labor Hours Requirement by only hiring qualified apprentices to perform one type of work and instead encourages taxpayers to use qualified apprentices across the full range of work performed with respect to the facility.

Commenters requested clarification on how to determine whether a taxpayer, contractor, or subcontractor employs four or more individuals to perform construction, alteration, or repair work with respect to the construction of a qualified facility. One commenter sought confirmation that the Participation Requirement does not apply on a daily basis. Commenters specifically requested clarification on whether the number of employees counted in determining whether the Participation Requirement applies are only those employed in the construction of the facility at the same time and at the same location.

Under section 45(b)(8)(C), the Participation Requirement applies if the taxpayer, contractor, or subcontractor employs four or more individuals to perform construction, alteration, or repair work with respect to the construction of a qualified facility. It does not require employment of four individuals in the construction of the qualified facility at the same time or at the same location. The final regulations clarify that the Participation Requirement applies if the taxpayer, contractor, or subcontractor employ four individuals in the construction of the qualified facility at any time during the construction, regardless of whether they are employed at the same location or at the same time.

Commenters suggested raising the number of employees that are required for the Participation Requirement to apply so that qualified apprentices will only need to be employed on larger projects with more resources. 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 the construction of a qualified facility must employ one or more qualified apprentices to perform such work. The final regulations adhere to the statutory requirement under section 45(b)(8)(C).

5. Other General Apprenticeship Issues

Section 45(b)(8)(A) provides, in relevant part, that taxpayers must ensure that not less than the applicable percentage of the total labor hours of the construction, alteration, or repair work with respect to such facility are performed by qualified apprentices. Consistent with this statutory provision, the Proposed Regulations would have provided that the taxpayer would be solely responsible for ensuring

that the Apprenticeship Requirements are satisfied. Some commenters stated that this provision is burdensome on taxpayers because it makes them responsible for the hiring decisions of contractors and subcontractors. Specifically, commenters were concerned that taxpayers may fail to satisfy the Apprenticeship Requirements if a contractor does not hire a sufficient number of qualified apprentices.

The statute requires that the taxpayer ensure that the applicable percentage of total labor hours are performed by qualified apprentices, irrespective of which entity employs the qualified apprentices. If a contractor or subcontractor does not comply with the Labor Hours Requirement, the taxpayer retains the opportunity to cure that failure by paying the penalty described under section 45(b)(8)(D)(i)(II). Thus, subject to the Participation Requirement, the taxpayer retains some flexibility in ensuring that the Apprenticeship Requirements are satisfied.

One commenter suggested that the final regulations require taxpayers to collect and audit their contractor and subcontractors' requests for qualified apprentices. Taxpayers may establish procedures to help ensure their compliance with the Apprenticeship Requirements. Those procedures may include regularly reviewing the qualified apprentice hiring practices of contractors and subcontractors or including requirements to hire qualified apprentices in contracts. Whether a taxpayer regularly reviewed contractors' and subcontractors' use of qualified apprentices is a factor in determining intentional disregard.

A commenter stated that depending on a construction project's geographic access to registered apprenticeship programs, it could be impractical for some smaller contractors to maintain the relatively high percentage of qualified apprentices necessary to meet each of the Apprenticeship Requirements. The Participation Requirement, which does not require the hiring of qualified apprentices if a contractor does not employ four or more individuals, provides limited relief for smaller businesses and addresses potential burdens. Further, the Good Faith Effort Exception discussed in Section VIII.B.1. of this Summary of Comments and Explanation of Revisions may provide relief in those circumstances raised by commenters. Accordingly, the final regulations do not provide any additional exceptions.

Section 45(b)(8)(E)(ii) defines a qualified apprentice as an individual who is employed by the taxpayer or by any contractor or subcontractor and who is participating in a registered apprenticeship program, as defined in section 3131(e)(3)(B). For purposes of the Apprenticeship Requirements, the Proposed Regulations would have defined a qualified apprentice, in part, as an individual who is employed by the taxpayer or by any contractor or subcontractor who is participating in a registered apprenticeship program. Under the Proposed Regulations, participating in a registered apprenticeship program would have included entering into a written agreement with a registered apprenticeship program. The Proposed Regulations would have also provided that for purposes of the Prevailing Wage Requirements, an apprentice includes an individual in the first 90 days of probationary employment who has been certified by the DOL OA or a State apprenticeship agency (if appropriate) to be eligible for probationary employment as an apprentice. One commenter asked for the final regulations to clarify whether the term qualified apprentice includes those individuals in the first 90 days of probationary employment with the registered apprenticeship program, similar to how such individuals are treated as apprentices under 29 CFR 22.401. The final regulations clarify that a qualified apprentice includes those individuals in the first 90 days of probationary employment with the registered apprenticeship program because they are participating in the registered apprenticeship program.

The Proposed Regulations would have provided that pre-apprenticeship programs do not qualify as registered apprenticeship programs for purposes of section 45(b)(8) and hours worked as part of a pre-apprenticeship program would not count towards the Labor Hours Requirement. Commenters recommended that the Treasury Department and the IRS permit other programs, such as trade schools, colleges, programs run by local high schools and school districts, and other privately run, non-registered apprenticeship or workforce development programs to supply apprentices to taxpayers, contactors, or subcontractors to satisfy the Apprenticeship Requirements. Commenters asserted that permitting programs in addition to registered apprenticeship programs to supply apprentices will help ease the expected short supply of qualified apprentices due to high demand. A commenter also explained that biogas systems are usually co-located at farms and some members in the biogas industry rely on apprenticeship programs run through local high schools and school districts, that help provide hands-on experience and develop interest for agricultural careers. The commenter suggested including those school-based apprenticeship programs if they meet certain criteria.

Although the Treasury Department and the IRS understand there may be advantages to hiring individuals through programs other than registered apprenticeship programs, the statute requires that qualified apprentices be employed by the taxpayer, contractor, or subcontractor and be participating in a registered apprenticeship program for purposes of the Apprenticeship Requirements. The final regulations adhere to the statutory requirements and the proposed rule is adopted without change.

Several commenters indicated a general concern with the lack of qualified apprentices to staff construction projects. One commenter stated that in the next five to ten years, the construction industry is bracing for hundreds of billions of dollars of additional infrastructure spending and tax incentives. The commenter was skeptical that there are sufficient registered apprenticeship programs and qualified apprentices available to meet the Apprenticeship Requirements. An additional commenter shared survey data indicating that the necessary registered apprenticeship programs have not been established in their geographic area. The same commenter also opined that there are not enough qualified apprentices currently enrolled in registered apprenticeship programs to supply a workforce capable of meeting the Labor Hour Requirements.

Comments discussing the possible shortage of qualified apprentices or registered apprenticeship programs are outside the scope of these final regulations. However, the Treasury Department and

the IRS appreciate that the commenters raised these concerns and have consulted with the DOL OA regarding them. The DOL OA explained that group registered apprenticeship programs that typically place qualified apprentices with multiple employers for on-the-job training are designed to expand with demand because they typically only admit as many qualified apprentices as they have guaranteed placements for. If there are additional employers, they can admit additional qualified apprentices to their programs. The DOL OA also indicated that over the last several years the DOL has made significant investments in the registered apprenticeship space to prepare and expand access to qualified apprentices. The DOL OA is ready to assist in the creation of new registered programs that may be needed to meet the increased demand for apprentices. Taxpayers, contractors, and subcontractors are encouraged to start their own registered apprenticeship programs to help increase the supply of qualified apprentices.

Additionally, the Good Faith Effort Exception contemplates that the supply of available qualified apprentices may not always match the demand necessary to meet the Apprenticeship Requirements and provides relief in those cases as explained in Section VIII.B.1. of this Summary of Comments and Explanation of Revisions. However, use of the Good Faith Effort Exception if there is no registered apprenticeship program that operates in the geographic location of the facility is expected to be rare because registered apprenticeship programs can operate across State and county lines and are expected to expand according to demands.

A commenter requested that the final regulations clarify that a registered apprenticeship program may only provide qualified apprentices for the specific classification(s) requested by the taxpayer. The regulation of registered apprenticeship programs is outside the scope of these final regulations. Taxpayers, contractors, and subcontractors retain flexibility in their hiring decisions, including with respect to qualified apprentices. Under these final regulations, the hours that are worked by a qualified apprentice only qualify towards the Labor Hours Requirement and the Participation Requirement to the extent the qualified apprentice is performing construction, alteration, or repair work with respect to the construction of a facility consistent with the occupation in which the qualified apprentice is training.

Another commenter claimed that the Proposed Regulations would place the responsibility to provide qualified apprentices on group sponsors of registered apprenticeship programs, thereby limiting taxpayer incentives to launch their own programs and hire qualified apprentices in other circumstances. The Proposed Regulations did not intend to restrict taxpayers, contractors, or subcontractors from developing their own registered apprenticeship programs. The final regulations clarify that taxpayers, contractors, and subcontractors have the flexibility to create their own registered apprenticeship program (within the meaning of section 3131(e)(3)(B)) or partner with existing registered apprenticeship programs to satisfy the Apprenticeship Requirements.

Another commenter requested that the final regulations require that any funds contributed to a registered apprenticeship program must be used to train qualified apprentices. While the Treasury Department and the IRS understand that commenters want to ensure funds contributed to a registered apprenticeship program are used appropriately, this is outside the scope of the final regulations.

Several commenters requested assistance in finding registered apprenticeship programs to provide qualified apprentices to a project. The DOL OA, in collaboration with participating State apprenticeship agencies, has created an online search tool to assist taxpayers, contractors, and subcontractors in finding registered apprenticeship programs (currently *https://www.apprenticeship.gov/partner-finder*). Taxpayers, contractors, and subcontractors can search for registered apprenticeship programs by occupation or industry in a certain State, city, or zip code. Taxpayers, contractors, and subcontractors can also contact the DOL OA or their State apprenticeship agency for assistance in locating registered apprenticeship programs.

A commenter also stated that the Apprenticeship Requirements could create new challenges for taxpayers who depend on labor from other countries to help install equipment. The commenter explained that foreign contractors and subcontractors will be unable to meet the Apprenticeship Requirements because they are not permitted to hire qualified apprentices from registered apprenticeship programs. The commenter suggested that the final regulations expand the Good Faith Effort Exception to provide reasonable accommodations for taxpayers who rely on foreign companies for specific work.

The Treasury Department and the IRS understand from the DOL OA that DOL regulations governing registered apprenticeship programs do not prohibit foreign employers from hiring qualified apprentices from registered apprenticeship programs or registering an apprenticeship program, provided certain requirements are satisfied (for example, the foreign employer must have a physical presence in the United States and be legally authorized to conduct business in the United States). The DOL OA confirmed that there are several registered apprenticeship programs sponsored by foreign employers. Accordingly, the Treasury Department and the IRS decline to provide special exceptions for taxpayers who use foreign contractors or subcontractors for specific work as the statute does not contemplate such an exception.

A commenter requested that the final regulations clarify the effect of the DOL deregistering a registered apprenticeship program. The commenter recommended that the final regulations permit taxpayers, contractors, and subcontractors to continue to pay the applicable apprenticeship prevailing wage rate if a registered apprenticeship program is deregistered, provided the taxpayer, contractor, or subcontractor can find a new registered apprenticeship program for the apprentices already employed within 90 days from the date the taxpayer, contractor, or subcontractor is notified in writing that the program was deregistered. The commenter also requested that the Treasury Department and the IRS provide an option for enrolling apprentices in registered apprenticeship programs that offer remote learning in the event a registered apprenticeship program is deregistered.

The Treasury Department and the IRS understand that programs may be deregistered by the DOL OA or the State appren-

ticeship agency as a result of the program's failure to follow the requirements in 29 CFR parts 29 and 30. When an apprenticeship program is deregistered, the DOL OA or State apprenticeship agency assists with transferring the apprentices to other registered apprenticeship programs. The DOL OA has indicated that deregistration is rare and the process leading up to deregistration involves ample opportunities for programs to take corrective action prior to deregistration such that there will be time for taxpayers, contractors, and subcontractors to find new registered apprenticeship programs or qualified apprentices if a program is at risk of deregistration.

The final regulations do not adopt this comment. Section 45(b)(8) requires the use of qualified apprentices participating in a registered apprenticeship program. An individual registered in an apprenticeship program that has been deregistered is no longer a qualified apprentice and the hours worked by the individual after deregistration of the program will not qualify towards the Apprenticeship Requirements. The Treasury Department and the IRS also decline to permit taxpayers, contractors, or subcontractors to pay the reduced applicable apprenticeship prevailing wage rate in the event of deregistration as doing so would be inconsistent with the statute.

A commenter recommended that the final regulations provide guidance for situations in which the construction work outlasts the qualified apprentice's tenure with a registered apprenticeship program, because the qualified apprentice is promoted, graduates, or otherwise leaves the program. The employment of individuals who are no longer qualified apprentices for any reason will not qualify for purposes of the Apprenticeship Requirements.

Similarly, a few commenters requested guidance regarding the impact to the Apprenticeship Requirements if circumstances change in the middle of construction of a facility, such as qualified apprentice labor becoming unavailable. The Treasury Department and the IRS understand there might be situations in which qualified apprentice labor becomes unavailable, which may affect a taxpayer's ability to comply with the Labor Hours Requirement. In this situation, taxpayers may be eligible for the Good Faith Effort Exception (if those requirements are satisfied) or may cure the failure to meet the Apprenticeship Requirements by paying the prescribed penalty under section 45(b)(8)(D)(i)(II). The Good Faith Effort Exception and the Apprenticeship Cure Provision are discussed in Section VIII.B. of this Summary of Comments and Explanation of Revisions.

A commenter also suggested that in order to ensure high quality on-the-job training in registered apprenticeship programs, the final regulations should either support or require employers seeking the increased amounts of credit to be registered training agents and demonstrate their proof of status with a registered apprenticeship program. Because registered apprenticeship programs must provide supervised work experience and training on the job, the use of qualified apprentices already ensures quality on-the-job training, and the final regulations do not require taxpayers, contractors, or subcontractors to register as training agents.

B. *Exceptions to the Apprenticeship Requirements*

Under section 45(b)(8)(D)(i), a taxpayer is not treated as failing to satisfy the Apprenticeship Requirements in section 45(b)(8) if: (i) the taxpayer satisfies the Good Faith Effort Exception in section 45(b)(8)(D)(ii), or (ii) in the case of any failure by the taxpayer to satisfy the Labor Hours Requirement under section 45(b)(8)(A) and the Participation Requirement under section 45(b)(8)(C), the taxpayer makes a penalty payment to the IRS.

1. Good Faith Effort Exception

Under the Good Faith Effort Exception, a taxpayer is deemed to have satisfied the Apprenticeship Requirements with respect to a qualified facility if the taxpayer has requested qualified apprentices from a registered apprenticeship program and: (i) such request has been denied, provided that such denial is not the result of a refusal by the taxpayer or any contractors or subcontractors engaged in the performance of construction, alteration, or repair work with respect to such qualified facility to comply with the established standards and requirements of the registered apprenticeship program, or (ii) the registered apprenticeship program fails to respond to such request within five business days after the date on which such registered apprenticeship program received the request.

The Proposed Regulations would have provided that, generally, a taxpayer is deemed to have satisfied the Apprenticeship Requirements with respect to a request for qualified apprentices if the taxpayer, contractor, or subcontractor submitted a written request for qualified apprentices to at least one registered apprenticeship program that: (i) has a geographic area of operation that includes the location of the facility, or that can reasonably be expected to provide apprentices to the location of the facility; (ii) trains apprentices in the occupation(s) needed to perform construction, alteration, or repair with respect to the facility; and (iii) has a usual and customary business practice of entering into agreements with employers for the placement of apprentices in the occupation for which they are training, pursuant to its standards and requirements. The Proposed Regulations would have further required that the request be in writing and sent electronically or by registered mail. The Proposed Regulations would have defined a registered apprenticeship program to mean a program that has been registered by the DOL OA or a recognized State apprenticeship agency pursuant to 29 CFR parts 29 and 30, as meeting the basic standards and requirements of the DOL (DOL Apprenticeship Standards).

The Proposed Regulations would have provided that the Good Faith Effort Exception is specific to the request for qualified apprentices made by the taxpayer, contractor, or subcontractor, including the number of apprentice hours for which the request for apprentices has been made to a registered apprenticeship program. Thus, the Good Faith Effort Exception would have applied to the specific portion of the request for qualified apprentices that was not responded to or denied. The Proposed Regulations would also have provided that the denial of a request for qualified apprentices would qualify for the Good Faith Effort Exception for a period of 120 days after the denial and that taxpayers, contractors, or subcontractors would be

required to submit an additional request for apprentices every 120 days after a denial to continue to qualify for the Good Faith Effort Exception. The Treasury Department and the IRS requested comments on the duration of requests for qualified apprentices under the Good Faith Effort Exception.

The Treasury Department and the IRS are aware that the DOL OA, as well as State apprenticeship agencies, routinely provide technical expertise on registered apprenticeship program matters, including identifying registered apprenticeship programs and assisting employers seeking to register their own programs. The Treasury Department and the IRS requested comments on whether and how the proposed Good Faith Effort Exception might account for a situation in which a taxpayer contacts the DOL OA or the appropriate State apprenticeship agency regarding their apprenticeship request, in addition to contacting a specific registered apprenticeship program(s).

The Treasury Department and the IRS also requested comments on how the proposed Good Faith Effort Exception would align with current practices with respect to use of apprentices in the construction, alteration, or repair of facilities. In particular, the Treasury Department and the IRS requested comments on the role of collective bargaining agreements, PLAs, and other agreements to satisfy the request for apprentices under the Good Faith Effort Exception. The following sections summarize the comments received. The final regulations provide further guidance regarding the Good Faith Effort Exception and revise the Proposed Regulations in response to the comments received.

a. Content and scope of a request

The Proposed Regulations would have required that a request for qualified apprentices must include the proposed dates of employment, occupation of apprentices needed, location of the work to be performed, number of apprentices needed, the expected number of labor hours to be performed by the apprentices, and the name and contact information of the taxpayer, contractor, or subcontractor requesting employment of apprentices from the registered apprenticeship program. The Proposed Regulations would have also required that the request state that the request for qualified apprentices is made with an intent to employ apprentices in the occupation for which they are being trained and in accordance with the requirements and standards of the registered apprenticeship program.

Several commenters requested that the final regulations further clarify what information must be included in the request for qualified apprentices for purposes of the Good Faith Effort Exception. At least one commenter asked whether the request could estimate the dates of employment and the number of qualified apprentices needed. Commenters suggested that the final regulations require requests to explain the need for qualified apprentices and provide the exact number of qualified apprentices needed. Other commenters specifically asked that the request be required to include the name and contact information of the entity that will employ the qualified apprentices.

The final regulations retain the proposed rule requiring taxpayers, contractors, and subcontractors to include specific and detailed information concerning the qualified apprentices that are requested and the work to be performed with certain revisions to provide greater clarity for taxpayers and to strengthen the Good Faith Effort Exception. The final regulations further require that a request must identify who will employ the qualified apprentices. The Treasury Department and the IRS understand that requests for qualified apprentices will be based on projections or estimates of the work to be performed including the duration of the work and the number of hours. Nonetheless, the estimates must be consistent with the requester's intent to employ the qualified apprentices. Accordingly, the final regulations provide that requests may include reasonable estimates, and also require that the request include a statement of intent to employ qualified apprentices consistent with the hours and dates of employment included in the request.

The Treasury Department and the IRS are aware of the concerns about potential abuse of the Good Faith Effort Exception. Taxpayers, contractors, and subcontractors should be mindful that requests that lack specific details of employment or do not reflect reasonable estimates will not be considered valid requests under the final regulations. Consistent with the general rule in §1.45-12 that taxpayers must maintain and preserve records sufficient to demonstrate compliance with the applicable PWA requirements, taxpayers need to keep records demonstrating the estimates included in the request were reasonable, such as projected and actual labor needs (both for journeyworkers and qualified apprentices) during the construction of the qualified facility, and any factors impacting those needs, such as apprentice utilization plans or contract requirements, as applicable.

b. Required format of a request

Commenters recommended that the final regulations require taxpayers to make requests for qualified apprentices in writing and by telephone. Commenters argued that adding the requirement to contact registered apprenticeship programs by telephone would ensure taxpayers, contractors, and subcontractors use forms of communication that are reasonably calculated to properly and timely notify registered apprenticeship programs of their requests.

The Treasury Department and the IRS recognize that some taxpayers, contractors, and subcontractors have ongoing relationships with registered apprenticeship programs and may request qualified apprentices from the program informally, such as by telephone. However, in administering the Good Faith Effort Exception the IRS needs to be able to verify and evaluate the request for qualified apprentices, including if the request was received by the registered apprenticeship program and whether the request included the necessary details to be considered a valid request. Accordingly, the final regulations retain the rule that a request to a registered apprenticeship program must be a written request, sent electronically or by registered mail, for purposes of the Good Faith Effort Exception. Taxpayers, contractors, or subcontractors are permitted and encouraged to contact registered apprenticeship programs in writing and by telephone, but in order to satisfy the Good Faith Effort Exception, the request must be in writing.

c. Required recipients of a request

A commenter stated that many employers who are signatories to collective bargaining agreements with building trades labor unions request qualified apprentices from the labor union and not from a registered apprenticeship program. The commenters indicated that this is the common practice because the labor union will have a list of qualified apprentices who will be dispatched to the employer's job site. The commenter suggested the final regulations revise the Good Faith Effort Exception to reflect this practice. The Treasury Department and the IRS understand that this practice may occur; however, section 45(b)(8)(D)(ii) provides that requests for qualified apprentices must be made to a registered apprenticeship program. Accordingly, the Treasury Department and the IRS decline to amend the Good Faith Effort Exception to allow this alternative procedure.

The Proposed Regulations would have provided that in order to qualify for the Good Faith Effort Exception, taxpayers, contractors, or subcontractors must submit a written request for qualified apprentices to at least one registered apprenticeship program, which has a geographic area of operation that includes the location of the facility, or to a registered apprenticeship program that can reasonably be expected to provide apprentices to the location of the facility. In the preamble to the Proposed Regulations, the Treasury Department and the IRS explained that although a taxpayer only needs to submit a request to one registered apprenticeship program, depending on the size of the facility and the likelihood of multiple occupations involved in the construction of the facility, a taxpayer may need to submit a request to more than one apprenticeship program in order to meet the Good Faith Effort Exception.

Several commenters suggested that the final regulations require taxpayers to request qualified apprentices from all available registered apprenticeship programs. Other commenters requested the final regulations retain the requirement to contact at least one available registered apprenticeship program in order to meet the Good Faith Effort Exception. Given that the statute does not impose this requirement, it would be unreasonable to require taxpayers to contact all possible apprenticeship programs. The final regulations adopt the proposed rule without change. In order to qualify for the Good Faith Effort Exception, taxpayers, contractors, or subcontractors must submit a written request for qualified apprentices to at least one registered apprenticeship program. The Good Faith Effort Exception is limited to the number of qualified apprentice labor hours that are requested as part of a valid request for qualified apprentices.

A commenter requested that the final regulations clarify that taxpayers are not required to request apprentices from the same geographic area as the project. The final regulations do not require taxpayers to use qualified apprentices from a program located in the same geographic area as the project to meet the Labor Hours Requirement. Taxpayers, contractors, or subcontractors have the flexibility to request and use qualified apprentices from any location so long as the apprentices are part of a registered apprenticeship program. However, as provided herein, in order to qualify for the Good Faith Effort Exception, taxpayers are required to request qualified apprentices from at least one apprenticeship program with a geographic area of operation that includes the geographic location of the facility.

Commenters requested additional guidance regarding how to determine those apprenticeship programs that would reasonably be expected to provide apprentices to the location of a facility. Some commenters suggested making this requirement less ambiguous by requiring taxpayers, contractors, and subcontractors to contact all registered apprenticeship programs within a certain distance from the project location. One commenter suggested that taxpayers should be required to accept apprentices from a "sister" program either from within the same State or from one or more States adjacent to the State in which the construction is occurring. Other commenters recommended being able to unconditionally use local registered apprenticeship programs. A commenter also recommended clarifying the expectations for nonunion contractors to use apprentices from union-affiliated programs if nonunion programs are not locally available.

The Treasury Department and the IRS agree that additional clarification is needed on which registered apprenticeship program must be contacted to satisfy the Good Faith Effort Exception. The proposed rule was intended to require sending the request to a registered apprenticeship program that would ordinarily provide apprentices to the area where the facility is located. The Treasury Department and the IRS have determined that this prerequisite is sufficiently addressed in the requirement that the registered apprenticeship program have a geographic area of operation that includes the location of the facility, because those registered apprenticeship programs can reasonably be expected to provide apprentices to the area where the facility is located. Accordingly, the proposed requirement to contact a registered apprenticeship program that can reasonably be expected to provide apprentices to the location of the facility is not retained in the final regulations. The final regulations clarify that the geographic area of operation of a registered apprenticeship program has the same meaning as geographic area and locality for purposes of the Prevailing Wage Requirements. In most cases, this will mean that the registered apprenticeship program operates in the county, independent city, or other civil subdivision of the State in which the facility is located, regardless of where the registered apprenticeship program is physically located.

Commenters requested guidance with respect to the application of the Good Faith Effort Exception if there is no registered apprenticeship program with a geographic area of operation that includes the location of the facility or that can be reasonably expected to provide apprentices to a project. A commenter also requested guidance in situations in which certain trades lacked qualified apprentices either locally or nationally. Commenters also requested clarification on how to determine that there are no registered apprenticeship programs in the geographic area or that can be reasonably expected to provide apprentices to a project. Other commenters recommended requiring taxpayers, contractors, or subcontractors to seek assistance from the DOL OA or State apprenticeship agency if the taxpayer is having trouble locating a registered apprenticeship pro-

gram with a geographic area of operation that includes the location of the facility in order to qualify for the Good Faith Effort Exception.

Although the Treasury Department and the IRS expect this situation to be rare, the final regulations address the application of the Good Faith Effort Exception in the absence of a registered apprenticeship program with an area of operation that includes the location of the facility. The final regulations provide that if there is no registered apprenticeship program with a geographic area of operation that includes the location of the facility, taxpayers will be deemed to satisfy the Good Faith Effort Exception for the apprentices they (or the contractor or subcontractor) would have requested for that occupation.

Taxpayers, contractors, and subcontractors should keep records sufficient to substantiate that there are no existing registered apprenticeship programs with a geographic area of operation that includes the facility at the time the request would have been made, as well as documentation of the requests for apprentices that would have been made, including the specific work and hours that would have been performed by the apprentices if a registered apprenticeship program were available. Taxpayers are also able, but not required for the purposes of the Good Faith Effort Exception, to create their own registered apprenticeship programs.

Because registered apprenticeship programs can operate across State and county lines, determining that a registered apprenticeship program does not have a geographic area of operation that includes the location of the facility may necessitate contacting the registered apprenticeship program to determine its geographic area of operation. Taxpayers should also consider contacting the DOL OA or relevant State apprenticeship agency for assistance in locating registered apprenticeship programs and documenting that no registered apprenticeship programs are available. Examples of evidence that no registered apprenticeship programs were available could include written confirmation from registered apprenticeship programs that they do not have a geographic area of operation that includes the location of the facility or confirmation from the DOL OA or the relevant State apprenticeship agency that there are no existing registered apprenticeship programs with a geographic area of operation that includes the facility.

Commenters also requested guidance on how a taxpayer, contractor, or subcontractor who sponsors its own registered apprenticeship program and employs qualified apprentices would qualify for the Good Faith Effort Exception. The final regulations clarify that if a taxpayer, contractor, or subcontractor is a registered apprenticeship program sponsor and there are no available qualified apprentices in the registered apprenticeship program sponsored by the taxpayer, contractor, or subcontractor, the taxpayer, contractor, or subcontractor may qualify for the Good Faith Effort Exception by demonstrating that it made a request to another registered apprenticeship program (and such request was denied or not responded to within five business days) or by establishing that there are no other registered apprenticeship programs with an area of operation that includes the location of the facility.

One commenter stated that it is customary for some employers who are signatories to collective bargaining agreements to hire qualified apprentices through the union instead of by contacting a registered apprenticeship program. The commenter requested the final rule clarify that this practice is permissible. The final regulations do not adopt this suggestion. The Treasury Department and the IRS recognize that an employer may not directly contact a registered apprenticeship program for qualified apprentices if the employer is a signatory to a collective bargaining agreement with a labor organization. However, for purposes of satisfying the Good Faith Effort Exception, the taxpayer must have requested qualified apprentices from a registered apprenticeship program and not a labor organization.

In the preamble to the Proposed Regulations, the Treasury Department and the IRS requested comments on whether and how the proposed Good Faith Effort Exception might take into account a situation in which a taxpayer contacts the DOL OA or the appropriate State apprenticeship agency regarding their apprenticeship request, in addition to contacting a specific registered apprenticeship program or programs. Some commenters requested that the final regulations clarify that a taxpayer's outreach to the DOL OA or a State apprenticeship agency has no bearing on whether a taxpayer qualifies for a Good Faith Effort Exception. The Treasury Department and the IRS have determined that taxpayers, contractors, or subcontractors are not required to contact the DOL OA or State apprenticeship agency to satisfy the Good Faith Effort Exception. However, as noted previously, it is recommended that taxpayers, contractors, and subcontractors contact the DOL OA or a State apprenticeship agency if they have difficulty locating a registered apprenticeship program. Additionally, the final regulations provide that evidence that the taxpayer, contractor, or subcontractor contacted the DOL OA or a State apprenticeship agency for assistance will be considered in determining whether taxpayers, contractors, or subcontractors acted with intentional disregard if the Good Faith Effort Exception does not apply.

d. Timing of a request

Commenters asked that the final regulations clarify when a request must be made in order to satisfy the Good Faith Effort Exception. Several commenters recommended that requests should be made within a certain time before the requested qualified apprentices are needed. Some commenters indicated that in the absence of a temporal requirement, some taxpayers, contractors, or subcontractors may make last-minute requests for qualified apprentices. The commenters asserted that it may be very difficult or impossible for a registered apprenticeship program to respond to a request for qualified apprentices without adequate time to staff the request. Some commenters suggested that there may be a loophole allowing for the application of the Good Faith Effort Exception in situations in which it was not intended to apply if the final regulations do not impose a temporal requirement. Commenters proposed time periods that ranged from five days before qualified apprentices are needed (if a taxpayer, contractor, or subcontractor has a pre-existing relationship with the registered apprenticeship program) to 90 days before qualified apprentices are needed in the absence of a pre-existing relation-

ship. Several commenters suggested that requests should be required 10 to 14 days before qualified apprentices are expected to start work on the project.

The DOL OA has indicated that typical apprenticeship cycles in construction involve at least 2,000 hours of on-the-job training and at least 144 hours of related instruction for each year of the apprenticeship program. According to the DOL OA, registered apprenticeship programs in the construction industry typically hire qualified apprentices in cohorts, and advance notice is needed to allow the registered apprenticeship program adequate time to supply the requested qualified apprentices within the timeframe needed.

The Treasury Department and the IRS agree that in order to satisfy the Good Faith Effort Exception, the initial request for qualified apprentices must be made with enough advance notice to allow registered apprenticeship programs time to respond. The Treasury Department and the IRS also recognize that given the nature of construction projects, and the desire to complete projects on time, a shorter timeframe may be appropriate for any subsequent requests once construction is underway. Accordingly, the final regulations require that taxpayers, contractors, and subcontractors must make an initial request for qualified apprentice(s) from a registered apprenticeship program at least 45 days before the qualified apprentice is requested to begin work on the facility so that registered apprenticeship programs have adequate time to plan for the anticipated need. The final regulations also clarify that to satisfy the Good Faith Effort Exception, any subsequent requests to the same registered apprenticeship program must be made no later than 14 days before qualified apprentices are requested to begin work on the facility.

The Treasury Department and the IRS received numerous comments regarding the 120-day period for which the denial or nonresponse of a request for qualified apprentices is considered to satisfy the Good Faith Effort Exception and the requirement for taxpayers to submit additional requests for qualified apprentices to continue to satisfy the Good Faith Effort Exception at the end of the 120-day period. Some commenters suggested eliminating the requirement to submit additional requests or extending the time before an additional request needs to be made from 120 days to one year, noting that the 120-day period could be impractical or burdensome, create uncertainty, and that it might not increase the hiring of qualified apprentices. Several commenters asserted that the 120-day period and the requirement to submit additional requests lacked a statutory basis, because the statutory text of the Good Faith Effort Exception in section 45(b)(8)(D) does not prescribe or mention any 120-day period and does not require any renewal by the taxpayer of its request for a qualified apprentice in order to be deemed to satisfy the Apprenticeship Requirements. Other commenters suggested that the 120-day period be shortened to better align with project timelines for subcontractors who typically conclude their work on a project well within the 120-day window.

Commenters also asked that the final regulations clarify if subsequent requests have to be made to the same registered apprenticeship program and if there is a limit on the number of times an additional request needed to be made in order to satisfy the Good Faith Effort Exception. Additionally, a commenter suggested that the final regulations require follow-up requests for qualified apprentices to include the names of any registered apprenticeship programs the taxpayer previously contacted for qualified apprentices. Commenters also asked whether the Labor Hours Requirement applied if taxpayers, contractors, or subcontractors met the Good Faith Effort Exception for 120 days, and subsequently obtained qualified apprentices in response to an additional request made after the expiration of the 120-day period. If the Labor Hours Requirement applied in this scenario, the commenter requested guidance on how to determine if a taxpayer satisfied the Labor Hours Requirement under these circumstances.

The Treasury Department and the IRS agree with the comments indicating that the 120-day period introduces unnecessary uncertainty with respect to labor supply and costs. A request that is initially denied for lack of available qualified apprentices that is later accepted pursuant to a renewed request after only 120 days could disrupt staffing decisions. Moreover, the Treasury Department and the IRS acknowledge that a requirement to submit additional requests after 120 days could increase burdens in cases in which businesses may not have the staff or staffing flexibility to comply with a requirement for multiple, ongoing requests. However, the Treasury Department and the IRS also recognize the value in prescribing the duration of requests to prevent the Good Faith Effort Exception from allowing the Apprenticeship Requirements to be avoided in their entirety if qualified apprentices will likely be available for work at some time during the lifespan of a construction project as the supply adjusts to demands.

Based on the comments received and in consultation with the DOL, the Treasury Department and the IRS have determined that the maximum duration of a request for qualified apprentices is 365 days (366 days in case of a leap year). The final regulations have been revised to provide that taxpayers must submit additional requests 365 days (366 days in case of a leap year) after the denial of a previous request to continue to satisfy the Good Faith Effort Exception. The final regulations also clarify that the annual duration applies if a taxpayer, contractor, or subcontractor is not able to locate a registered apprenticeship program with an area of operation that includes the location of the facility.

Extending the maximum duration of requests for qualified apprentices to an annual period will allow employers sufficient time to assess future work needs appropriate for qualified apprentices without causing uncertainty for existing staff and unexpected costs that might otherwise result if requests were required on a more frequent basis. It also allows sufficient time for the supply of qualified apprentices to adjust to the construction demands of the location of the facility through the registration of new apprenticeship programs and recruitment of qualified apprentices into those programs. The final regulations retain the rule that requests for purposes of the Good Faith Effort Exception must be specific as to the dates of employment and the expected number of hours the qualified apprentices are needed with the intent to employ the qualified apprentices consistent with the request. Taxpayers, contractors, or subcontractors making general requests that lack an

intent to employ the qualified apprentices consistent with the request would not satisfy the Good Faith Effort Exception. The final regulations also clarify that requests for qualified apprentices do not need to be made to the same registered apprenticeship program that received and denied an earlier request.

The final regulations also include an example in response to the request for clarification on how the Labor Hours Requirement applies if a taxpayer satisfies the Good Faith Effort Exception for one 365-day period (or 366-day period in the case of a leap year), and then obtains qualified apprentices in response to an additional request for qualified apprentices that is made later.

e. Definition of a response

The Proposed Regulations would have provided that an acknowledgement, whether in writing or otherwise by a registered apprenticeship program, of receipt of the request is a sufficient response for purposes of the Good Faith Effort Exception. Several commenters requested that the final regulations modify this proposed requirement and provide that open-ended and non-substantive replies do not constitute a response for purposes of satisfying the Good Faith Effort Exception. Commenters were concerned that if a non-substantive acknowledgement is treated as a response, taxpayers could be foreclosed from relying on the Good Faith Effort Exception and be unable to satisfy the Apprenticeship Requirements despite legitimate attempts to do so. They also stated that the proposed rule could lead to uncertainty for taxpayers and indefinitely delay construction while taxpayers attempt to comply with the Apprenticeship Requirements. Another commenter requested that the final regulations require the acknowledgment to be in writing, consistent with the requirement that the request must be in writing.

The Treasury Department and the IRS agree with the concerns raised by the commenters. Accordingly, the final regulations provide that a response is a substantive written reply that agrees, in part or in whole, to the specific requirements in the taxpayer's, contractor's, or subcontractor's request. Automated or other non-substantive responses or acknowledgments are not responses for purposes of the Good Faith Effort Exception.

One commenter suggested the final regulations clarify that if a program replies with a non-substantive response, the taxpayer is not required to follow up with the registered apprenticeship program for a more specific response. The Treasury Department and the IRS agree that additional guidance is needed on the procedures after a taxpayer, contractor, or subcontractor makes an initial request to a registered apprenticeship program. The final regulations clarify that, for purposes of the Good Faith Effort Exception and subject to the annual duration of a request, a taxpayer, contractor, or subcontractor does not need to follow up with the registered apprenticeship program after an initial request is made or after receipt of a non-substantive response.

Although follow-up requests are not required for purposes of the Good Faith Effort Exception, the Treasury Department and the IRS encourage taxpayers, contractors, and subcontractors to regularly follow up with registered apprenticeship programs regarding requests for qualified apprentices, and the final regulations clarify that evidence that this occurred is a factor the IRS will consider in determining whether there is intentional disregard of the Apprenticeship Requirements if the Good Faith Effort Exception does not apply.

f. Denial of a request

The Proposed Regulations would have provided that a denial of a request means that the registered apprenticeship program denied the request in its entirety. The Proposed Regulations would have further provided that a registered apprenticeship program's response that it could partially fulfill a request in the occupation(s) for which it trains apprentices would not constitute a denial of the request with respect to the parts of the request that could be fulfilled. Commenters suggested that the final regulations require taxpayers to accept all qualified apprentices offered by a registered apprenticeship program, even if a registered apprenticeship program is only partially able to meet a request. The final regulations clarify that partial denials may also serve as a valid basis for the Good Faith Effort Exception with respect to the portion denied, provided that the taxpayer, contractor, or subcontractor hires the qualified apprentices that are available for the construction as provided by the registered apprenticeship program in its response. The final regulations also clarify through an example that a denial that follows an initial acceptance and is received prior to the start of the requested work (for example, if a registered apprenticeship program indicates it can provide qualified apprentices to a project and is subsequently unable to fulfill the request) may also serve as a valid basis for the Good Faith Effort Exception.

Commenters also asked if the Labor Hours Requirement is proportionately reduced in the event of a partial denial. The Treasury Department and the IRS understand the need for clarification on the interaction between the Labor Hours Requirement and the Good Faith Effort Exception. An example in proposed §1.45-8(e)(1)(ii)(F) illustrates that if a request is partially denied, the part of the request that was denied would qualify for the Good Faith Effort Exception. As proposed, the example would have stated the number of qualified apprentice labor hours that would qualify for the Good Faith Effort Exception, but it did not clearly indicate how these hours are treated. The final regulations contain a revised example clarifying that there is no proportionate reduction of the Labor Hours Requirement. Instead, the qualified apprentice labor hours that qualify for the Good Faith Effort Exception are treated as labor hours performed by qualified apprentices.

Commenters requested that the final regulations clarify how to determine the date on which a registered apprenticeship program received a request for purposes of the Good Faith Effort Exception. One commenter suggested that the date of receipt should be determined by a proof of receipt from a delivery service. As explained in Section VIII.B.1.b. of this Summary of Comments and Explanation of Revisions, for purposes of the Good Faith Effort Exception, requests for qualified apprentices must be in writing and sent electronically or by registered mail. The final regulations provide that date of receipt of the request is the date an email

request is sent to the registered apprenticeship program, or the date of delivery shown on a receipt from the registered mail delivery.

Under section 45(b)(8)(D)(ii)(I), in order to satisfy the Good Faith Effort Exception, a denial of a request for qualified apprentices cannot be "the result of a refusal by the taxpayer or any contractors or subcontractors engaged in the performance of construction, alteration or repair work with respect to such qualified facility to comply with the established standards and requirements of the registered apprenticeship program." The Proposed Regulations reiterated this requirement. The preamble to the Proposed Regulations provided further that "if a registered apprenticeship program requires a requesting employer to enter into an agreement with the registered apprenticeship program, then a denial of the request because the employer refused to enter into the agreement would not be a valid denial for purposes of the Good Faith Effort Exception."

A few commenters requested that the final regulations confirm that the established standards and requirements of the registered apprenticeship program refer to those requirements included in the DOL Apprenticeship Standards. Commenters asserted that requiring taxpayers to comply with requirements other than those necessary to comply with the DOL Apprenticeship Standards would unfairly restrict a taxpayer's ability to negotiate contract terms with a registered apprenticeship program. Some commenters were also concerned that the proposed rule would require taxpayers, contractors, and subcontractors who are not parties to collective bargaining agreements or PLAs to enter into these agreements in order to comply with a union registered apprenticeship program's standards and requirements. Commenters stated that non-union contractors generally do not employ qualified apprentices enrolled in union sponsored registered apprenticeship programs, and they requested confirmation that this rule would not require them to do so. A commenter also requested guidance concerning what remedies are available to taxpayers if there is a conflict between standards imposed by an apprenticeship program registered by the DOL OA and an apprenticeship program registered by a State apprenticeship agency. The commenter requested clarification that taxpayers may choose to request and employ qualified apprentices from either registered apprenticeship program.

The Treasury Department and the IRS agree that the final regulations should further clarify what established standards and requirements means. Under section 45(b)(8)(D)(ii) the denial cannot be a result of a failure to comply with the "established standards and requirements" of a registered apprenticeship program (as defined in section 3131(e)(3)(B)). Section 3131(e)(3)(B) requires a registered apprenticeship program to satisfy the DOL Apprenticeship Standards.

Section 29.5 of the current DOL Apprenticeship Standards provides the standards of apprenticeship that an apprenticeship program must satisfy to be eligible for approval and registration by the DOL OA or a State apprenticeship agency.[35] Under 29 CFR 29.5(a), the apprenticeship program must have "an organized, written plan (program standards) embodying the terms and conditions of employment, training, and supervision of one or more apprentices in an apprenticeable occupation, as defined in this part, and subscribed to by a sponsor who has undertaken to carry out the apprentice training program." Section 29.5(b) lists 23 different provisions that the program standards must address, including the employment and training of the apprentice, the term of apprenticeship and the minimum qualifications required by a sponsor for persons entering the apprenticeship program. The Treasury Department and the IRS have determined that the use of the phrase "established standards" in section 45(b)(8)(D)(ii)(l) of the Code should be construed as a reference to the DOL Apprenticeship Standards referenced by section 3131(e)(3)(B) of the Code and contained in 29 CFR parts 29 and 30. Based on consultation with the DOL OA, the Treasury Department and the IRS understand that the DOL also refers to the established standards as the DOL Apprenticeship Standards that are applicable to – and required of – all employers who wish to join the registered apprenticeship program for the purpose of employing apprentices.

However, Congress's use of the phrase "established standards and requirements" captures more than the DOL Apprenticeship Standards. In order to give meaning to the words "and requirements," terms and conditions beyond those contained in the DOL Apprenticeship Standards (those that are necessary for DOL approval) must not be rejected by taxpayers, contractors, and subcontractors for purposes of the Good Faith Effort Exception. Whether additional requirements may be imposed by the registered apprenticeship program will depend, in part, on what the DOL allows the registered apprenticeship program to require. The DOL is the agency responsible for regulating registered apprenticeship programs, and the DOL determines the permissible standards and requirements of a registered apprenticeship program. The DOL OA has indicated it is important for efficient oversight and administration of registered apprenticeship programs that these programs not be required to establish separate standards and requirements for the purposes of the IRA.

The Treasury Department and the IRS appreciate the importance of the DOL's management of the registered apprenticeship program and the DOL's well-established understanding of what constitutes established standards and requirements for the registered apprenticeship programs that the DOL is responsible for overseeing and approving. Based on consultation with the DOL OA, the Treasury Department and the IRS also understand that registered apprenticeship programs are expected to provide prospective employers with the program's established standards and requirements, including those reviewed by the DOL or the State apprenticeship agency.

The Treasury department and the IRS have determined that the final regulations must interpret the statutory language in a way that gives meaning to the entire phrase, and also appropriately recognize

[35] On January 17, 2024, the DOL released a notice of proposed rulemaking proposing to update the DOL Apprenticeship Standards contained in 29 CFR part 29. *See* 89 FR 3118.

procedures implemented by the DOL OA. Accordingly, the final regulations provide that the requirements referenced as part of the established standards and requirements are those additional requirements that are established by the registered apprenticeship program for the placement of apprentices, applicable to all employers participating in the registered apprenticeship program, and not found by the DOL OA or a State apprenticeship agency to be contrary to the DOL guidance regarding the administration of registered apprenticeship programs.

Consistent with this explanation and in response to comments, the final regulations revise the proposed rule with respect to the established standards and requirements that must not be rejected by taxpayers, contractors, or subcontractors for purposes of satisfying the Good Faith Effort Exception. For example, if a registered apprenticeship program requires all employers who request qualified apprentices to enter into an agreement with the registered apprenticeship program, sign a collective bargaining agreement, and pay user fees, and these requirements have not been found by the DOL OA or a State apprenticeship agency to be contrary to DOL guidance regarding the administration of registered apprenticeship programs, then a denial of the request because the employer refused to enter into the agreement, sign the collective bargaining agreement, or pay the user fees would not qualify as a valid denial for purposes of the Good Faith Effort Exception. In order to substantiate the Good Faith Effort Exception, a taxpayer will be expected to document that a denial of a request was not because of the taxpayer's refusal to comply with the established standards and requirements of the registered apprenticeship program.

Taxpayers, contractors, and subcontractors also retain the ability to contact other registered apprenticeship programs that do not have similar requirements in an effort to satisfy the Apprenticeship Requirements or the Good Faith Effort Exception. Because of the requirement that taxpayers, contractors, and subcontractors contact registered apprenticeship programs with a geographic area of operation that includes the location of the facility, the Treasury Department and the IRS do not anticipate that the established standards and requirements of the registered apprenticeship program will conflict with those required by State law. In the unlikely event that they do, the taxpayer, contractor, or subcontractor should contact the DOL OA for assistance.

g. Other Good Faith Effort Exception issues

A commenter asked the Treasury Department and the IRS to consider limiting the number of Good Faith Effort Exceptions available per trade to encourage taxpayers to individually sponsor new registered apprenticeship programs. The Treasury Department and the IRS acknowledge that there is interest in developing new registered apprenticeship programs to meet the anticipated need for additional qualified apprentices. The final regulations already impose some limits on the Good Faith Effort Exception through the requirement to submit additional requests following the denial of a request and other requirements relating to the required contents and scope of a request. The final regulations do not otherwise impose a limit on the availability of using the Good Faith Effort Exception.

Under section 45(b)(8)(D)(ii), to satisfy the Good Faith Effort Exception, requests must be made for qualified apprentices from a registered apprenticeship program as defined in section 3131(e)(3)(B). One commenter was concerned that employers would fund apprenticeship programs and request qualified apprentices from those programs in an effort to manufacture denials. To reduce abuse of the Good Faith Effort Exception, the commenter recommended requiring apprenticeship requests to be sent only to registered programs with a prior record of operation and prior record of meeting certain graduation rates. A few other commenters were concerned with the proliferation of new registered apprenticeship programs that are registered with the DOL but do not provide training to a meaningful number of workers.

As discussed in Section VIII.B.1.c., the final regulations clarify that a taxpayer cannot satisfy the Good Faith Effort Exception through a denial from a registered apprenticeship program it sponsors. If the program sponsored by the taxpayer has no available qualified apprentices, the taxpayer must contact other registered apprenticeship programs for qualified apprentices to satisfy the Apprenticeship Requirements or the Good Faith Effort Exception. Additionally, while the Treasury Department and the IRS recognize that there are concerns that the Good Faith Effort Exception may be abused, the statute requires requests of qualified apprentices from registered apprenticeship programs. Registered apprenticeship programs are registered by the DOL OA or a recognized State apprenticeship agency, pursuant to the standards in 29 CFR parts 29 and 30. As indicated in Section II.D.1. of this Background, the DOL is responsible for regulating the registered apprenticeship programs, and the extent to which operational history, graduation rates, and training are relevant to registration is more appropriate for the DOL to determine. Comments suggesting that the final regulations impose requirements on registered apprenticeship programs beyond those required by the DOL are outside the scope of these final regulations and are not adopted.[36]

Another commenter suggested that taxpayers make requests solely to the DOL registered apprenticeship programs. Under section 45(b)(8)(D)(ii), to qualify for the Good Faith Effort Exception, a taxpayer is required to make a request for a qualified apprentice from a registered apprenticeship program, as defined in section 3131(e)(3)(B). Under 3131(e)(3)(B), a registered apprenticeship program means an apprenticeship registered under

[36] Under 29 CFR 29.5(a), registered apprenticeship programs must have an organized, written plan embodying the terms and conditions of employment, training, and supervision of one or more apprentices in an apprenticeable occupation, as defined in 29 CFR part 29, and subscribed to by a sponsor who has undertaken to carry out the apprentice training program. Additionally, under 29 CFR 29.5(b)(3), a registered apprenticeship program's program standards must contain provisions that outline the work process in which the apprentice will receive supervised work experience and training on the job. Accordingly, taxpayers are required to make requests to programs that provide meaningful training to qualified apprentices. The DOL's proposed 29 CFR 29.8(a) provides that each registered apprenticeship program must have a written set of standards of apprenticeship that will govern the conduct and operation of that program. 89 FR 3118, 3278.

the Act of August 16, 1937 (commonly known as the National Apprenticeship Act; 50 Stat. 664, chapter 663; 29 U.S.C. 50 *et seq*.) that meets the standards of subpart A of part 29 and part 30 of title 29, Code of Federal Regulations.

29 CFR 29.3(a) provides that eligibility for registration of an apprenticeship program is conditioned upon a program's conformity with the apprenticeship program standards of 29 CFR part 29. For a program to be determined by the DOL as conforming with the standards under 29 CFR part 29, the program must apply for registration and be registered with the DOL OA or with a State apprenticeship agency recognized by the DOL OA. 29 CFR 29.2 defines a State apprenticeship agency to mean an agency of a State government that has responsibility and accountability for apprenticeship within the State. 29 CFR 29.2 specifies that only a State apprenticeship agency may seek recognition by the DOL OA as an agency that has been properly constituted under an acceptable law or Executive order, and authorized by the DOL OA to register and oversee apprenticeship programs. Thus, the final regulations provide that a request may be made to a registered apprenticeship program that is either registered by the DOL OA or a State apprenticeship agency. Regardless of whether the program is registered by the DOL OA or a State apprenticeship agency, the registered apprenticeship program must meet the standards of 29 CFR parts 29 and 30.

A commenter recommended expanding the Good Faith Effort Exception to make allowances for emergency circumstances during which it may not be practicable or in the public interest to ensure compliance with the Apprenticeship Requirements, such as during an unexpected outage due to severe weather or operational issues. The commenter explained that in these circumstances, companies must be able to restore service quickly to provide critical fuel supplies.

The Treasury Department and the IRS acknowledge that there may be circumstances in which it will be impractical to have qualified apprentices perform work on the qualified facility. However, the Apprenticeship Requirements do not require qualified apprentices to work at all times. The Participation Requirement only requires 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 to employ one or more qualified apprentices to perform such work. The Labor Hours Requirement only requires taxpayers to ensure that not less than a certain percentage (10 percent, 12.5 percent, or 15 percent, depending on the date on which construction began) of total labor hours of the construction, alteration, or repair work (including such work performed by any contractor or subcontractor) with respect to such facility, be performed by qualified apprentices.

In other words, taxpayers have flexibility in satisfying the Labor Hours Requirement. Additionally, the Apprenticeship Requirements apply only to the construction of the qualified facility (including alteration and repair performed during construction), and not to alteration or repair work conducted after the facility is placed in service. Because the Apprenticeship Requirements do not apply to the alteration or repair work after a facility is placed in service and because the Labor Hours Requirement only requires qualified apprentices to perform a certain percentage of work, the Treasury Department and the IRS have determined that the Good Faith Effort Exception does not need to be expanded to make allowances for emergency circumstances contemplated by the commenter.

One commenter requested that the Treasury Department and the IRS grant a Good Faith Effort Exception in situations in which taxpayers are denied qualified apprentices because States have illegally and unjustifiably delayed or denied registration of apprenticeship programs. The Good Faith Effort Exception requires a request to a registered apprenticeship program. If the apprenticeship program is not registered, the denial of or nonresponse to that request is irrelevant for purposes of the Good Faith Effort Exception. The Treasury Department and the IRS decline to adopt an exception from that rule based on the reasons an apprenticeship program is denied registration.

Commenters asked for clarification regarding the operation of the Good Faith Effort Exception for employers that do not participate in registered apprenticeship programs that share a "pool" of qualified apprentices. The Treasury Department and the IRS are interpreting these comment letters as referring to group registered apprenticeship programs, under which the registered apprenticeship program places qualified apprentices with multiple-employer participants. One commenter stated that many construction firms typically sponsor an existing employee's apprenticeship through an association, community-based, or employer-run registered apprenticeship programs and the commenter was concerned that the Good Faith Effort Exception would not align with those existing practices.

Section 45(b)(8)(D)(ii) provides that taxpayers are deemed to satisfy the Apprenticeship Requirements if they have requested qualified apprentices from a registered apprenticeship program and such request has been denied or if the registered apprenticeship program fails to respond within five business days of receiving a request. The Proposed Regulations would have provided that a taxpayer, contractor, or subcontractor must submit a written request to at least one registered apprenticeship program that has a usual and customary business practice of entering into agreements with employers for the placement of qualified apprentices in the occupation for which they are training.

The Treasury Department and the IRS recognize that many contractors currently sponsor existing employees through registered apprenticeship programs, and hours worked by those employees may satisfy the Apprenticeship Requirements, provided all requirements are met. However, as discussed in Section VII.B.1.c. of this Summary of Explanations and Revisions, if a taxpayer, contractor, or subcontractor is a registered apprenticeship program sponsor and there are no available qualified apprentices in the registered apprenticeship program sponsored by the taxpayer, contractor, or subcontractor, then the taxpayer, contractor, or subcontractor may only qualify for the Good Faith Effort Exception by demonstrating that it made a request to another registered apprenticeship program (and such request was denied or not responded to within five business days) or by establishing that there are no other registered apprenticeship programs

with an area of operation that includes the location of the facility. The final regulations clarify this requirement.

A commenter asked the Treasury Department and the IRS to consider requiring the DOL OA or the appropriate State apprenticeship agency representative to sign off on a taxpayer's satisfaction of the Good Faith Effort Exception. As discussed in Section V.A. of this Summary of Comments and Explanation of Revisions, the taxpayer is ultimately responsible for ensuring compliance with the PWA requirements, including exceptions to the requirements such as the Good Faith Effort Exception, and may not rely on other parties, the DOL OA, or State apprenticeship agencies to certify compliance. Consequently, the final regulations do not adopt this suggestion. The final regulations provide that contacting the DOL OA or a State apprenticeship agency for assistance in locating a registered apprenticeship program may be a factor for purposes of determining intentional disregard.

A commenter suggested requiring taxpayers relying on the Good Faith Effort Exception to summarize their good faith efforts as part of their reporting to the IRS. As an example, the commenter stated that taxpayers could list the registered apprenticeship programs from which they requested qualified apprentices, the dates of their requests, and any reasons that their requests were denied. The final regulations retain the requirement from the Proposed Regulations that taxpayers must maintain and preserve sufficient records to demonstrate compliance with the PWA requirements, and if the taxpayer is relying on the Good Faith Effort Exception, this includes any written requests for the employment of qualified apprentices from registered apprenticeship programs and all correspondence with the registered apprenticeship program regarding the request, including denials of such requests. Whether, and to what extent information must be provided to the IRS at filing will be addressed in IRS forms, instructions, and publications.

Some commenters suggested that to qualify for the Good Faith Effort Exception, taxpayers, contactors, or subcontractors should develop and submit apprenticeship utilization plans to the Treasury Department. The Treasury Department and the IRS decline to include this requirement in the final regulations because such rules would not further tax administration and are not required by the statute. While an apprenticeship utilization plan is not required for the Good Faith Effort Exception, the existence of a utilization plan may assist taxpayers in requesting qualified apprentices from a registered apprenticeship program and the final regulations provide that the development and use of an apprenticeship utilization plan is a factor the IRS will consider in determining whether the failure to satisfy the Apprenticeship Requirements is due to intentional disregard.

2. Apprenticeship Cure Provision

a. General procedures

Commenters requested additional guidance concerning the Apprenticeship Cure Provision. Specifically, comments asked if there is a deadline for the penalty payment provided by section 45(b)(8)(D)(i)(II) to cure any failure to satisfy the Labor Hours Requirement and Participation Requirement, and whether, for such penalties, the IRS would issue a final determination consistent with the Prevailing Wage Requirements, a statutory notice of deficiency, or other notice to the taxpayer regarding this penalty. The Treasury Department and the IRS understand the need for clarification regarding the deadline to make the penalty payment required by the Apprenticeship Cure Provision.

With respect to failures to pay wages at rates not less than the prevailing rates, section 45(b)(7)(B)(iv) provides that the taxpayer must make required correction and penalty payments within 180 days after a final determination to be eligible for the increased credit amount. There is no similar statutory requirement in the Apprenticeship Cure Provision. Further, section 45(b)(7)(B)(ii) provides that Subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and certain excise taxes) does not apply with respect to the assessment or collection of any penalty imposed by section 45(b)(7) with respect to the Prevailing Wage Requirements. Section 45(b)(8) does not provide a similar exception to the deficiency procedures with respect to the Apprenticeship Cure Provision. The final regulations clarify that there is no specific deadline for payment of the penalty required by the Apprenticeship Cure Provision. The deficiency procedures apply to the penalty payments for the failure to satisfy the Apprenticeship Requirements. Although there is no specific statutory deadline for payment of the penalty, as discussed in Section VII.D.3. of this Summary of Comments and Explanation of Revisions, if a taxpayer makes the necessary penalty payments before the taxpayer receives notice of an examination from the IRS with respect to a claim for the increased credit amount under section 45(b)(6), the taxpayer will be presumed not to have intentionally disregarded the Apprenticeship Requirements.

At least one commenter suggested clarifying whether the Treasury Department and the IRS intended to double-count the penalty with respect to any given labor hour if the taxpayer fails to meet both the Labor Hours Requirement and Participation Requirement. The Proposed Regulations would have provided that if a taxpayer fails both the Labor Hours Requirement and the Participation Requirement the penalty would equal the sum of the penalty for the failure to meet the Labor Hours Requirement plus the penalty for failure to meet the Participation Requirement. The penalty provision of section 45(b)(8)(D)(i)(II) provides that the penalty applies to any failure by the taxpayer to satisfy the Labor Hours Requirement under section 45(b)(8)(A) and the Participation Requirement under section 45(b)(8)(C). The use of "any failure" reflects a broad scope such that taxpayers may be subject to penalties for failure to meet the Labor Hours Requirement and the Participation Requirement with respect to the same facility.

One commenter requested that the Treasury Department and the IRS exercise discretion to decline to impose penalties for any failure to satisfy the Participation Requirement with respect to any contractor or subcontractor that qualifies as a small business under the U.S. Small Business Administration's guidance. Although the Treasury Department and the IRS appreciate the concern for small businesses, the Participation Requirement in section 45(b)(8)(C) applies to each tax-

payer, 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. The final regulations retain the proposed rule consistent with this statutory language.

b. Intentional disregard

The Proposed Regulations would have provided that failures to meet the Apprenticeship Requirements would be due to intentional disregard, and subject to enhanced penalty amounts, if the failure is knowing or willful, considering all relevant facts and circumstances. The Proposed Regulations would have provided a non-exhaustive list of facts and circumstances that may be relevant to determining whether the failure was knowing or willful.

In assessing intentional disregard, commenters recommended considering whether the taxpayer: (i) used and complied with an apprenticeship utilization plan; (ii) failed to require contractors and subcontractors to forward to the taxpayer all requests to registered apprenticeship programs for qualified apprentices within five business days of when the requests were made; (iii) failed to audit requests to registered apprenticeship programs for qualified apprentices to ensure compliance with the labor hours, participation, and ratio obligations in the Apprenticeship Requirements; and (iv) abided by anti-retaliation procedures. The Proposed Regulations would have provided that the failure to meet the Labor Hours Requirement or the Participation Requirement would be due to intentional disregard if the failure was knowing or willful. The determination that a failure was knowing or willful will be made by considering all the relevant facts and circumstances.

The final regulations provide a non-exhaustive list of facts and circumstances that may be relevant to determine whether the failure was knowing or willful. The Treasury Department and the IRS agree that the following factors are relevant and may be considered in determining whether a failure was due to intentional disregard: (i) the taxpayer's use of and compliance with an apprenticeship utilization plan; (ii) the taxpayer requiring contractors and subcontractors to forward to the taxpayer requests to registered apprenticeship programs within five business days of when requests are made; (iii) whether taxpayers regularly reviewed contractors' and subcontractors' use of qualified apprentices; and (iv) investigating complaints concerning failures to comply with the Apprenticeship Requirements and complaints concerning retaliation. The final regulations incorporate these additional factors and other clarifying edits consistent with the intentional disregard factors in §1.45-7(c)(3) that are applicable to the Prevailing Wage Requirements. Intentional disregard for purposes of the Prevailing Wage Requirements is discussed in Section VII.D.3. of this Summary of Comments and Explanation of Revisions.

A commenter recommended that a taxpayer who is found to have failed the Good Faith Effort Exception, be presumed to have done so with intentional disregard. The Good Faith Effort Exception is intended to provide relief for taxpayers, contractors, and subcontractors who were unable to employ qualified apprentices despite making valid requests for qualified apprentices to registered apprenticeship programs. The failure to qualify for the Good Faith Effort Exception does not create a presumption of intentional disregard because the intentional disregard provisions are only relevant if the taxpayer has otherwise failed to meet the Apprenticeship Requirements. Thus, the Treasury Department and the IRS decline to adopt the commenter's suggestion.

A commenter suggested that the Treasury Department and the IRS adopt a presumption that the taxpayer did not act in good faith if a labor union or representative of a registered apprenticeship program contacted the taxpayer, contractor, or subcontractor and made them aware of the apprenticeship requirement and the availability of qualified apprentices and was ignored. The Treasury Department and the IRS decline to adopt this recommendation. The Proposed Regulations would have provided a non-exhaustive list of facts and circumstances considered to determine whether a failure to satisfy the Apprenticeship Requirements is due to intentional disregard. If a taxpayer makes a request for qualified apprentices to a registered apprenticeship program and the registered apprenticeship program informs the taxpayer of available qualified apprentices, but the taxpayer does not employ the available qualified apprentices and fails to satisfy the Apprenticeship Requirements, then the taxpayer's refusal to employ the available qualified apprentices could be considered in determining whether the taxpayer's failure was due to intentional disregard. However, if labor unions or representatives of registered apprenticeship programs are reaching out to taxpayers regarding the Apprenticeship Requirements and the availability of qualified apprentices and taxpayers ignore these solicitations, taxpayers will not automatically be deemed to have acted with intentional disregard.

IX. *Applying the PWA Provisions for Increased Amounts of Credit and Deduction Under Other Code Sections*

The majority of the comments the Treasury Department and the IRS received relate to the general application of the PWA requirements across multiple Code sections, and those comments have been addressed in Sections I. through VIII. of this Summary of Comments and Explanation of Revisions. Additional comments that relate solely to specific Code sections are discussed in this Section IX. of this Summary of Comments and Explanation of Revisions.

A. *Section 30C*

Section 30C provides a credit for the cost of any qualified alternative fuel vehicle refueling property placed in service during the taxable year. For properties placed in service before January 1, 2023, the credit is equal to 30 percent. For properties placed in service after December 31, 2022, the credit is equal to 30 percent (6 percent for property of a character subject to depreciation). If a taxpayer satisfies the PWA requirements in sections 30C(g)(2) and (3) or meets the BOC Exception with respect to a qualified alternative fuel vehicle refueling project, then the credit determined under section 30C(a) for any qualified alternative fuel vehicle refueling property of a character subject to an allowance for depreciation that is part of such project is multiplied by five. For pur-

poses of the PWA requirements, section 30C(g)(1)(B) defines a qualified alternative fuel vehicle refueling project as a project consisting of one or more properties that are part of a single project. The Prevailing Wage Requirements in section 30C(g)(2)(A) are that the taxpayer ensure that laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction of any qualified alternative fuel vehicle refueling property that is part of a qualified alternative fuel vehicle refueling project are paid wages at rates not less than prevailing rates. Under section 30C(c)(g)(3), rules similar to the rules in section 45(b)(8) apply regarding the Apprenticeship Requirements.

Proposed §1.30C-3(b) would have provided that a qualified alternative fuel vehicle refueling project would satisfy the PWA requirements for the increased credit amount if the project either begins construction prior to January 29, 2023, or meets the Prevailing Wage Requirements of section 45(b)(7) and proposed §1.45-7, the Apprenticeship Requirements of section 45(b)(8) and proposed §1.45-8, and the recordkeeping and reporting requirements of proposed §1.45-12.

Commenters asked whether cross-references in proposed §1.30C-3(b)(2) to sections 45(b)(7) and 45(b)(8) meant that PWA requirements apply to alteration or repair work after a qualified property is placed in service under section 30C. Commenters asserted that the statutory text of section 30C(g)(2)(A) limits the PWA requirements only to the construction of any qualified alternative fuel vehicle refueling property. Commenters also stated the impracticality of imposing PWA requirements under section 30C after qualified alternative fuel vehicle refueling property is placed in service. Commenters emphasized that alteration or repair work of such property often requires a trained technician due to the necessary skill sets for both the hardware and software characteristics of the charging property. Commenters further stated that requesting and waiting for qualified apprentices in order to complete alteration or repair work could imperil a taxpayer's ability to comply with national uptime requirements implemented by the Department of Transportation through the National Electric Vehicle Infrastructure program.

Section 30C(g)(2)(A) states that the Prevailing Wage Requirements apply in the construction of any qualified alternative fuel vehicle refueling property that is part of a qualified alternative fuel vehicle refueling project. Nothing in section 30C requires the payment of prevailing wages with respect to alterations or repairs after the property is placed in service. By contrast, section 45(b)(7)(A) provides that the Prevailing Wage Requirements apply in the construction of a facility and to the alteration and repair of the facility in the 10-year period after placed in service. The final regulations clarify that the Prevailing Wage Requirements do not apply after a section 30C project is placed in service. The applicable scope of the PWA requirements is explained in Section VI. of this Summary of Comments and Explanation of Revisions. As explained in Section VIII.A.1. of this Summary of Comments and Explanation of Revisions, the Apprenticeship Requirements apply only during the construction of the qualified alternative fuel vehicle refueling property that is part of a qualified alternative fuel vehicle refueling project (including alterations and repairs that occur during construction) and not with respect to any alteration or repair after a section 30C project is placed in service. Under the transition rule described in Section II. of this Summary of Comments and Explanation of Revisions, the PWA requirements do not apply to any work performed before January 29, 2023.

Another commenter suggested that the Treasury Department and the IRS consider aligning the implementation of PWA requirements for section 30C projects with forthcoming guidance on section 30C eligible census tracts. On January 19, 2024, the Treasury Department and the IRS issued Notice 2024-20 providing notice of intent to propose regulations on eligible census tracts under section 30C. Notice 2024-20 does not address the application of PWA requirements under section 30C. Guidance concerning eligible census tracts under section 30C is outside the scope of these final regulations.

B. *Section 45L*

Section 45L provides a credit for a qualified new energy efficient home (qualified home) that is constructed by an eligible contractor and acquired by a person from that eligible contractor for use as a residence during the taxable year. In the case of a qualifying residence that meets the Prevailing Wage Requirements, section 45L(g)(1) provides an increased credit amount. The Prevailing Wage Requirements in section 45L(g)(2)(A) are that the taxpayer must ensure that laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction of any qualified residence are paid wages at rates not less than prevailing rates.

Proposed §1.45L-3(a) would have provided that with respect to a qualified home, the credit determined under section 45L(a)(2)(B)(i) is $2,500 and the credit determined under section 45L(a)(2)(B)(ii) is $5,000 if the qualified home meets the requirements under section 45L(c)(1)(A) or 45L(c)(1)(B), as applicable; is constructed by an eligible contractor; is acquired by a person for use as a residence during the taxable year; and satisfies the Prevailing Wage Requirements of section 45(b)(7) and proposed §1.45-7, and the recordkeeping and reporting requirements of proposed §1.45-12.

One commenter stated that the Proposed Regulations may have erroneously incorporated the requirement in proposed §1.45-7(a) to pay prevailing wages during the 10-year period after a facility is placed in service and requested that the final regulations specify whether the PWA requirements apply after a facility is placed in service.

Section 45L(g)(2)(A) provides that the Prevailing Wage Requirements apply "in the construction of such residence." Nothing in section 45L requires the payment of prevailing wages with respect to alterations or repairs after construction of a qualified residence ends. For the reasons described in Section IX.A. of this Summary of Comments and Explanation of Revisions, the final regulations clarify that the Prevailing Wage Requirements under section 45L do not apply after construction of a qualified residence ends. The applicable scope of the Prevailing Wage Requirements is explained in Section VI. of this Summary of Comments and Explanation of Revisions. Under the transition rule described in Section II. of this Summary of Comments and Explanation of

Revisions, the Prevailing Wage Requirements do not apply to any work performed before January 29, 2023.

C. *Section 45Q*

Section 45Q provides a credit for the capture and sequestration of qualified carbon oxide using equipment placed in service at a qualified facility. Section 45Q(h) provides an increased credit amount for qualified facilities or any carbon capture equipment placed in service or installed at such facilities that satisfies the PWA requirements.

Proposed §1.45Q-6(b)(1) would have provided that to claim the increased credit amount with respect to a qualified facility the construction of which begins on or after January 29, 2023, and any carbon capture equipment placed in service at such facility, the taxpayer must meet the Prevailing Wage Requirements of section 45(b)(7) and proposed §1.45-7 with respect to such facility and equipment, the Apprenticeship Requirements of section 45(b)(8) and proposed §1.45-8 with respect to the construction of such facility and equipment, and the recordkeeping and reporting requirements of proposed §1.45-12.

Proposed §1.45Q-6(b)(2) would have provided that to claim the increased credit amount with respect to any carbon capture equipment the construction of which begins on or after January 29, 2023, and that is installed at a qualified facility the construction of which began prior to such date, the taxpayer must meet the Prevailing Wage Requirements of section 45(b)(7) and proposed §1.45-7 with respect to such equipment, the Apprenticeship Requirements of section 45(b)(8) and proposed §1.45-8 with respect to the construction of such equipment, and the recordkeeping and reporting requirements of proposed §1.45-12.

Proposed §1.45Q-6(b)(3) would have provided that to claim the increased credit amount a taxpayer does not need to meet the PWA requirements with respect to the construction of carbon capture equipment the construction of which begins prior to January 29, 2023, provided that such equipment is installed at a qualified facility the construction of which also begins prior to January 29, 2023.

Commenters sought clarification regarding the application of PWA requirements to construction of a qualified facility the construction of which begins on or after January 29, 2023. Commenters opined that section 45Q(h)(2)(A) could be interpreted to apply the PWA requirements with respect to construction of a facility before it is known or even expected to be within the definition of a qualified facility. Commenters argued that this would equate to a retroactive application of the PWA requirements and may have a negative impact on the construction of these facilities. Commenters stated that facilities may be built in 2023, but the decision to construct and install carbon capture equipment can come later as technologies develop. Commenters argued that a retroactive application of PWA requirements would put an end to investment in this area. At least one commenter also contended that the penalty and cure provisions built into the PWA requirements would be a far from certain means to secure the increased credit amount under section 45Q. The commenter stated that construction contracts for facilities with no plans for carbon capture would have no reason to require contractors to retain and disclose wage and apprenticeship information to the taxpayer. Without such information, the taxpayer would be unable to later determine the applicable correction and penalty payments.

Section 45Q(h)(2)(A) states that to qualify for the increased credit amount, the taxpayer must satisfy the PWA requirements with respect to the construction of any qualified facility the construction of which begins on or after January 29, 2023, as well as any carbon capture equipment placed in service at such facility. Under section 45Q(d), a facility may be a qualified facility, even if carbon capture equipment was not included in its original planning and design, so long as construction of the facility and carbon capture equipment begins before January 1, 2033. There is no exception from the PWA requirements if the construction of the qualified facility begins on or after January 29, 2023. The commenters' suggestions are not adopted in the final regulations.

One commenter stated that the definition of a qualified facility could be construed as requiring taxpayers to satisfy the PWA requirements with respect to the entire facility even if only a small portion of the facility is responsible for the carbon oxide emission stream. Similarly, a commenter recommended clarifying that the scope of construction, alteration, or repair work only applies to the single process train of carbon capture equipment as defined in §1.45Q-2(c)(3), and is not inclusive of any other construction, alteration, or repair work performed at the facility or plant. The applicable scope of the PWA requirements is explained in Section VI. of this Summary of Comments and Explanation of Revisions.

Another commenter stated that proposed §1.45Q-6(b) would have erroneously incorporated the requirement in section 45(b)(7) and proposed §1.45-7 to pay prevailing wages for the alteration or repair of a facility during the 10-year period after a facility is placed in service, even though section 45Q(h)(3)(A)(ii) prescribes the payment of prevailing wages for alteration or repair during the 12-year period beginning on the date the equipment was originally placed in service. The final regulations clarify that the Prevailing Wage Requirements under section 45Q apply with respect to the alteration or repair of a qualified facility or carbon capture equipment placed in service at such facility during the applicable 12-year period. As explained in Section VIII.A.1. of this Summary of Comments and Explanation of Revisions, the Apprenticeship Requirements apply only during the construction of the facility and not with respect to any alteration or repair after a facility is placed in service. Under the transition rule described in Section II. of this Summary of Comments and Explanation of Revisions, the PWA requirements do not apply to any work performed before January 29, 2023.

D. *Section 45U*

Section 45U provides a credit for electricity produced by the taxpayer at a qualified nuclear power facility (as defined in section 45U(b)(1)) and sold by the taxpayer to an unrelated person during the taxable year. Generally, for taxable years beginning after December 31, 2023, the credit is equal to the amount by which the product of 0.3 cents multiplied by the

kilowatt hours of electricity produced by the taxpayer at a qualified nuclear power facility and sold by the taxpayer to an unrelated person during the taxable year exceeds the reduction amount (as determined under section 45(b)(2)) for such taxable year. Under section 45U(d), if a taxpayer satisfies the Prevailing Wage Requirements with respect to a qualified nuclear power facility, then the credit determined under section 45U(a) for the qualified nuclear power facility is multiplied by five. Under section 45U(d)(2)(A), the Prevailing Wage Requirements apply to the alteration or repair of any qualified nuclear power facility.

Proposed §1.45U-3(a) would have provided that the amount of the zero-emission nuclear power production credit for the taxable year is equal to the credit amount determined under section 45U(a) multiplied by five, if a qualified nuclear power facility satisfies the Prevailing Wage Requirements of section 45(b)(7) and proposed §1.45-7 in the alteration or repair of such facility, and the recordkeeping and reporting requirements of proposed §1.45-12.

One commenter suggested that the final regulations create an exception from the Prevailing Wage Requirements under section 45U for taxpayers, contractors, and subcontractors who have fewer than 25 employees. There is no statutory exception for employers of less than 25 individuals and, consistent with the statute, the final regulations do not adopt one.

The applicable scope of the Prevailing Wage Requirements is explained in Section VI. of this Summary of Comments and Explanation of Revisions. As discussed in Section II. of this Summary of Comments and Explanation of Revisions, a transition rule is unnecessary because the Prevailing Wage Requirements under section 45U apply to electricity produced and sold after December 31, 2023, in taxable years beginning after such date. The Treasury Department and the IRS interpret section 13105(c) of the IRA as providing that the Prevailing Wage Requirements only apply to alterations or repairs of a qualified nuclear power facility occurring in taxable years beginning after December 31, 2023. The final regulations are clarified to reflect the statutory effective date under section 45U of the Code for alteration and repairs. Finally, as explained in Section V.D. of this Summary of Comments and Explanation of Revisions, the final rules include a definition of "qualifying project labor agreement" that is modified specifically for the purposes of section 45U.

E. *Section 45V*

Section 45V provides a credit for the production of qualified clean hydrogen by the taxpayer during the taxable year at a qualified clean hydrogen production facility during the 10-year period beginning on the date the facility was originally placed in service. Proposed §1.45V-3(b)(1) would have provided that with respect to a facility the construction of which began prior to January 29, 2023, the taxpayer must meet the Prevailing Wage Requirements of section 45(b)(7) and proposed §1.45-7 with respect to an alteration or repair of the facility that occurs after January 29, 2023 (to the extent applicable), and must meet the recordkeeping and reporting requirements of proposed §1.45-12, in order to claim the increased credit amount. Proposed §1.45V-3(b)(2) would have provided that with respect to a facility, a taxpayer must meet the Prevailing Wage Requirements of section 45(b)(7) and proposed §1.45-7, the Apprenticeship Requirements of section 45(b)(8) and proposed §1.45-8, and the recordkeeping and reporting requirements of proposed §1.45-12 in order to claim the increased credit amount.

No comments were received specifically pertaining to proposed §1.45V-3. The applicable scope of the PWA requirements is explained in Section VI. of this Summary of Comments and Explanation of Revisions. As explained in Section VIII.A.1. of this Summary of Comments and Explanation of Revisions, the Apprenticeship Requirements apply only during the construction of the facility and not with respect to any alteration or repair after a facility is placed in service. Under the transition rule described in Section II. of this Summary of Comments and Explanation of Revisions, the PWA requirements do not apply to any work performed before January 29, 2023. Proposed §1.45V-3 is otherwise adopted without change.

F. *Section 45Y*

Section 45Y provides a credit for clean electricity produced by the taxpayer at a qualified facility and sold to an unrelated person, or in the case of a qualified facility that is equipped with a metering device that is owned and operated by an unrelated person, sold, consumed, or stored by the taxpayer during the taxable year, for facilities placed in service after December 31, 2024. Generally, the credit for any taxable year is the product of the kilowatt hours of electricity multiplied by either: (i) 0.3 cents (the base amount under section 45Y(a)(2)(A)); or (ii) 1.5 cents (the alternative amount under section 45Y(a)(2)(B)) for certain qualified facilities. Under section 45Y(c), both the base amount and the alternative amount are adjusted for inflation in years beginning after 2024.

Proposed §1.45Y-3(a) would have provided that the amount of the credit for producing clean electricity determined under section 45Y(a)(2) equals 1.5 cents if any qualified clean electricity production facility satisfies the requirements of proposed §1.45Y-3(b). Proposed §1.45Y-3(b) would have provided that a qualified facility satisfies the PWA requirements by having a maximum net output of less than one megawatt (as measured in alternating current), or beginning construction prior to January 29, 2023, or meeting the Prevailing Wage Requirements of section 45(b)(7) and proposed §1.45-7, the Apprenticeship Requirements of section 45(b)(8) and proposed §1.45-8, and the recordkeeping and reporting requirements of proposed §1.45-12.

Commenters suggested definitions regarding the One Megawatt Exception for purposes of section 45Y and requested clarifications with respect to determining nameplate capacity. A few commenters suggested testing methodologies for purposes of the greenhouse gas emissions rate under section 45Y(b)(2) and specific approaches for publishing those emissions rates under section 45Y(b)(2)(C)(i). Comments regarding the One Megawatt Exception for the purposes of section 45Y will be addressed in future guidance under section 45Y finalizing those rules.

The applicable scope of the PWA requirements is explained in Section VI. of this Summary of Comments and

Explanation of Revisions. As explained in Section VIII.A.1. of this Summary of Comments and Explanation of Revisions, the Apprenticeship Requirements apply only during the construction of the facility (including alterations and repairs that occur during construction) and not with respect to any alteration or repair after a facility is placed in service. Under the transition rule described in Section II. of this Summary of Comments and Explanation of Revisions, the PWA requirements do not apply to any work performed before January 29, 2023. The final regulations also clarify that for certain facilities, the applicable amount determined under section 45Y(a)(2) is the alternative amount described in section 45Y(a)(2)(B), subject to adjustment for inflation as provided by section 45Y(c). Proposed §1.45Y-3 is otherwise adopted without change.

G. *Section 45Z*

Section 45Z provides a credit for clean transportation fuel produced by the taxpayer at a qualified facility after December 31, 2024, and sold to an unrelated person in a manner described in section 45Z(a)(4). Generally, the credit is the product of the applicable amount (determined under section 45Z(a)(2) and (3)) per gallon (or gallon equivalent) of transportation fuel multiplied by the emissions factor for the fuel (determined under section 45Z(b)). If a taxpayer satisfies the PWA requirements in sections 45Z(f)(6) and (7), then the applicable amount is $1.00 for transportation fuel that is not a sustainable aviation fuel (non-SAF) (determined under section 45Z(a)(2)(B)) and $1.75 for transportation fuel that is a sustainable aviation fuel (SAF) (determined under section 45Z(a)(3)(A)(ii)). If the taxpayer does not satisfy the PWA requirements in section 45Z(f)(6) and (7), the applicable amount is 20 cents for non-SAF and 35 cents for SAF. Under section 45Z(c), the applicable amounts are adjusted for inflation in years beginning after 2024.

In general, section 45Z(f)(6)(A) provides that rules similar to section 45(b)(7) apply for purposes of the Prevailing Wage Requirements. Section 45Z(f)(7) provides that rules similar to section 45(b)(8) apply for purposes of the Apprenticeship Requirements. Section 45Z(f)(6)(B) provides a special rule for a facility placed in service before January 1, 2025. Under this rule, if a facility is placed in service before January 1, 2025, the taxpayer is not subject to the Prevailing Wage Requirements with respect to the construction of the facility but is subject to the Prevailing Wage Requirements for the alteration or repair of the facility with respect to any taxable year beginning after December 31, 2024, for which the section 45Z credit is allowed. Section 13704(c) of the IRA provides that these provisions are effective for transportation fuel produced after December 31, 2024.

Proposed §1.45Z-3(b)(1) would have provided that a qualified facility that begins construction on or after January 29, 2023, and is placed in service after December 31, 2024, satisfies the requirements for the increased credit under section 45Z of the Code if it meets the Prevailing Wage Requirements of section 45(b)(7) and proposed §1.45-7, the Apprenticeship Requirements of section 45(b)(8) and proposed §1.45-8, and the recordkeeping and reporting requirements of proposed §1.45-12. Proposed §1.45Z-3(b)(2) would have provided that a qualified facility that is placed in service before January 1, 2025, satisfies the requirements for the increased credit amount under section 45Z if it meets the Prevailing Wage Requirements of section 45(b)(7) and proposed §1.45-7, the Apprenticeship Requirements of section 45(b)(8) and proposed §1.45-8, and the recordkeeping and reporting requirements of proposed §1.45-12, with respect to any alteration or repair of the facility with respect to any taxable year beginning after December 31, 2024, for which the credit is allowed under section 45Z.

With respect to the proposed rule in §1.45Z-3(b)(1), commenters asked that the final regulations clarify the requirements for the increased credit amount with respect to facilities that begin construction before January 29, 2023, but are not placed in service until after December 31, 2024. Commenters asked whether the Proposed Regulations intended to create a BOC Exception for section 45Z. Some commenters indicated support for a BOC Exception for consistency with other increased credit provisions, while others argued that there is no statutory support for a BOC Exception. Other commenters generally requested transition relief from the PWA requirements and suggested that the final regulations clarify proposed §1.45Z-3(b)(1) to remove the clause requiring construction on or after January 29, 2023.

In response to comments, the final regulations modify the Proposed Regulations in several respects. With respect to the rule in proposed §1.45Z-3(b)(1) for facilities placed in service after December 31, 2024, the final regulations remove the clause requiring construction on or after January 29, 2023. The Treasury Department and the IRS agree that this language, which was intended to provide transition relief similar to that described in Section II. of this Summary of Comments and Explanation of Revisions, was confusing. Taxpayers can satisfy the requirements for the increased credit amount regardless of whether construction began before or after January 29, 2023. The Treasury Department and the IRS decline to prescribe a BOC Exception through regulation because Congress did not statutorily provide for one. Under the transition rule described in Section II. of this Summary of Comments and Explanation of Revisions, the PWA requirements do not apply for any work performed before January 29, 2023. Thus, the final regulations provide that for facilities placed in service on or after January 1, 2025, taxpayers must meet the Prevailing Wage Requirements, but only for construction, alteration, and repair work performed on or after January 29, 2023.

Regarding the special rule proposed in §1.45Z-3(b)(2) for facilities placed in service before January 1, 2025, commenters requested that the final regulations clarify that the special rule in section 45Z(f)(6)(B) applies to all facilities placed in service before January 1, 2025, regardless of whether construction began before January 29, 2023. The final regulations confirm that with respect to all facilities placed in service before January 1, 2025 (regardless of when construction began), the Prevailing Wage Requirements do not apply with respect to construction, but taxpayers must satisfy the Prevailing Wage Requirements with respect to any alteration or repair of the facility for taxable years beginning after December 31, 2024, for which the credit is allowed.

At least one commenter asserted that the special rule in section 45Z(f)(6)(B) also includes an exception from the Apprenticeship Requirements for facilities placed in service before January 1, 2025. Section 45Z(f)(6)(A) provides that, "[s]ubject to [the special rule of] subparagraph (B), rules similar to the [prevailing wage] rules of section 45(b)(7) shall apply." Section 45Z(f)(7) provides that "[r]ules similar to the apprenticeship requirement rules of section 45(b)(8) shall apply." Under section 13101(k) of the IRA, the rules of section 45(b)(7) and 45(b)(8) apply with respect to facilities that are placed in service after December 31, 2021. Thus, the Treasury Department and the IRS interpret the PWA requirements of sections 45Z(f)(6) and 45Z(f)(7) generally as applying to any qualified facility that is placed in service after December 31, 2021, subject to the transition rule described in Section II. of this Summary of Comments and Explanation of Revisions. There is no exception to the Apprenticeship Requirements in section 45Z(f)(7), regardless of whether a facility is placed in service before, on, or after January 1, 2025. In the absence of a statutory basis, the Treasury Department and the IRS do not provide an exception to the Apprenticeship Requirements in the final regulations.

While there is no statutory basis to except taxpayers from the Apprenticeship Requirements in section 45Z, the Treasury Department and the IRS agree that the proposed rule caused confusion for taxpayers that intend to place a qualified facility in service before January 1, 2025. The Proposed Regulations suggested that taxpayers that placed a qualified facility in service before January 1, 2025, must only satisfy the Prevailing Wage Requirements and the Apprenticeship Requirements with respect to alterations and repairs that occur in taxable years beginning after December 31, 2024. This incorrectly suggested that there was an Apprenticeship Requirement with respect to alterations and repairs to a facility after it is placed in service and did not address whether the construction of a qualified facility is subject to the Apprenticeship Requirements prior to the facility being placed in service.

In recognition of the confusion created by the Proposed Regulations, the final regulations provide additional transition relief under section 45Z for taxpayers who relied on the Proposed Regulations with respect to the Apprenticeship Requirements for facilities placed in service before January 1, 2025. In general, the final regulations allow taxpayers to continue to rely on the Proposed Regulations up to the date these regulations are published in the ***Federal Register***. The final regulations provide that taxpayers may rely on proposed §1.45Z-3(b)(2) for an additional 90 days from the date these regulations are published in the ***Federal Register*** as transition relief from the Apprenticeship Requirements. This 90-day period will provide taxpayers with time to locate and request qualified apprentices from registered apprenticeship programs for any remaining construction work that occurs after 90 days after the date these regulations are published in the ***Federal Register*** and before the facility is placed in service. This transition relief does not apply to facilities that are placed in service after December 31, 2024. Such facilities must comply with the Prevailing Wage Requirements and the Apprenticeship Requirements with respect to construction, alteration, or repair work beginning on or after January 29, 2023.

A commenter asked for clarification regarding the applicable amount used to calculate the increased credit amount under section 45Z if the PWA requirements are satisfied. The commenter requested that the description of the credit amount in proposed §1.45Z-3(a) be amended to clarify that the alternative applicable amount of the credit is $1.00 per gallon for non-SAF (and $1.75 for SAF) and not $5.00 per gallon for non-SAF ($8.75 for SAF).

Section 45Z generally provides a base applicable amount, and if the PWA requirements are satisfied, an alternative applicable amount that is five times the base amount. The Treasury Department and the IRS recognize that proposed §1.45Z-3(a) could have been interpreted to mean that the entire increased credit amount determined under section 45Z(a) should be multiplied by five, rather than just the base applicable amount. The final regulations clarify that if the PWA requirements are satisfied, then the applicable amount is the alternative applicable amount determined under section 45Z(a)(2)(B) for non-SAF or section 45Z(a)(3)(A)(ii) for SAF, each subject to adjustments for inflation under section 45Z(c).

H. *Section 48C*

Section 48C provides a credit for a qualified investment in a qualifying advanced energy project for that taxable year (section 48C Credit). The IRA added section 48C(e) to the Code, extending the section 48C Credit to provide an additional section 48C Credit allocation of $10 billion. Generally, the credit amount for section 48C Credits allocated pursuant to section 48C(e) is equal to six percent of the basis of the eligible property. Under section 48C(e)(4), if a taxpayer satisfies the PWA Requirements in section 48C(e)(5) and (6) with respect to a qualifying advance energy project, then the credit amount determined under section 48C(a) is 30 percent.

To satisfy the Prevailing Wage Requirements under section 48C(e)(5)(A), a taxpayer must ensure that with respect to a qualifying advanced energy project, any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the re-equipping, expansion, or establishment of a manufacturing facility are paid wages at rates not less than the prevailing rates for construction, alteration, or repair of a similar character in the locality in which the project is located. Section 48C(e)(5)(B) provides that rules similar to section 45(b)(7)(B) apply for purposes of the correction and penalty related to the failure to satisfy the Prevailing Wage Requirements. Section 48C(e)(6) provides that rules similar to section 45(b)(8) apply for purposes of the Apprenticeship Requirements.

A section 48C Credit allocation is made after an application and project certification. The extension of section 48C and the additional allocations under section 48C(e) are effective on January 1, 2023. The Treasury Department and the IRS issued Notice 2023-18, 2023-10 I.R.B. 508, Notice 2023-44, 2023-25 I.R.B. 924, and Notice 2024-36, 2024-24 I.R.B. 1479, to provide guidance under section 48C(e). These notices provide a process for the IRS to allocate section 48C Credits. To prevent an overallocation of section 48C Credits, section 5.07 of Notice 2023-18 requires a taxpayer that applies for a sec-

tion 48C Credit allocation at the 30 percent credit amount to confirm that the taxpayer intends to satisfy the PWA requirements. Section 5.07 of Notice 2023-18 additionally requires that if the taxpayer provides notification that it placed the project in service, the taxpayer must also confirm that it satisfied the PWA requirements.

The Proposed Regulations would have provided that if a taxpayer satisfies both the PWA requirements and the PWA confirmation requirements provided in Notice 2023-18 (or any subsequent guidance), then the credit amount for section 48C Credits allocated pursuant to section 48C(e) of the Code would be equal to 30 percent. Notice 2023-44 provides that a property placed in service prior to being awarded a section 48C Credit under the section 48C(e) program is not eligible to receive such an allocation. It is possible that a taxpayer will have performed work after January 1, 2023, with respect to the construction, alteration, or repair of a qualifying advanced energy project and before being awarded an allocation under section 48C.

Proposed §1.48C-3 would have provided that the increased credit amount is available for any qualifying advanced energy project that satisfies the Prevailing Wage Requirements of section 45(b)(7) and proposed §1.45-7, the Apprenticeship Requirements of section 45(b)(8) and proposed §1.45-8, and the recordkeeping and reporting requirements of proposed §1.45-12.

One commenter stated that the Proposed Regulations may have erroneously incorporated the requirement in proposed §1.45-7(a) to pay prevailing wages during the 10-year period after a facility is placed in service and requested that the final regulations specify whether the PWA requirements apply after a facility is placed in service. Section 48C provides that the Prevailing Wage Requirements apply in the "re-equipping, expansion, or establishment of a manufacturing facility." Nothing in section 48C requires the payment of prevailing wages with respect to alterations or repairs after a qualifying advanced energy project is placed in service. For the reasons described in Sections VIII.A.1. and IX.A. of this Summary of Comments and Explanation of Revisions, the final regulations amend the Proposed Regulations to confirm that the PWA requirements under section 48C apply only during the re-equipping, expansion, or establishment of a qualifying advanced energy project and not with respect to any alteration or repair after a qualifying advanced energy project is placed in service. Under the transition rule described in Section II. of this Summary of Comments and Explanation of Revisions, the PWA requirements do not apply to any work performed before January 29, 2023.

Additionally, a commenter requested guidance concerning whether for purposes of section 48C projects the PWA requirements are similarly limited to the same eligible property defined by section 48C(c)(2). The commenter asked for PWA requirements to be limited to this same eligible property and any costs integral to that eligible property – excluding any work related to the building or its structural components. The applicable scope of the PWA requirements is explained in Section VI. of this Summary of Comments and Explanation of Revisions.

I. *Section 179D*

Section 179D(a) generally allows a deduction in an amount equal to the cost of energy efficient commercial building property placed in service during the taxable year. Section 179D(f) generally allows as a deduction for the taxable year the amount of the aggregate adjusted basis of energy efficient building retrofit property placed in service by the taxpayer pursuant to a qualified retrofit plan. Under section 179D(b)(3), (4), and (5), an increased deduction amount is allowed if the taxpayer ensures that laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the installation of any energy efficient commercial building property, energy efficient building retrofit property, or property installed pursuant to a qualified retrofit plan (collectively, 179D qualified property) are paid wages at rates not less than the prevailing rates and satisfies the Apprenticeship Requirements. Under section 179D(g), the increased deduction amount in section 179D(b) is subject to an adjustment for inflation in taxable years beginning after 2022.

Proposed §1.179D-3(b) would have provided that the increased deduction is available for any 179D qualified property that either began installation prior to January 29, 2023, or meets the Prevailing Wage Requirements of section 45(b)(7) and proposed §1.45-7, the Apprenticeship Requirements of section 45(b)(8) and proposed §1.45-8, and the recordkeeping and reporting requirements of proposed §1.45-12.

One commenter stated that the Proposed Regulations may have erroneously incorporated the requirement in proposed §1.45-7(a) to pay prevailing wages during the 10-year period after a property is placed in service and requested that the final regulations specify whether the PWA requirements apply after a property is placed in service. Section 179D provides that the Prevailing Wage Requirements apply "in the installation of any property." Nothing in section 179D requires the payment of prevailing wages with respect to alterations or repairs after such installation. For the reasons described more fully in Sections VIII.A.1. and IX.A. of this Summary of Comments and Explanation of Revisions, the final regulations amend the Proposed Regulations to confirm that the PWA requirements under section 179D apply only during the installation of the 179D qualified property and not with respect to any alteration or repair after the 179D qualified property is placed in service. The applicable scope of the PWA requirements is explained in Section VI. of this Summary of Comments and Explanation of Revisions. Under the transition rule described in Section II. of this Summary of Comments and Explanation of Revisions, the PWA requirements do not apply to any work performed before January 29, 2023. The final regulations also clarify that the deduction amounts are increased for inflation.

On October 5, 2022, the IRS issued Notice 2022-48 and requested comments with respect to the allocation of the section 179D deduction and the criteria that the Treasury Department and the IRS should consider in drafting rules to determine the person that is primarily responsible for designing the property under section 179D(d)(3)(A). The Proposed Regulations would have provided general rules for satisfying the PWA requirements for purposes of section 179D, but the Proposed Regulations would not have

addressed the allocation of the deduction in the case of 179D qualified property installed on, or in property owned by, a specified tax-exempt entity as described in section 179D(d)(3)(B).

A few commenters suggested that the Treasury Department and the IRS provide an exception to meeting PWA requirements for primary designers who are allocated the deduction under section 179D(d)(3)(A). For example, the commenters explained that because designers do not directly employ laborers, mechanics, contractors, or subcontractors and because the allocating tax-exempt entity has little interest in undertaking the compliance burden for an allocated deduction, the designer will have difficulty ensuring compliance with the PWA requirements. Another commenter suggested that the regulations require the contractor to consult with all other contractors and subcontractors on the project and certify that they are not also seeking the allocation of the deduction, similar to an approach developed by the General Services Administration.

The Proposed Regulations would not have provided rules regarding the allocation of the deduction in the case of 179D qualified property installed on or in property owned by a specified tax-exempt entity. After reviewing comments, the Treasury Department and the IRS determined that the section 179D allocation is outside the scope of these final regulations and rules for the section 179D allocation will be addressed in future guidance.

One commenter asked whether architects and engineers who do not employ laborers, mechanics, contractors, or subcontractors automatically qualify for the increased section 179D deductions. Generally applicable rules for laborers and mechanics are discussed in Section VII.C.1. of this Summary of Comments and Explanation of Revisions. Another commenter stated that without a *de minimis* threshold for noncompliance, small, accidental deviations may prevent earning the increased section 179D deduction. The limited penalty waiver is discussed in Section VII.D.4. of this Summary of Comments and Explanation of Revisions.

Additionally, a commenter requested that section 179D be modified so that the relevant property's basis is not reduced by the amount of the claimed deduction under section 179D. The commenter stated that reducing the property's basis by the received deduction amount may actually place the taxpayer worse off financially. Statutory revisions are outside the scope of these final regulations.

X. *Recordkeeping and Reporting Requirements*

A. *In general*

Section 45(b)(12) authorizes the Secretary to issue such regulations or other guidance as the Secretary determines necessary to carry out the purposes of section 45(b), including regulations or other guidance that provide requirements for recordkeeping or information reporting for purposes of administering the requirements of section 45(b). Section 6001 provides that every person liable for any tax imposed by the Code, or for the collection thereof, must keep such records as the Secretary may from time to time prescribe. Section 1.6001-1(a) provides that any person subject to income tax must keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax. Section 1.6001-1(e) provides that the books and records required by §1.6001-1 must be retained so long as the contents thereof may become material in the administration of any Internal Revenue law.

Proposed §1.45-12(a) would have provided that the increased credit amount must be claimed in such form and manner as may be prescribed in IRS forms or instructions or in publications or guidance published in the Internal Revenue Bulletin. The preamble to the Proposed Regulations also stated that the Proposed Regulations would require taxpayers to provide a statement with the tax return that claims an increased amount of credit or deduction that includes aggregate information as detailed in proposed §1.45-12.

The Proposed Regulations would have imposed recordkeeping requirements that are generally consistent with the recordkeeping requirements under the DBA regime for purposes of the PWA requirements. Proposed §1.45-12(b) would have provided that with respect to each qualified facility for which a taxpayer is claiming or transferring (under section 6418) an increased credit amount under section 45(b)(6)(A), unless section 45(b)(6)(B)(i) or 45(b)(6)(B)(ii) applies, the taxpayer would be required to maintain and preserve records sufficient to demonstrate compliance with the applicable PWA requirements in proposed §§1.45-7 and 1.45-8, respectively. Under the Proposed Regulations, at a minimum, those records would have included payroll records for each laborer and mechanic (including each qualified apprentice) employed by the taxpayer, contractor, or subcontractor in the construction, alteration, or repair of the qualified facility.

Proposed §1.45-12(c) would have provided an enumerated list of records, in addition to payroll records otherwise maintained by the taxpayer, that may be sufficient to establish compliance with the Prevailing Wage Requirements. The list in proposed §1.45-12(c) included the following information for each laborer or mechanic (including each qualified apprentice) employed by the taxpayer, a contractor, or subcontractor with respect to each qualified facility: (i) identifying information, including the name, social security or tax identification number, address, telephone number, and email address; (ii) the location and type of qualified facility; (iii) the labor classification(s) the taxpayer applied to the laborer or mechanic for determining the prevailing wage rate and documentation supporting the applicable classification, including the applicable wage determination; (iv) the hourly rate(s) of wages paid (including rates of contributions or costs for bona fide fringe benefits or cash equivalents thereof) for each applicable labor classification; (v) records to support any contribution irrevocably made on behalf of a laborer or mechanic to a trustee or other third person pursuant to a bona fide fringe benefit program, and the rate of costs that were reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a plan or program described in 40 U.S.C. 3141(2)(B), including records demonstrating that the enforceable commitment was provided in writing to the

laborers and mechanics affected; (vi) the total number of labor hours worked per pay period; (vii) the total wages paid for each pay period (including identifying any deductions from wages); (viii) records to support wages paid to any apprentices at less than the applicable prevailing wage rates, including records reflecting the registration of the apprentices with a registered apprenticeship program and the applicable wage rates and apprentice-to-journeyworker ratios prescribed by the apprenticeship program; and (ix) the amount and timing of any correction payments and documentation reflecting the calculation of the correction payments.

Proposed §1.45-12(d) would have required taxpayers subject to the Apprenticeship Requirements to maintain sufficient records to establish compliance with the Labor Hours Requirement, Ratio Requirement, and Participation Requirement. Under the Proposed Regulations, records that may be sufficient to demonstrate compliance with the applicable Apprenticeship Requirements in §1.45-8 would have included the following information for each apprentice employed by the taxpayer, a contractor, or subcontractor with respect to each qualified facility: (i) any written requests for the employment of apprentices from registered apprenticeship programs, including any contacts with the DOL OA or a State apprenticeship agency regarding requests for apprentices from registered apprenticeship programs; (ii) any agreements entered into with registered apprenticeship programs with respect to the construction, alteration, or repair of the facility; (iii) documents reflecting the standards and requirements of any registered apprenticeship program, including the applicable ratio requirement prescribed by each registered apprenticeship program from which taxpayers, contractors, or subcontractors employ apprentices; (iv) the total number of labor hours worked by apprentices; and (v) records reflecting the daily ratio of apprentices to journeyworkers.

The Proposed Regulations under sections 30C, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48C, and 179D would have provided similar recordkeeping requirements as described in proposed §1.45-12.

As discussed in Section I. of this Summary of Comments and Explanation of Revisions, several commenters suggested that the final regulations should impose additional reporting and recordkeeping requirements, including many pre-filing reporting requirements such as certified weekly payroll and monthly apprenticeship hours reporting. However, other commenters stated that having to comply with the recordkeeping and reporting requirements as proposed would be burdensome and create costly administrative work for business owners. These commenters requested that documentation and reporting requirements be as streamlined and minimal as possible.

As explained in greater detail in Section I. of this Summary of Comments and Explanation of Revisions, the final regulations strike an appropriate balance between imposing requirements intended to encourage the timely and correct payment of prevailing wages and the hiring of qualified apprentices while recognizing the prospective nature inherent in the increased amount of credit and deduction. The Treasury Department and the IRS want to avoid imposing unnecessary administrative work on taxpayers, especially small businesses. However, the IRS must be able to determine taxpayer compliance with the PWA requirements once a return is filed claiming an increased amount of credit or deduction. For this reason, the final regulations do not incorporate the suggestions regarding pre-filing activities, although many comments are incorporated as factors for determining intentional disregard, and instead adopt the robust recordkeeping and reporting requirements from the Proposed Regulations. The final regulations provide recordkeeping and reporting requirements that are consistent with the DBA, relevant for the purposes of the increased amount of credit and deduction and the intent of the IRA, and that are necessary for, and consistent with, sound tax administration.

Many commenters stated that the proposed regulations struck an appropriate balance between ensuring there is significant documentation to ensure compliance without adding unnecessary burden. Some commenters requested that taxpayers be provided flexibility related to the recordkeeping requirements, while others asked for guidance on how to demonstrate compliance with the recordkeeping requirements and whether specific records would satisfy the recordkeeping requirement. A few commenters suggested that the final regulations incorporate or require specific forms or reporting methods similar to those used in other contexts (for example, the IRS Form 1099). Some commenters suggested taxpayers could use the DOL's Registered Apprenticeship Partners Information Data System (commonly referred to as RAPIDS) to assist in reporting compliance with the Participation Requirement. Another commenter suggested the final regulations require taxpayer to report evidence of compliance with the Good Faith Effort Exception at filing.

The final regulations largely follow the approach in the Proposed Regulations. Consistent with IRS practice, the final regulations adopt the rule from the Proposed Regulations that the increased credit amount must be claimed in such form and manner as may be prescribed in IRS forms, instructions, publications, or guidance published in the Internal Revenue Bulletin. Comments suggesting specific forms or reporting methods are not incorporated. It is critical that the IRS retain the ability to prescribe the required reporting requirements in relevant forms and instructions to allow for modifications as necessary. Draft forms and instructions are typically made available for public comment on *https://www.irs.gov*.

To provide flexibility to taxpayers, the final regulations do not prescribe a specific form or manner in which records must be kept. In response to comments that asked whether certain records would be sufficient, the final regulations indicate that an accurately completed DOL Form WH-347 may constitute a sufficient record reflecting the payment of prevailing wages to the individuals identified on the form for the period identified on the form for purposes of §1.45-12. The final regulations also add copies of contracts for construction, alteration, or repair of the facility with any contractor or subcontractor to the list of records that may be sufficient to demonstrate compliance with the Prevailing Wage Requirements. In most cases, payroll records alone will not demonstrate a taxpayer's compliance with the totality of the PWA requirements. Nothing in these regulations is intended to restrict the IRS's authority to request additional records to

determine whether the taxpayer has complied with the PWA requirements. For example, during an examination, the IRS may request information and documents with respect to the taxpayer's process for the proper identification, classification, and payment of wages to laborers and mechanics performing construction on the qualified facility and for determining labor needs on a construction project, including specific apprenticeship needs.

Commenters requested guidance on the length of time records need to be maintained. A commenter stated that once a construction project is completed, the taxpayer would no longer have access to competitively sensitive data, such as wage information, stored by contractors and subcontractors. One commenter suggested that records should be retained for at least three years after all work on the construction project is completed. Another commenter suggested requiring taxpayers to retain adequate payroll records for at least five years from the projected end of the tax credit period. At least one commenter suggested that not retaining adequate records should be considered evidence of intentional disregard. The commenter emphasized that maintaining such records would not be burdensome because records are now kept digitally. The final regulations clarify that taxpayers are required to maintain and preserve records sufficient to establish compliance with the PWA requirements for relevant tax years as provided for under section 6001 and §1.6001-1(e). The final regulations also add the failure to maintain records to the intentional disregard factors.

Some commenters stated that it might be difficult for taxpayers to obtain records of wages paid by contractors and subcontractors. Commenters suggested permitting taxpayers to rely on written certifications from contractors and subcontractors that the contractor or subcontractor is complying with the PWA requirements, including recordkeeping. One commenter suggested that the final regulations permit taxpayers to rely on contractual provisions that require strict adherence to IRS goals and standards. Another commenter was concerned that despite contractual agreements between the taxpayer and a general contractor detailing the PWA requirements, taxpayers would be subject to the subcontractors' recordkeeping abilities, over which they have no control.

Commenters also claimed that the proposed recordkeeping requirements raise privacy and antitrust concerns. Specifically, commenters argued that requiring taxpayers to maintain the payroll records of contractors and subcontractors could violate Federal or State privacy laws or company policies on the proper handling of personally identifiable information (PII) such as social security numbers and dates of birth. Commenters suggested: (i) allowing the direct employer (whether that is the taxpayer, contractor, or subcontractor) to maintain required payroll records and confidential employee information subject to contractual provisions requiring the maintenance and preservation of the records and permitting access to such records by the IRS as part of a duly issued audit request; (ii) allowing the taxpayer to collect and maintain the payroll records and data specified in proposed §1.45-12 with a third-party vendor subject to similar contractual provisions and access to the IRS audit function; (iii) allowing taxpayers, transferee taxpayers, and/or their agents to inspect payroll records and data under a nondisclosure arrangement as part of proper due diligence without taking physical custody or control of such payroll records or data; (iv) allowing payroll records and data to be collected and maintained by the taxpayer or any contractor in a manner that redacts certain sensitive information as long as the information is maintained by the direct employer pursuant to contractual arrangements; and (v) allowing alternative forms of validation for hourly wage rates and other payroll data to avoid antitrust and confidentiality concerns among taxpayers, contractors, and subcontractors. A commenter recommended that for recordkeeping of fringe benefits, the final regulations should accept sworn statements of contributions as sufficient. The commenter stated that it is exceedingly difficult for entities to monitor and verify subcontractor contributions to fringe benefit programs.

Consistent with the requirements in section 45(b)(7) and (8) that the taxpayer ensure that the Prevailing Wage Requirements and Apprenticeship Requirements are satisfied, the final regulations adopt the rule as proposed that the taxpayer is required to maintain all relevant records, regardless of whether the laborers and mechanics are employed by the taxpayer, a contractor, or a subcontractor. In response to comments regarding privacy concerns and data sensitivity, the final regulations amend the proposed rule to clarify that records need only contain the last four digits of a social security number. The final regulations also provide three alternatives that taxpayers may use to satisfy the recordkeeping requirements in §1.45-12. These alternatives are intended to assist taxpayers in satisfying the recordkeeping requirements while also complying with applicable law. Under the final regulations: (i) taxpayers may collect and physically retain redacted records from every relevant contractor and subcontractor; (ii) taxpayers may use a third-party vendor to collect and physically retain records from every relevant contractor and subcontractor on behalf of the taxpayer, and the records may have PII redacted to comply with applicable privacy laws; or (iii) taxpayers, contractors, and subcontractors may physically retain unredacted records for their own employees. Under all three alternatives, unredacted records must be made available to the IRS upon request.

Although retaining records consistent with one or more of these options will constitute satisfaction of the recordkeeping requirements in §1.45-12 of these final regulations, the Prevailing Wage Requirements in §1.45-7 and the Apprenticeship Requirements in §1.45-8 of these final regulations must be satisfied (as applicable) in order for the taxpayer to obtain the increased amount of credit or deduction. The taxpayer is ultimately responsible for compliance with the PWA requirements and may not rely on certifications from contractors and subcontractors that they are complying with PWA requirements (including recordkeeping). Taxpayers may delegate certain recordkeeping activities to comply with applicable laws; however, the ultimate responsibility to ensure compliance with the PWA requirements remains with the taxpayer, and taxpayers may not rely on a contractual provision to delegate that responsibility to contractors and subcontractors for purposes of satisfying the PWA requirements. Additionally, taxpayers should consider the impact that a recordkeeping approach may have on

their ability to demonstrate the facts and circumstances listed in §§1.45-7(c)(3)(iii) and 1.45-8(f)(2)(ii) pertaining to intentional disregard.

The preamble to the Proposed Regulations would have provided that to demonstrate that a failure was not due to intentional disregard, taxpayers must maintain and preserve records sufficient to document any failures to satisfy the Prevailing Wage Requirements or the Apprenticeship Requirements, and the actions taken to prevent, mitigate, or remedy the failure (for example, records demonstrating that the taxpayer regularly reviewed payroll practices, included requirements to pay prevailing wages in contracts with contractors, and posted prevailing wage rates in a prominent place on the job site). The preamble to the Proposed Regulations also indicated that the Proposed Regulations would have imposed recordkeeping requirements related to correction and penalty payments, penalty waiver provisions, and the Good Faith Effort Exception. The final regulations incorporate these provisions as described in the preamble to the Proposed Regulations and clarify that any failures to satisfy the Prevailing Wage Requirements and the actions taken to prevent, mitigate, or remedy the failure may be documented with records demonstrating that the taxpayer engaged an independent third party to aid in the review of payroll information.

B. *Recordkeeping for credits transferred pursuant to section 6418*

The Proposed Regulations would have provided that because an eligible taxpayer determines any increased credit amount applicable to the PWA requirements, the general recordkeeping requirements would remain with an eligible taxpayer who transfers a specified credit portion that includes an increased credit amount. The increased credit amount that is determined by an eligible taxpayer would be reported on the return of the eligible taxpayer. The minimum required documentation to be provided to the transferee taxpayer is a separate requirement under the 6418 Final Regulations that does not impact the requirements in these final regulations. Comments received relating to section 6418 and responses by the Treasury Department and the IRS are discussed in Section V.B. of this Summary of Comments and Explanation of Revisions.

XI. *Applicability Date*

The Proposed Regulations would have provided that the final regulations apply to facilities, property, projects, or equipment placed in service in taxable years ending after the date these final regulations are published in the ***Federal Register*** and the construction, or installation, of which begins after the date these final regulations are published in the ***Federal Register***. The Proposed Regulations would have provided that taxpayers could rely on the Proposed Regulations with respect to construction or installation of a facility, property, project, or equipment beginning on or after January 29, 2023, and on or before the date these final regulations are published, provided, that beginning after the date that is 60 days after August 29, 2023, taxpayers follow the Proposed Regulations in their entirety and in a consistent manner. The Proposed Regulations would have also provided that the provisions of sections 3 and 4 of Notice 2022-61 would be obsoleted for facilities, property, projects, or equipment the construction, or installation of which begins after the date these final regulations are published. The Proposed Regulations would not have otherwise affected Notice 2022-61.

Several commenters requested transition relief with respect to the applicability date of these final regulations. One commenter suggested that because Notice 2022-61 was used to justify the application of PWA requirements to projects that started after January 29, 2023, the IRS should establish a new effective date for the IRA's PWA requirements. The commenter argued that, at a minimum, additional guidance set forth in the Proposed Regulations and the final regulations should be applied only prospectively. The commenter raised that the rescission of guidance issued in Notice 2022-61, if done on a retroactive basis, would be arbitrary and capricious and a violation of the Administrative Procedure Act, 5 U.S.C. 702, unless the IRS provides much greater explanation for its actions.

As stated in Section II. of this Summary of Comments and Explanation of Revisions, the final regulations provide a transition rule under which the PWA requirements do not apply to construction, alteration, and repair activities occurring before January 29, 2023. Further, the final regulations generally apply to qualified facilities placed in service in taxable years ending after June 25, 2024, and the construction of which begins after June 25, 2024. Additionally, taxpayers may choose to apply the final regulations to qualified facilities placed in service in taxable years ending on or before June 25, 2024, and qualified facilities placed in service in taxable years ending after June 25, 2024, the construction of which begins before June 25, 2024, provided that taxpayers follow the final regulations in their entirety and in a consistent manner. Taxpayers may also rely on the Proposed Regulations with respect to construction of a qualified facility beginning on or after January 29, 2023, and on or before June 25, 2024, provided, that beginning after the date that is 60 days after August 29, 2023, taxpayers follow the Proposed Regulations in their entirety and in a consistent manner.

Consistent with the Proposed Regulations, the final regulations confirm that the obsoletion of sections 3 and 4 of Notice 2022-61 is prospective as it applies facilities, property, projects, or equipment the construction, or installation, of which begins after June 25, 2024. The final regulations do not otherwise affect Notice 2022-61.

XII. *Severability*

If any provision in this rulemaking is held to be invalid or unenforceable facially, or as applied to any person or circumstance, it shall be severable from the remainder of this rulemaking, and shall not affect the remainder thereof, or the application of the provision to other persons not similarly situated or to other dissimilar circumstances.

Applicability Dates

These regulations apply to qualified facilities placed in service in taxable years ending after June 25, 2024, and the construction of which begins after June 25, 2024. Taxpayers may choose to apply these regulations to qualified facil-

ities placed in service in taxable years ending on or June 25, 2024, and qualified facilities placed in service in taxable years ending after June 25, 2024, the construction of which begins before June 25, 2024, provided that taxpayers follow these regulations in their entirety and in a consistent manner. Taxpayers may also continue to rely on the Proposed Regulations with respect to construction of a qualified facility beginning on or after January 29, 2023, and on or before June 25, 2024, provided, that beginning after the date that is 60 days after August 29, 2023, taxpayers follow the Proposed Regulations in their entirety and in a consistent manner.

Effect on Other Documents

Sections 3 and 4 of Notice 2022-61 are obsoleted for facilities, property, projects, or equipment the construction, or installation, of which begins after August 26, 2024.

Special Analyses

I. *Regulatory Planning and Review*

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6(b) of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

II. *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) (PRA) generally requires that a Federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit.

The collections of information in these final regulations contain reporting, recordkeeping, and third-party disclosure requirements, each of which is described below. These collections are required for purposes of claiming an increased amount of credit or deduction; and are necessary for the IRS to validate that taxpayers have met the regulatory requirements and are eligible to claim the increased credit amounts. The likely respondents are individual, business, trust and estate filers, and tax-exempt organizations.

These final regulations set forth procedures for requesting supplemental wage determinations and wage rates for additional classifications from the DOL. This collection is approved by the OMB under DOL Control Number 1235-0034. These final regulations do not alter any of the DOL collections approved under this control number.

These final regulations include requirements to keep records sufficient to demonstrate that the PWA requirements have been met as detailed in §1.45-12. For purposes of the PRA, the records required to be kept pursuant to §1.45-12 are considered general tax records. The collection of these general tax records is approved annually under 1545-0074 for individuals/sole proprietors, 1545-0123 for business entities, and 1545-0047 for tax-exempt organizations. The IRS received from the OMB a new OMB Control number (1545-2315) for trust and estate filers.

These final regulations also include reporting requirements that taxpayers provide a statement with the tax return that claims an increased amount of credit or deduction that includes aggregate information as detailed in §1.45-12. The IRS may issue forms and instructions in future guidance for the purpose of meeting these reporting requirements. These reporting requirements will be covered under 1545-0074 for individuals/sole proprietors and 1545-0123 for business entities. These reporting requirements are covered under the new OMB Control Number (1545-2315) for trust and estate filers.

These final regulations include third-party disclosures that include notifying laborers and mechanics of the applicable prevailing wage rates as detailed in §1.45-7. These final regulations also include third-party disclosures for taxpayers requesting the dispatch of qualified apprentices from a registered apprenticeship program as detailed in §1.45-8. The third-party disclosures apply to all filers. The third-party disclosures applicable to all filers are also covered under the new OMB Control Number (1545-2315).

In the Notice of Proposed Rulemaking, the Treasury Department and the IRS requested public comments on the proposed collections of information including: (i) whether the proposed collection of information is necessary for the proper performance of the functions of the IRS; (ii) the accuracy of the estimated burden associated with the proposed collection of information; (iii) how the quality, utility, and clarity of the information to be collected may be enhanced; (iv) how the burden of complying with the proposed collection of information may be minimized; and (v) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

One commenter suggested the Treasury Department and the IRS provide additional clarification regarding the estimated time for filers to find and display the prevailing wage rates and to request qualified apprentices from registered apprenticeship programs. One commenter suggested that the estimate failed to consider additional actions related to complying with PWA rules, such as tracking the payment of prevailing wages and usage of qualified apprentices. Commenters stated that it may take some taxpayers more than two hours annually to find and display the prevailing wage rates and to request qualified apprentices from registered apprenticeship programs. Another commenter expressed confusion over the difference in the proposed compliance time required by trusts and estate in comparison to all other filers.

The Treasury Department and the IRS agree that the estimated annual burden with respect to the reporting and recordkeeping requirements of these final regulations can be clarified. The preamble to the notice of proposed rulemaking estimated these recordkeeping and reporting obligations necessary for compliance with the PWA Requirements will take 40 hours annually. This estimate was submitted as part of seeking a new OMB control number with respect to trust and estate filers. The estimate will also be submitted to OMB as part of the annual approval process with respect to the OMB control numbers that already exist for other fil-

ers.[36] This estimate includes time necessary for taxpayers to become familiar with the obligations set forth in these regulations. Much of the data taxpayers will be required to maintain, such as the applicable prevailing wage rates, is readily available from DOL websites. Additionally, the recordkeeping requirements with respect to amounts paid to laborers and mechanics are similar to existing requirements imposed by other law. While exact data is not available to estimate the additional burden imposed by these regulations, the Treasury Department and the IRS have retained the estimate of 40 hours.

The commenters also suggested that the two hours estimated for all filers with respect to the third-party disclosures did not properly account for the expected burdens. The Treasury Department and the IRS agree with this comment and have revised the estimate to account for the burden of complying with the Apprenticeship Requirements. The final regulations require taxpayers to request qualified apprentices from an apprenticeship program with an area of operation that includes the location of the facility and may require taxpayers to submit additional requests on an annual basis if requests have been denied. Further, the final regulations will require taxpayers to review the standards and requirements of the registered apprenticeship program as part of making a request, which will likely take more than the two hours estimated as part of the preamble to the proposed regulations. Accordingly, the Treasury Department and the IRS have determined that the estimated burden to comply with the third-party disclosures is four hours instead of two hours.

No other public comments were received by the IRS directed specifically at the PRA or on the collection requirements, but commenters generally articulated the burdens associated with the documentation requirements contained in the Proposed Regulations. As described in the relevant portions of this preamble, the Treasury Department and the IRS believe that the documentation requirements are necessary to administer the increased credit amounts resulting from compliance with the PWA requirements.

III. *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq*.) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq*.) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present a final regulatory flexibility analysis (FRFA) of the final regulations. The Treasury Department and the IRS have not determined whether the final regulations will likely have a significant economic impact on a substantial number of small entities. This determination requires further study. Because there is a possibility of significant economic impact on a substantial number of small entities, a FRFA is provided in these final regulations.

Pursuant to section 7805(f) of the Code, the Proposed Regulations were submitted to the Chief Counsel of the Office of Advocacy of the Small Business Administration for comment on its impact on small business. The Treasury Department and the IRS also requested comments generally with respect to the number of entities affected by the Proposed Regulations and the economic impact on small entities.

A. *Need for and objectives of the rule*

The final regulations provide clarifying guidance for taxpayers intending to satisfy the PWA requirements to qualify for the increased amounts of credit or deduction under sections 30C, 45, 45Q, 45V, 45Y, 45Z, 48C, and 179D and for those taxpayers intending to satisfy the Prevailing Wage Requirements to qualify for the increased credit amounts under sections 45L and 45U. These final regulations provide needed guidance for taxpayers on obtaining and using applicable wage determinations issued by the DOL, on the time and manner for reporting compliance with the PWA requirements, as well as needed definitions. The final regulations also provide guidance concerning correction and penalty payments that can be made by taxpayers who initially fail to satisfy the PWA requirements in order to qualify for the increased amounts of credit and deduction.

The Treasury Department and the IRS expect that the increased amounts of credit and deduction of five times the base amount of credit or deduction for taxpayers that ensure the payment of prevailing wages and hiring of qualified apprentices in the construction, alteration, or repair of qualified facilities provides financial incentives that will beneficially impact various industries involved in the investment in and production of clean energy. These final regulations provide clarifying guidance that will assist taxpayers seeking to comply with the statutory PWA requirements in order to take advantage of the financial incentives. In the absence of this clarifying guidance, taxpayers would be required to rely solely upon the language of the Code in determining how to comply with the PWA requirements, which would likely deter many taxpayers from seeking the increased amounts of credit and deduction and would otherwise greatly increase the costs of compliance for taxpayers choosing to pursue the credits. The Treasury Department and the IRS expect that the increased credit and deduction amounts available to taxpayers as financial incentives will exceed the costs of the additional recordkeeping and reporting obligations imposed on taxpayers by these regulations beyond those otherwise required by the statute.

The Treasury Department and the IRS also expect the financial incentives of the increased amounts of credit and deduction for taxpayers that ensure payment of prevailing wage rates and use of qualified apprentices will deliver benefits across the economy by creating increased opportunities for contractors and subcontractors as well as laborers and mechanics to become involved in clean energy production. Allowing these increased amounts of credits and deduction for taxpayers who satisfy the PWA requirements will incentivize expansion of clean energy resources and will reduce economy wide greenhouse gas emissions.

[37] Additional information on taxpayer compliance burdens can be found in Publication 5743, IRS Taxpayer Compliance Burden, https://www.irs.gov/pub/irs-pdf/p5743.pdf.

B. *Significant issues raised by public comments in response to the initial regulatory flexibility analysis*

The Small Business Administration's Office of Advocacy provided comments on the initial regulatory flexibility analysis (IRFA) set forth in the Proposed Regulations. Specifically, the Office of Advocacy commented that the IRFA did not adequately describe regulated small entities, that the IRFA did not adequately estimate potential impacts to regulated small entities, and that the IRFA did not adequately discuss specific alternatives that might reduce the impact on small entities.

Other comments were received on the burdens associated with the PWA requirements, including burdens on small businesses. One commenter requested that the process for obtaining wage determinations from the DOL be streamlined to avoid delays that might increase uncertainty and costs for contractors. Another commenter suggested that because prevailing wage rates are subject to change, the PWA requirements create uncertainty and risk that will increase costs for construction projects. One commenter suggested reducing the burden on small businesses to qualify for the Good Faith Effort Exception. Another commenter proposed that the Treasury Department and the IRS decline to impose penalties for any failure to satisfy the Participation Requirement with respect to any contractor or subcontractor that qualifies as a "small business" under the U.S. Small Business Administration's "Table of Size Standards".

The Treasury Department and the IRS have made a number of revisions to these final regulations to assist taxpayers, including small businesses, and reduce the burdens associated with complying with the PWA requirements. These revisions are discussed in this Summary of Comments and Explanation of Revisions of the preamble to these regulations and in this FRFA.

C. *Affected small entities*

The RFA directs agencies to provide a description of, and if feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted. The Small Business Administration's (SBA) Office of Advocacy estimates in its 2023 Frequently Asked Questions that 99.9 percent of American businesses meet its definition of a small business. The applicability of these Proposed Regulations does not depend on the size of the business, as defined by the SBA. These final regulations may affect a variety of different entities across several different green energy industries as they prescribe rules with respect to ten different sections of the Code with provisions related to increased amounts of credit and deduction.

The Office of Advocacy commented that the IRFA did not describe or estimate the number of impacted small entities and did not provide information related to such entities such as the North American Industry Classification System (NAICS) classifications. The Office of Advocacy also commented that because the regulation requires taxpayers to verify compliance for contracted work, that the Proposed Regulations were directly regulating the contractors hired to perform the work and that the IRFA failed to consider the impact of the proposed rules on these contractors and subcontractors, many of which are likely small businesses. The Treasury Department and the IRS utilize tax data as the basis for its Regulatory Flexibility Act analysis. Tax entities supply information on tax forms, which information is processed and recorded by the IRS. This data is then available to the IRS office of Research, Applied Analytics and Statistics and to the Treasury Department's Office of Tax Policy for use in estimating the impact of tax regulation on businesses.

Tax data is the more appropriate data as it provides nearly universal coverage of the entities that are affected by these tax regulations. All taxpayers and many potential taxpayers are represented in the universe of tax data. Second, the tax data more accurately reflect the level of organization to which tax regulations are applicable because tax data is collected on the entity rather than the enterprise level. Overwhelmingly, business tax regulations apply to the entity level making tax data a natural fit for the analysis of regulatory impact. Further, with limited exceptions, tax regulations apply to all entities organized in a particular manner regardless of industry or size. Finally, analysis of the implications of tax regulations for the purposes of the Paperwork Reduction Act and any Special Analyses, including the Regulatory Impact Analysis, are carried out using tax data. Generally, restricting analysis for the RFA to tax data prevents difficulties in reconciling the different analyses within a given regulation.

Reliance on tax data has some drawbacks. In general, tax forms do not collect information unless it is directly relevant to the calculation of tax liability. The NAICS codes referenced by the Office of Advocacy are included on tax forms for informational purposes and may not be reliable. For example, past the first two-digits of the NAICS code, economic sector level, entries may be left blank in the raw data. In addition, for a tax entity that is comprised of multiple different enterprises that each operate in a different industry, the NAICS code reported on a tax form may not reflect the appropriate industry for the regulation under analysis. Furthermore, most tax returns have no independent verification of the accuracy of NAICS codes. Notwithstanding this concern, tax data remains the most appropriate data for analysis of the implications of tax regulations.

The Treasury Department and the IRS have considered other data alternatives including Census data sources, such as the Statistics of U.S. Businesses (SUSB) suggested by SBA's Office of Advocacy. The 2020 SUSB includes only six million firms and eight million establishments while the proposed tax data includes approximately 18 million business entities. Unlike the SUSB data, the tax data includes more small businesses, not only ones with at least one employee. Tax data provides a more inclusive estimate of businesses affected by tax regulations. In conclusion, while tax data is an appropriate resource for evaluating the impact of tax regulations, this data does not permit some of the usual analysis presented to the SBA. Furthermore, since the NAICS codes reported on the tax return may not accurately reflect the industry of the entity, applying separate standards by industry is inadvisable.

Thus, the Treasury Department and the IRS have determined that reliance on NAICS codes would not accurately reflect the entities affected by these regulations.

Further, the Treasury Department and the IRS currently do not have useable tax data that reflects the entities that will be affected by these regulations. While there is uncertainty as to the exact number of small businesses within this group, the Treasury Department and the IRS continue to estimate that approximately 70,000 taxpayers will be impacted as described in the preamble to the Proposed Regulations.

With respect to the Office of Advocacy's comments regarding the regulation of contractors and subcontractors, these regulations provide guidance for taxpayers that seek the increased amounts of credit and deduction provided under the IRA by ensuring the payment of prevailing wage rates and the use of qualified apprentices with respect to the construction of qualified facilities. The regulations do not directly regulate the contractors and subcontractors who may be hired by taxpayers. The taxpayers claiming the increased amounts of credit and deduction are the entities responsible for compliance with the PWA requirements. While the final regulations set forth and incentivize various practices, taxpayers retain flexibility to determine how best to ensure compliance with the statutory requirements and the recordkeeping and reporting obligations imposed as part of these final regulations.

D. *Impact of the rules*

These final regulations provide rules for how taxpayers can satisfy the PWA requirements in order to seek the increased credit amounts under section 45 as well as the increased amounts of credit or deduction available under sections 30C, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48C, and 179D. Taxpayers that seek to claim the increased amount of credit or deduction will have administrative costs related to reading and understanding these final regulations, as well as increased costs for the recordkeeping and reporting requirements necessary to establish compliance with the PWA requirements. The costs will vary across different-sized taxpayers and across the type of facilities and projects in which such taxpayers are engaged.

The Prevailing Wage Requirements require the taxpayer to obtain the published wage determination issued by the DOL for the county in which the facility is located. To the extent a wage determination does not include a required classification, or if no wage determination has been published, the taxpayer is required to contact the DOL to obtain a supplemental wage determination or a wage rate for an additional classification. The taxpayer is required to ensure that any contractor or subcontractor that works on the construction, alteration, or repair of a facility has paid hourly wages in accordance with the applicable wage determination for each classification required to complete such work. In order to be eligible for certain cure provisions, the taxpayer is required to know or be able to determine whether the laborers and mechanics employed for construction, alteration, or repair of the facility were paid in accordance with the applicable wage determination. Additionally, the taxpayer is required to retain records sufficient to establish compliance for as long as may be relevant. The Treasury Department and the IRS expect that some of the recordkeeping that is required under these rules will be consistent with recordkeeping requirements already imposed under the DBA and the Fair Labor Standards Act, 29 U.S.C. 201 *et seq*.

In adopting these final regulations, the Treasury Department and the IRS have made several revisions that will ease burdens for taxpayers. A few commenters commented on the time that will be required for taxpayers and contractors to read and understand these regulations. In a number of instances, the final regulations have been revised in response to comments to assist taxpayers with understanding the rules, including through clarifying explanations in the preamble, edits to the regulatory text, and additional examples.

Other changes have been made throughout these regulations that will reduce burdens on taxpayers. The Proposed Regulations would have established the time that construction starts as the applicable time for taxpayers and contractors to determine applicable wage rates. Commenters stated this would be burdensome for taxpayers to determine labor costs and could require the renegotiation of contracts that have been executed. In response to these comments, the final regulations provide that generally the applicable prevailing wage rates are determined at the time a taxpayer (or the taxpayer's designee, assignee, or agent) executes the contract for the construction, alteration, or repair of the facility with a contractor. The final regulations also provide transition rules that delay the start of the PWA Requirements to assist taxpayers with complying with the PWA requirements. Under the transition rules, the PWA requirements only apply for work performed on or after January 29, 2023, which follows the issuance of the initial guidance on the PWA requirements by the Treasury Department and the IRS. The final regulations also prescribe penalty waivers for taxpayers who make limited errors in compliance with the Prevailing Wage Requirements. In response to comments, the threshold to qualify for the penalty waivers has been increased to underpayments that do not exceed five percent of all amounts required to be paid in a calendar year to make the penalty waiver more accessible to taxpayers with small failures.

For the Apprenticeship Requirements, the taxpayer, contractor, or subcontractor, is required to contact a registered apprenticeship program for purposes of requesting the dispatch of qualified apprentices to work on the construction, alteration, or repair of the facility. Whether or not the registered apprenticeship program dispatches qualified apprentices, the taxpayer is required to maintain and preserve records to establish compliance for as long as may be relevant.

The Apprenticeship Requirements have also been revised in these final regulations that will reduce burdens for taxpayers. In response to several comments, the final regulations clarify that the requirement to use qualified apprentices only applies with respect to the construction of a facility prior to the facility being placed in service, and does not apply to alterations or repairs after the facility is placed in service. Several comments were received on the burden of the Proposed Regulations that would have required the renewal of requests for qualified apprentices every 120 days for taxpayers to continue to qualify for the Good Faith Effort Exception. These final regulations have extended the 120-day period to provide that qualified apprentices only need to be requested on an annual basis to qualify

for the Good Faith Effort Exception. This revision reduces burdens for taxpayers and contractors who would have been required to evaluate labor needs on a frequent basis and provides taxpayers and their contractors with flexibility to make hiring decisions over a longer period of time.

The taxpayer claiming the increased credit or deduction amount is required to report the payment of prevailing wages and the utilization of qualified apprentices consistent with the forms and instructions of the IRS. Although the Treasury Department and the IRS do not have sufficient data to precisely determine the likely extent of the increased costs of compliance, the estimated burden of complying with the recordkeeping and reporting requirements are described in Section II. of this Special Analyses pertaining to the Paperwork Reduction Act.

E. *Alternatives considered*

The Treasury Department and the IRS considered alternatives to these final regulations. The Office of Advocacy commented that the recordkeeping and reporting requirements of the Proposed Regulations would likely discourage small entities from bidding on clean energy projects because they will incur heightened compliance costs without sharing in the financial benefits of the increased amounts of credit and deduction. In contrast, several commenters recommended that the Treasury Department and the IRS adopt additional pre-filing enforcement processes to ensure that laborers and mechanics are paid wages at rates not less than the applicable prevailing wage rates. Commenters suggested that the final regulations impose significant additional reporting and recordkeeping requirements, including many pre-filing reporting requirements such as certified weekly payroll and monthly apprenticeship hours reporting.

The final regulations strike an appropriate balance between these alternatives that minimizes burdens for taxpayers and their contractors while also ensuring that laborers and mechanics are paid wages at rates not less than the applicable prevailing wage rates, and ultimately that the IRS has sufficient information to administer the provisions related to increased amounts of credit and deduction that are claimed on returns filed by taxpayers. Thus, the final regulations do not adopt the pre-filing alternatives urged by the commenters, including the DBA requirement of submitting weekly certified payroll records to the IRS. The submission of weekly payroll records to the IRS by taxpayers would not assist the IRS with the efficient administration of the increased credit amount provisions and would increase burdens for taxpayers. The Treasury Department and the IRS also considered an alternative requirement that taxpayers submit payroll records for all laborers and mechanics at the time of filing a return that claims an increased credit amount. The Treasury Department and the IRS determined that per-laborer and per-mechanic payroll records would not provide the IRS with useful information and would also involve substantial burdens for taxpayers to report such information.

The Office of Advocacy also commented that the IRFA did not analyze how the Proposed Regulations treatment of PLAs would increase the compliance costs of the regulation to small construction firms because they primarily use non-union labor. As discussed in Section V.D. of this Summary of Comments and Explanation of Revisions, the Treasury Department and the IRS have determined that PLAs may help taxpayers comply with the PWA requirements. Further, studies show that PLAs do not necessarily increase construction costs. Lastly, a taxpayer may choose to use a PLA for construction of its facility; it is not a mandate.

A few commenters expressed concern regarding the potential of the PWA requirements to inflate construction costs, increase the time to complete clean energy projects, and lessen the participation of small businesses in such projects. Commenters opined that by using the DBA prevailing wage rates, the Treasury Department and the IRS were setting wage standards using a process that is flawed and inaccurate, and that will have inflationary impacts on construction costs. The Prevailing Wage Requirements for an increased credit (or deduction) amount are set forth in the various provisions of the IRA that direct the use of prevailing wage rates as determined by the Secretary of Labor in accordance with the DBA. Thus, alternatives to using the DBA prevailing rates were not adopted in the final regulations as they would lack a statutory basis. Further, DOL processes for setting standards are within the DOL's jurisdiction and thus outside the scope of these final regulations.

F. *Duplicative, overlapping, or conflicting Federal rules*

For facilities built under contracts with the Federal Government, or with Federal financial or other assistance provided under a Davis-Bacon Related Act, the final regulations may overlap with the rules under the DBA, 29 CFR parts 1, 5, and 7. In all other instances, the final regulations do not duplicate, overlap, or conflict with any relevant Federal rules.

IV. *Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of $100 million (updated annually for inflation). These final regulations do not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

V. *Executive Order 13132: Federalism*

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. These final regulations do not have federalism implications and do not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

VI. *Executive Order 13175: Consultation and Coordination with Indian Tribal governments*

Executive Order 13175 (Consultation and Coordination with Indian Tribal governments) prohibits an agency from publishing any rule that has Tribal implications if the rule either imposes substantial, direct compliance costs on Indian Tribal governments, and is not required by statute, or preempts Tribal law, unless the agency meets the consultation and funding requirements of section 5 of the Executive order. On September 25, 2023, the Treasury Department and the IRS held a consultation with Tribal leaders requesting assistance in addressing questions related to the Proposed Regulations, which informed the development of these final regulations.

VII. *Congressional Review Act*

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as a major rule as defined by 5 U.S.C. 804(2).

Statement of Availability of IRS Documents

IRS notices and other guidance cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *https://www.irs.gov*.

Drafting Information

The principal author of these final regulations is the Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the Office of Chief Counsel, the Treasury Department, and the IRS participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries for §§1.30C-3, 1.45-6 through 1.45-8, 1.45-12, 1.45L-3, 1.45Q-6, 1.45U-3, 1.45V-3, 1.45Y-3, 1.45Z-3, and 1.179D-3 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.30C-3 also issued under 26 U.S.C. 30.

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Section 1.45-6 also issued under 26 U.S.C. 45.

Section 1.45-7 also issued under 26 U.S.C. 45.

Section 1.45-8 also issued under 26 U.S.C. 45.

Section 1.45-12 also issued under 26 U.S.C. 45.

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Section 1.45L-3 also issued under 26 U.S.C. 45L.

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Section 1.45Q-6 also issued under 26 U.S.C. 45Q.

Section 1.45U-3 also issued under 26 U.S.C. 45U.

Section 1.45V-3 also issued under 26 U.S.C. 45V.

Section 1.45Y-3 also issued under 26 U.S.C. 45Y.

Section 1.45Z-3 also issued under 26 U.S.C. 45Z.

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Section 1.179D-3 also issued under 26 U.S.C. 179D.

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Par. 2. Sections 1.30C-1 through 1.30C-3 are added to read as follows:

§§1.30C-1 - 1.30C-2 [Reserved]

§1.30C-3 Rules relating to the increased credit amount for prevailing wage and apprenticeship.

(a) *In general*. If any qualified alternative fuel vehicle refueling project (as defined by section 30C(g)(1)(B)) placed in service during the taxable year satisfies the requirements in paragraph (b) of this section, the credit determined under section 30C(a) for any qualified alternative fuel vehicle refueling property of a character subject to an allowance for depreciation that is part of such project is multiplied by five.

(b) *Qualified alternative fuel vehicle refueling project requirements*. A qualified alternative fuel vehicle refueling project satisfies the requirements of this paragraph (b) if it is one of the following–

(1) A project the construction of which began prior to January 29, 2023; or

(2) A project that meets the prevailing wage requirements of section 45(b)(7) and §1.45-7, the apprenticeship requirements of section 45(b)(8) and §1.45-8, and the recordkeeping and reporting requirements of §1.45-12, all with respect to the construction of any qualified alternative fuel refueling property within the meaning of section 30C before such project is placed in service.

(c) *Applicability date*. This section applies to qualified alternative fuel vehicle refueling projects placed in service in taxable years ending after June 25, 2024, and the construction of which begins after June 25, 2024. Taxpayers may apply this section to qualified alternative fuel vehicle refueling projects placed in service in taxable years ending on or before June 25, 2024, and qualified alternative fuel vehicle refueling projects placed in service in taxable years ending after June 25, 2024, the construction of which begins before June 25, 2024, provided that taxpayers follow this section in its entirety and in a consistent manner.

Par. 3. Sections 1.45-0 through 1.45-12 are added to read as follows:

Sec.

* * * * *

1.45-0 Table of contents.
1.45-1 - 1.45-5 [Reserved]
1.45-6 Increased credit amount.
1.45-7 Prevailing wage requirements.
1.45-8 Apprenticeship requirements.
1.45-9 - 1.45-11 [Reserved]
1.45-12 Recordkeeping and reporting.

* * * * *

§1.45-0 Table of contents.

This section lists the table of contents for §§1.45-1 through 1.45-12.

§§1.45-1 - 1.45-5 [Reserved]

§1.45-6 Increased credit amount.

(a) In general.

(b) Qualified facility requirements.

(c) Definition of nameplate capacity for purposes of determining maximum net output under section 45(b)(6)(B)(i).

(d) Applicability date.

§1.45-7 Prevailing wage requirements.

(a) Prevailing wage requirements.

(b) Wage determinations.

(c) Curing a failure to satisfy the prevailing wage requirements.

(d) Definitions.

(e) Applicability date.

§1.45-8 Apprenticeship requirements.

(a) Apprenticeship requirements.

(b) Labor hours requirement.

(c) Ratio requirement.

(d) Participation requirement.

(e) Examples.

(f) Exceptions to the apprenticeship requirements.

(g) Definitions.

(h) Applicability date.

§§1.45-9 – 1.45-11 [Reserved]

§1.45-12 Recordkeeping and reporting.

(a) In general.

(b) Recordkeeping for the prevailing wage and apprenticeship requirements.

(c) Recordkeeping for the prevailing wage requirements.

(d) Recordkeeping for the apprenticeship requirements.

(e) Satisfaction of the recordkeeping requirements.

(f) Applicability date.

§§1.45-1 - 1.45-5 [Reserved]

§1.45-6 Increased credit amount.

(a) *In general*. If a qualified facility (as defined in section 45) satisfies the requirements in paragraph (b) of this section, the amount of the renewable electricity production credit determined under section 45(a) (after the application of section 45(b)(1) through (5)) is equal to the credit determined under section 45(a) multiplied by five.

(b) *Qualified facility requirements*. A qualified facility satisfies the requirements of this paragraph (b) if it is one of the following–

(1) A facility with a maximum net output (as determined under paragraph (c) of this section) of less than one megawatt (as measured in alternating current);

(2) A facility the construction of which began prior to January 29, 2023; or

(3) A facility that meets the prevailing wage requirements of section 45(b)(7) and §1.45-7, the apprenticeship requirements of section 45(b)(8) and §1.45-8, and the recordkeeping and reporting requirements of §1.45-12.

(c) *Definition of nameplate capacity for purposes of determining maximum net output under section 45(b)(6)(B)(i)*. For purposes of determining whether a facility has a maximum net output of less than one megawatt (as measured in alternating current) for purposes of section 45(b)(6)(B)(i), nameplate capacity is determinative. *Nameplate capacity* for an electrical generating unit means the maximum electrical generating output in megawatts that the unit is capable of producing on a steady state basis and during continuous operation under standard conditions, as measured by the manufacturer and consistent with the definition provided in 40 CFR 96.202. If applicable, the International Standard Organization (ISO) conditions are used to measure the maximum electrical generating output or usable energy capacity.

(d) *Applicability date*. This section applies to qualified facilities placed in service in taxable years ending after June 25, 2024, and the construction of which begins after June 25, 2024. Taxpayers may apply this section to qualified facilities placed in service in taxable years ending on or before June 25, 2024, and qualified facilities placed in service in taxable years ending after June 25, 2024, the construction of which begins before June 25, 2025, provided that taxpayers follow this section in its entirety and in a consistent manner.

§1.45-7 Prevailing wage requirements.

(a) *Prevailing wage requirements*—(1) *In general*. Except as provided in paragraphs (a)(2), (3), and (c) of this section, a taxpayer claiming or transferring (under section 6418) the increased credit amount under section 45(b)(6)(B)(iii) with respect to any qualified facility must satisfy the requirements of section 45(b)(7) and this section by ensuring that all laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction of such facility, and with respect to any taxable year, for any portion of such taxable year that is within the 10-year period beginning on the date the qualified facility was placed in service, the alteration or repair of such facility, are 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 (Prevailing Wage Requirements). If alteration or repair of a qualified facility occurs during any portion of such taxable year(s) within the 10-year period after the qualified facility was placed in service, the Prevailing Wage Requirements apply with respect to such taxable year(s) in which that alteration or repair occurs. If no alteration or repair work occurs during the taxable year(s) with respect to the qualified facility after the facility is placed in service, the taxpayer is deemed to satisfy the Prevailing Wage Requirements with respect to such taxable year. Prevailing rates are those rates most recently determined by the Secretary of Labor in accordance with 40 U.S.C. chapter 31, subchapter IV (Davis-Bacon Act), and as set forth in paragraph (b) of this section. See paragraph (d) of this section for definitions of terms used in this section.

(2) *Transition relief*. Taxpayers are excepted from the Prevailing Wage Requirements with respect to any activities that would be considered construction, alteration, or repair of the qualified facility and that occurred prior to January 29, 2023.

(3) *Relief for Indian Tribal governments*. An Indian Tribal government, as defined in section 30D(g)(9), and including any subdivision, agency, or instrumentality of the Indian Tribal government, is excepted from the Prevailing Wage Requirements with respect to laborers and mechanics that are employees, within the meaning of section 3121(d)(2), of the Indian Tribal government. This para-

graph (a)(3) also applies to a qualified facility that is subject to joint ownership arrangements that involve an Indian Tribal government, including any subdivision, agency, or instrumentality of the Indian Tribal government. However, any activity that would be considered construction, alteration, or repair of the qualified facility that is not performed by Indian Tribal government employees (within the meaning of section 3121(d)(2)), but that is instead performed by or through a contractor or subcontractor, is subject to the Prevailing Wage Requirements described in this paragraph (a).

(b) *Wage determinations*—(1) *In general*. A taxpayer satisfies the Prevailing Wage Requirements with respect to a qualified facility, if the taxpayer ensures that laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction, alteration, or repair of the facility are paid wages at rates not less than those set forth in the applicable wage determination issued by the Secretary of Labor pursuant to 40 U.S.C. 3142, 29 CFR part 1, and other implementing guidance for the specified type of construction in the geographic area where that facility is located. If the construction, alteration, or repair of a facility occurs in more than one geographic area, the taxpayer, contractor, or subcontractor must use the applicable wage determination for the work performed in each geographic area. Subject to the requirements of this section, the applicable wage determination is a general wage determination described in paragraph (b)(2) of this section (including any additional classifications and wage rates described in paragraph (b)(3) of this section), or a supplemental wage determination described in paragraph (b)(3) of this section.

(2) *General wage determinations*—(i) *In general*. Except as provided in paragraph (b)(3) of this section, to satisfy the Prevailing Wage Requirements described in paragraph (a) of this section with respect to a qualified facility, taxpayers must ensure that laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction, alteration, or repair of the facility are paid wages at rates not less than those set forth in the applicable general wage determination(s) published by the U.S. Department of Labor on the approved website. The applicable general wage determination is the general wage determination in effect for the specified type of construction in the geographic area at the time a contract for the construction, alteration, or repair of the facility is executed by the taxpayer (or the taxpayer's designee, assignee, or agent) and any contractor. The applicable general wage determination will continue in effect for any additional contracts executed by such contractor with any subcontractors with respect to the construction, alteration, or repair of the facility. In the absence of a contract (or if the date of execution of the contract cannot be reasonably determined), the applicable general wage determination is the general wage determination in effect for the specified type of construction in the geographic area when the construction, alteration, or repair of the facility starts.

(ii) *Wage determinations applicable to Indian Tribal governments*. If the taxpayer is an Indian Tribal government, as defined in section 30D(g)(9), including any subdivision, agency, or instrumentality of the Indian Tribal government, and the construction, alteration, or repair of a qualified facility occurs on Indian land, as defined in 25 U.S.C. 3501(2), that encompasses or overlaps with more than one geographic area with respect to which the U.S. Department of Labor has issued a general wage determination, the Indian Tribal government may choose the general wage determination applicable for any one of those geographic areas and apply that general wage determination for work performed on any qualified facility that is located on the Indian land. This paragraph (b)(2)(ii) also applies to a qualified facility that is subject to joint ownership arrangements that involve an Indian Tribal government, including any subdivision, agency, or instrumentality of the Indian Tribal government. If the Indian Tribal government chooses to use a single general wage determination under this paragraph (b)(2)(ii), it must maintain and preserve records sufficient to document the applicable prevailing wage rates for each laborer and mechanic employed by the Indian Tribal government or any contractor or subcontractor with respect to each qualified facility on Indian land.

(3) *Supplemental wage determinations and additional classifications and rates*—(i) *Use of supplemental wage determinations and additional classifications and rates*. In the event the Secretary of Labor has not issued a general wage determination for the relevant geographic area and type of construction for the facility, or the Secretary of Labor has issued a general wage determination for the relevant geographic area and type of construction, but one or more labor classifications for the construction, alteration, or repair work that will be done on the facility by laborers or mechanics is not listed, the taxpayer must ensure that laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction, alteration, or repair of a facility are paid wages at rates not less than those set forth in a supplemental wage determination or in an additional classification and wage rate issued to the taxpayer by the U.S. Department of Labor upon request by the taxpayer, contractor, or subcontractor in accordance with paragraph (b)(3)(ii) of this section. A taxpayer, contractor, or subcontractor may also request a supplemental wage determination if the location of the facility involves work by covered laborers and mechanics that spans more than one contiguous geographic area.

(ii) *Request for supplemental wage determinations and additional classifications and rates*—(A) *Manner of making request*. A taxpayer, contractor, or subcontractor requesting a supplemental wage determination or additional classification and wage rate under paragraph (b)(3)(i) of this section must submit the request to the U.S. Department of Labor at, U.S. Department of Labor, Wage and Hour Division, Branch of Construction Wage Determinations, Washington, D.C. 20210, by email at IRAprevailingwage@dol.gov, or such other address as may be prescribed in guidance and instructions issued by the Administrator of the Wage and Hour Division of the U.S. Department of Labor (Wage and Hour Division).

(B) *Timing of supplemental wage determination requests*. A taxpayer, contractor, or subcontractor should make requests for a supplemental wage determination no more than 90 days before the taxpayer (or the taxpayer's designee, assignee, or agent) expects to execute the

contract for the construction, alteration, or repair of the facility with a contractor. In the absence of a contract, the taxpayer, contractor, or subcontractor should make such requests no more than 90 days before construction, alteration, or repair of the facility starts.

(C) *Timing of requests for prevailing wage rates for additional classifications*. A request for prevailing wage rates for additional classifications can be made any time after a contract for the construction, alteration, or repair of a facility has been executed between the taxpayer (or the taxpayer's designee, assignee, or agent) and a contractor. In the absence of a contract, the taxpayer, contractor, or subcontractor should make such requests no more than 90 days before construction, alteration, or repair of the facility starts. If the taxpayer, contractor, or subcontractor cannot reasonably determine prior to execution of the contract between the taxpayer (or the taxpayer's designee, assignee, or agent) and the contractor or prior to the start of the construction, alteration, or repair work that an additional classification and wage rate is necessary, the taxpayer, contractor, or subcontractor should make such request as soon as practicable after determining that an additional classification and wage rate is necessary.

(D) *Required information*. The request for a supplemental wage determination or additional classification and wage rate must include the following information:

(*1*) The name of the taxpayer, contractor, or subcontractor requesting the supplemental wage determination or wage rate;

(*2*) The general wage determination(s), if any, applicable to construction, alteration, or repair of the facility;

(*3*) A description of the work to be performed, including the type(s) of construction involved and, if the project involves multiple types of construction, information indicating the expected cost breakdown by type of construction;

(*4*) The geographic area in which the facility is being constructed, altered, or repaired, including the name and address of the facility (if known);

(*5*) The date the taxpayer (or the taxpayer's designee, assignee, or agent) expects to enter into a contract with a contractor for which a supplemental wage determination is needed or the date of execution of the contract with a contractor for which a prevailing wage rate for an additional classification is needed;

(*6*) The start date of construction, alteration, or repair at the facility;

(*7*) The labor classification(s) needed for performance of the work on the facility (excluding those for which wage rates are available on an applicable general wage determination);

(*8*) The duties to be performed by each such labor classification on the facility;

(*9*) The proposed wage rate, including any bona fide fringe benefits, for each such labor classification;

(*10*) Any pertinent wage payment information that may be available;

(*11*) Any additional relevant information otherwise required by forms and instructions published by the U.S. Department of Labor; and

(*12*) Any additional information the taxpayer, contractor, or subcontractor wants the U.S. Department of Labor to consider.

(iii) *Issuance of supplemental wage determinations and additional classifications and wage rates.* After review, the Wage and Hour Division will notify the taxpayer, contractor, or subcontractor as to the supplemental wage determination or the labor classifications and wage rates to be used for the type of work in question in the geographic area in which the facility is located. Supplemental wage determinations issued by the Wage and Hour Division are effective for 180 calendar days from the date such determinations are issued. If a supplemental wage determination is not incorporated into the contract (or, in the absence of a contract, if construction has not started) during the 180-day period, the determination is no longer effective, and a new supplemental wage determination will need to be requested. The Wage and Hour Division will resolve requests for a prevailing wage rate for an additional classification within 30 days of receipt of the request or will advise the requester within the 30-day period that additional time is necessary.

(iv) *Special rule for qualified facilities located offshore*. If a general wage determination is not available, in lieu of requesting a supplemental wage determination for a qualified facility located in an offshore area within the outer continental shelf of the United States, a taxpayer, contractor, or subcontractor may rely on the general wage determination for the relevant category of construction that is applicable in the geographic area closest to the area in which the qualified facility will be located.

(4) *Reconsideration and review*. A taxpayer, contractor, or subcontractor may seek reconsideration and review by the Administrator of the Wage and Hour Division of a general wage determination, or a determination issued with respect to a request for a supplemental wage determination or additional classification and wage rate in accordance with the procedures set forth in 29 CFR 1.8 and 5.13 and any subsequent guidance issued by the U.S. Department of Labor. A taxpayer, contractor, or subcontractor may appeal the decision of the Administrator of the Wage and Hour Division to the U.S. Department of Labor's Administrative Review Board in accordance with the procedures set forth in 29 CFR part 7 and any subsequent guidance issued by the U.S. Department of Labor. Questions regarding wage determinations and rates may be referred to the Administrator of the Wage and Hour Division.

(5) *Timing of wage determination*. The applicable prevailing wage rates on a general wage determination are those in effect at the time a contract for the construction, alteration, or repair of the qualified facility is executed by the taxpayer (or the taxpayer's designee, assignee, or agent) and a contractor. After the qualified facility is placed in service, the applicable prevailing wage rates on a general wage determination for the alteration or repair of a qualified facility are those in effect at the time the contract for the alteration or repair work is executed by the taxpayer (or the taxpayer's designee, assignee, or agent) and a contractor. The applicable prevailing wage rates on a general wage determination at the time such contract is executed apply to all subcontractors of that contractor. If a taxpayer (or the taxpayer's designee, assignee, or agent) executes separate contracts with more than one contractor with respect to the construction, alteration, or repair of the qualified facility, then, for each such contract, the applicable prevailing wage rates

with respect to any work performed by the contractor (and all subcontractors of the contractor) are determined at the time the contract is executed by the taxpayer (or the taxpayer's designee, assignee, or agent). If no contract exists with respect to the construction, alteration, or repair of the qualified facility (or if the date of execution of the relevant contract cannot be reasonably determined), the applicable prevailing wage rates on a general wage determination are those in effect at the time the construction, alteration, or repair work starts. The applicable prevailing wage rates of a general wage determination generally remain valid for the duration of the work performed with respect to the construction, alteration, or repair of the qualified facility by the taxpayer, contractor, or subcontractor. A new general wage determination is required to be used if the contract between the taxpayer (or the taxpayer's designee, assignee, or agent) and the contractor for work on a facility is modified to include additional substantial construction, alteration, or repair work not within the scope of work of the original contract, or to require work to be performed for an additional time period not originally obligated, including if an option to extend the term of a contract for the construction, alteration, or repair is exercised. A new general wage determination is not required if the contractor is simply given additional time to complete its original commitment or if the additional construction, alteration, and/or repair work in the modification of the contract is merely incidental. In circumstances in which a new general wage determination is required, the applicable prevailing wage rates on a general wage determination are those in effect at the time the additional substantial work is agreed to or at the time when an option to extend the term of the contract is executed. If a taxpayer enters into a contract for alteration or repair work over an indefinite period of time that is not tied to the completion of any specific work, the applicable prevailing wage rates must be updated on an annual basis on the anniversary date of such contract. General wage determinations published on the U.S. Department of Labor approved website contain no expiration date and remain valid until revised, superseded, or canceled. Any supplemental wage determination issued under paragraph (b)(3) of this section applies without expiration from the time the taxpayer incorporates the supplemental wage determination into the contract provided that the supplemental wage determination is incorporated into the contract within 180 days of issuance of the supplemental wage determination. If there is no contract, any supplemental wage determination issued under paragraph (b)(3) of this section applies without expiration from the time construction, alteration, or repair starts provided the construction, alteration, or repair starts within 180 days of issuance of the supplemental determination. Any additional classification and wage rate issued under paragraph (b)(3) of this section applies without expiration from the earlier of the date of issuance or the first day in which work in the additional classification was performed. If a supplemental wage determination or additional classification and wage rate is issued after construction, alteration, or repair of the facility has started, the applicable prevailing rates apply retroactively to the date construction started.

(6) *Payment of wages*. All laborers and mechanics working on a qualified facility must be paid in the time and manner consistent with the regular payroll practices of the taxpayer, contractor, or subcontractor, as applicable. The payment of wages must be made without subsequent deduction or rebate on any account (except such payroll deductions as are required by the law or permitted by regulations issued by the Secretary of Labor), and must consist of the full amount of wages (including bona fide fringe benefits or cash equivalents thereof) due at the time of payment computed at rates not less than those contained in the applicable wage determination of the Secretary of Labor. A taxpayer may discharge its wage obligations for the payment of wages by paying the full amount in cash, by making payments to a bona fide fringe benefit provider or incurring costs for bona fide fringe benefits, or by a combination thereof. The taxpayer is solely responsible for ensuring that laborers and mechanics are paid wages not less than the prevailing rate whether employed directly by the taxpayer, a contractor, or a subcontractor in the construction, alteration, or repair of the qualified facility for purposes of claiming the increased credit amount under section 45(b)(6)(B)(iii). The rules set forth in 29 CFR 5.25 through 5.33, and any subsequent guidance issued by the U.S. Department of Labor apply with respect to costs for bona fide fringe benefits that may be credited for purposes of the payment of wages.

(7) *Apprentices*—(i) *Rate of pay*. Apprentices who perform work with respect to the construction, alteration, or repair of a qualified facility consistent with the requirements of section 45(b)(8) and §1.45-8 may be paid wages at rates that are less than the rates that would otherwise apply under paragraph (a) of this section. Every apprentice must be paid wages at rates not less than the rates specified by the registered apprenticeship program for the apprentice's level of progress, expressed as a percentage of the journeyworker hourly rate specified for the apprentice's classification in the applicable wage determination. If the apprentice is working in a classification that is not part of the occupation of the registered apprenticeship program, the apprentice must be paid not less than the applicable wage rate on the wage determination for laborers or mechanics working in that classification. Any individual listed on payroll at an apprenticeship wage, who is not participating in a registered apprenticeship program, must be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed to satisfy the Prevailing Wage Requirements. In the event the U.S. Department of Labor's Office of Apprenticeship or a State apprenticeship agency recognized by the U.S. Department of Labor's Office of Apprenticeship withdraws approval of an apprenticeship program, the taxpayer, contractor, or subcontractor will no longer satisfy the Prevailing Wage Requirements by paying apprentices less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(ii) *Bona fide fringe benefits*. To satisfy the Prevailing Wage Requirements, apprentices must be paid bona fide fringe benefits in accordance with the provisions of the registered apprenticeship program. If the apprenticeship program does not specify the payment of bona fide fringe benefits, apprentices must be paid the full

amount of bona fide fringe benefits listed on the wage determination for the applicable classification in cash or in kind.

(iii) *Apprenticeship ratio*. The allowance for payment of wages to apprentices at rates less than the applicable prevailing wage rates determined by the U.S. Department of Labor is subject to any applicable ratio of apprentices to journeyworkers required under the registered apprenticeship program and consistent with section 45(b)(8)(B) and §1.45-8. Any apprentice performing construction, alteration, or repair work on the job site in excess of the ratio permitted under the registered program or the ratio applicable to the geographic area of the facility pursuant to 29 CFR 5.5(a)(4)(i) must be paid not less than the applicable wage rate on the wage determination for the work actually performed to satisfy the Prevailing Wage Requirements. Taxpayers, contractors, or subcontractors have the discretion to determine which apprentice(s) must receive the full prevailing wage rate for hours worked if the applicable ratio of apprentices to journeyworkers has not been met.

(iv) *Reciprocity of ratios and wage rates*. If a taxpayer, contractor, or subcontractor is performing construction, alteration, or repair work on a facility in a geographic area other than the geographic area in which an apprenticeship program is registered, the taxpayer, contractor, or subcontractor must comply with the apprentice-to-journeyworker ratios applicable within the geographic area in which the construction, alteration, or repair work is being performed. If there is no applicable ratio for the geographic area of the facility, the ratio specified in the registered apprenticeship program standard must be observed. The wage rates (expressed in percentages of the journeyworker's hourly rate) applicable within the geographic area in which the construction, alteration, or repair work is being performed must be observed.

(c) *Curing a failure to satisfy the prevailing wage requirements*—(1) *In general*. If a taxpayer fails to ensure that all laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction, alteration, or repair of a qualified facility are paid wages at rates not less than those set forth in the applicable wage determination(s), such taxpayer will be deemed to have satisfied the Prevailing Wage Requirements with respect to such facility for any year if the taxpayer makes the correction and penalty payments provided in paragraphs (c)(1)(i) and (ii) of this section.

(i) *Correction payment*. The taxpayer must pay any laborer or mechanic who was paid wages at a rate below the rate described in paragraph (b) of this section for any pay period during such year an amount equal to the sum of:

(A) The difference between the amount of wages paid to such laborer or mechanic for all hours worked during such period and the amount of wages required to be paid to such laborer or mechanic pursuant to paragraph (a) of this section for all hours worked during such period; and

(B) Interest on the amount determined under paragraph (c)(1)(i)(A) of this section at the Federal short-term rate as determined under section 6621 but substituting "6 percentage points" for "3 percentage points" in section 6621(a)(2).

(ii) *Penalty payment*. The taxpayer must pay a penalty equal to $5,000 multiplied by the total number of laborers and mechanics who were paid wages at a rate below the rate described in paragraph (b) of this section for any period during such year.

(iii) *Correction and penalty payments not required if taxpayer ineligible for increased credit amount under section 45(b)(6)(B)(iii)*. If the taxpayer claims the increased credit amount under section 45(b)(6)(B)(iii) and does not satisfy the Prevailing Wage Requirements for the claimed increased credit amount, then the obligation to make correction and penalty payments under paragraphs (c)(1)(i) and (ii) of this section applies in order for the taxpayer to retain the credit. If the IRS determines that a taxpayer claiming the increased credit amount under section 45(b)(6)(B)(iii) failed to meet the Prevailing Wage Requirements and the taxpayer does not make the correction and penalty payments provided in paragraphs (c)(1)(i) and (ii) of this section, then no penalty is assessed under paragraph (c)(1)(ii) of this section, and the taxpayer is not eligible for the increased credit amount under section 45(b)(6)(B)(iii). Taxpayers that are not eligible to claim the increased credit amount may still be eligible to claim the base amount of the renewable electricity production credit under section 45(a) if they meet the requirements to claim the credit.

(iv) *Correction and penalty payments in the event of a transfer pursuant to section 6418*. To the extent an eligible taxpayer, as defined in section 6418(f)(2), has determined an increased credit amount under section 45(b)(6) and transferred such increased credit amount as part of a specified credit portion, the obligation to make correction and penalty payments under paragraphs (c)(1)(i) and (ii) of this section remains with the eligible taxpayer. The obligation for an eligible taxpayer to satisfy the Prevailing Wage Requirements becomes binding upon the earlier of the filing of the eligible taxpayer's return for the taxable year for which the specified credit portion is determined with respect to the eligible taxpayer, or the filing of the return of the transferee taxpayer for the year in which the specified credit portion is taken into account. If the IRS determines that the eligible taxpayer failed to meet the Prevailing Wage Requirements and the eligible taxpayer does not then make the correction and penalty payments provided in paragraphs (c)(1)(i) and (ii) of this section, then no penalty is assessed under paragraph (c)(1)(ii) of this section, and the eligible taxpayer is not eligible for the increased credit amount determined under section 45(b)(6)(B)(iii). Section 6418 and the regulations under section 6418 control for determining the impact of an eligible taxpayer's failure to cure on any transferee taxpayer. The eligible taxpayer that is not eligible to claim the increased credit amount may still be eligible to claim the base amount of the renewable electricity production credit under section 45(a) if they meet the requirements to claim the credit.

(v) *Special rule for laborers and mechanics who cannot be located.* A taxpayer will be deemed to have paid a correction payment, under this paragraph (c)(1), to a laborer or mechanic who cannot be located if the taxpayer can establish that correction payments have been made. A taxpayer may establish that correction payments have been made by demonstrating compliance with the applicable State unclaimed property law and all Federal

and State withholding and information reporting requirements with respect to the payments.

(vi) *Examples*. The provisions of this paragraph (c)(1) are illustrated by the following examples, which do not take into account any possible application of the enhanced correction and penalty payment requirements in the case of intentional disregard under paragraph (c)(3) of this section, the exception for wages paid before a determination by the U.S. Department of Labor under paragraph (c)(5) of this section, or the penalty waiver under paragraph (c)(6) of this section. In each example, assume that the taxpayer uses the calendar year as the taxpayer's taxable year.

(A) *Example 1*. Taxpayer A starts construction of a qualified facility on February 3, 2023. The facility is placed in service on October 10, 2023, and Taxpayer A claims the increased credit amount under section 45(b)(6)(B)(iii) on its 2023 tax return. Laborer X was employed in the construction, alteration, or repair of the facility in calendar year 2023 for 20 weeks and was paid on a weekly basis. Laborer X was paid wages below the prevailing wage rate for all pay periods in calendar year 2023. All other laborers and mechanics were paid wages at the prevailing wage rate. The aggregate difference between the amount of wages Laborer X was paid and the amount required to be paid under paragraph (a) of this section is $400 (that is, Laborer X worked 20 weeks during the year and was underpaid by $20 in each of those weeks). The amount of the correction payment Taxpayer A must make to Laborer X is equal to $400 plus interest from the date of each underpayment at the rate as determined under section 6621 but substituting "6 percentage points" for "3 percentage points" in section 6621(a)(2). The total number of laborers underpaid for any period in 2023 was one, so the total amount of the penalty payment that Taxpayer A must pay to the IRS to retain the increased credit amount is $5,000.

(B) *Example 2*. Taxpayer B starts construction of a qualified facility on January 30, 2023. The facility is placed in service on February 2, 2024. Taxpayer B claims the increased credit amount under section 45(b)(6)(B)(iii) on its 2024 tax return. Taxpayer B paid workers on a biweekly basis. Five laborers employed in the construction of the facility were paid wages at rates below the prevailing wage rates in 2023, with the difference between the amount they were paid and the amount of wages required to be paid under paragraph (a) of this section being $500 per laborer. One of those laborers remained employed in the construction of the facility in 2024 and was paid wages below the prevailing wage rate in 2024, with the difference between the amount the laborer was paid and the amount of wages required to be paid under paragraph (a) of this section being $100. All other laborers and mechanics involved in the construction, alteration, or repair of the facility were paid wages at the prevailing wage rates. Taxpayer B must make correction payments of $500 plus interest from the date of each underpayment at the rate as determined under section 6621 but substituting "6 percentage points" for "3 percentage points" in section 6621(a)(2) to each of the five laborers that were underpaid in 2023, and a correction payment of $100 plus interest from the date of each underpayment at the rate as determined under section 6621 but substituting "6 percentage points" for "3 percentage points" in section 6621(a)(2) to the laborer that was underpaid in 2024. The total amount of the penalty payment that Taxpayer B must pay to the IRS to retain the increased credit amount is $30,000, which includes $5,000 for each laborer underpaid in 2023 and $5,000 for the laborer underpaid in 2024.

(C) *Example 3*. Taxpayer C starts construction of a qualified facility on January 30, 2023. The facility is placed in service on February 2, 2024. Taxpayer C claims the increased credit amount under section 45(b)(6)(B)(iii) on its 2024 tax return. Taxpayer C paid workers on a biweekly basis. Laborer Y was employed in the construction of the facility for 22 weeks in 2023 and was paid wages at rates below the prevailing wage rates for the first 20 weeks of her employment in the amount of $500 (that is, Laborer Y was underpaid $50 in each of the 10 biweekly periods). For the last biweekly pay period, Taxpayer C paid Laborer Y the correct prevailing rate for the work performed during the period, plus $500 for the amounts that were underpaid in the first 10 periods. All other laborers and mechanics involved in the construction, alteration, or repair of the facility were paid at the prevailing wage rates. Taxpayer C is required to make a correction payment to Laborer Y in the amount of the interest from the date of each underpayment at the rate as determined under section 6221 but substituting "6 percentage points" for "3 percentage points" in section 6221(a)(2) to the laborer that was underpaid in 2023. To retain the increased credit amount, Taxpayer C must make a penalty payment of $5,000 to the IRS with respect to Laborer Y.

(2) *Deficiency procedures not to apply*. The penalty payment required by paragraph (c)(1)(ii) of this section may be assessed and collected without regard to the deficiency procedures provided by subchapter B of chapter 63 of the Code. Any determination by the IRS disallowing a claim for the increased credit amount under section 45(b)(6) will be subject to the deficiency procedures of subchapter B of chapter 63.

(3) *Intentional disregard*—(i) *Application of section 45*(*b*)*(7)*(*B*)(*iii*). If the IRS determines that any failure to satisfy the Prevailing Wage Requirements in paragraph (a) of this section is due to intentional disregard of the requirements—

(A) The correction payment under paragraph (c)(1)(i) of this section is increased to three times the sum determined in paragraph (c)(1)(i) of this section; and

(B) The penalty payment under paragraph (c)(1)(ii) of this section is increased to $10,000 multiplied by the total number of laborers and mechanics who were paid wages at a rate below the rate described in paragraph (b) of this section for any period during such year.

(ii) *Meaning of intentional disregard*. A failure to ensure that any laborer or mechanic employed in the construction, alteration, or repair of a qualified facility is paid wages at the prevailing wage rate is due to intentional disregard if it is knowing or willful.

(iii) *Facts and circumstances considered*. The facts and circumstances that are considered in determining whether a failure to satisfy the Prevailing Wage Requirements is due to intentional disregard include, but are not limited to—

(A) Whether the failure was part of a pattern of conduct that includes repeated or systemic failures to ensure that the laborers and mechanics were paid wages at rates not less than the applicable prevailing wage rate, including failures to pay prevailing wages as required under other applicable laws;

(B) Whether the taxpayer took steps to determine or review the applicable classifications of laborers and mechanics, such as through a quarterly, or more frequent, review of the applicable classifications of laborers and mechanics according to the actual duties performed by those laborers and mechanics;

(C) Whether the taxpayer took steps to determine or review the applicable prevailing wage rate(s) for laborers and mechanics to ensure usage of correct rates by all contractors and subcontractors, such as through a quarterly, or more frequent, review of the prevailing wage rates;

(D) Whether the taxpayer promptly cured any failures to ensure that laborers and mechanics were paid wages at rates not less than the applicable prevailing rates;

(E) Whether the taxpayer has been required to make a penalty payment under paragraph (c)(1)(ii) of this section in previous years;

(F) Whether the taxpayer undertook (or engaged an independent third party to aid in conducting) a quarterly, or more frequent, review of wages paid to mechanics and laborers to ensure that wages at rates not less than the applicable prevailing wage rates were paid (including by reviewing payroll information of contrac-

tors and subcontractors or by requiring contractors and subcontractors to regularly provide payroll information to the taxpayer or a third party acting on behalf of the taxpayer);

(G) Whether the taxpayer included provisions in any contracts entered into with contractors that required the contractors and any subcontractors retained by the contractors to pay laborers and mechanics wages at rates not less than the prevailing wage rates and maintain records to ensure the taxpayer's compliance with recordkeeping requirements set forth in §1.45-12;

(H) Whether the taxpayer posted in a prominent place at the qualified facility or otherwise provided written notice to laborers and mechanics during the construction, alteration, or repair of the qualified facility, the applicable wage rate(s) as determined by the U.S. Department of Labor for all classifications of work to be performed for the construction, alteration, or repair of the facility, that in order to be eligible to claim certain tax benefits, employers must ensure that laborers and mechanics are paid wages at rates not less than such wage rates, and instructions on how laborers and mechanics may contact the taxpayers' personnel departments or taxpayers' managers to report suspected failures to pay prevailing wages and/or suspected failures to classify workers in accordance with applicable wage determinations, employment tax violations, or violations of workplace standard laws without retaliation or adverse action;

(I) Whether laborers and mechanics were given the opportunity to acknowledge notice provided by the taxpayer, contractor, or subcontractor that in order to be eligible to claim certain tax benefits, taxpayers must ensure that laborers and mechanics employed by the taxpayer, contractor, or subcontractor in the construction of a qualified facility are paid wages at rates not less than prevailing wage rates;

(J) Whether the taxpayer had in place procedures whereby laborers and mechanics could report suspected failures to pay prevailing wages and/or suspected failures to classify workers in accordance with the wage determination of workers, employment tax violations, or violations of workplace standard laws to appropriate personnel departments or managers without retaliation or adverse action, and whether the taxpayer investigated such reports by laborers and mechanics and had internal controls to prevent failures to pay prevailing wages and classify workers in accordance with the wage determination of workers, employment tax violations, and violations of workplace standard laws;

(K) Whether all laborers and mechanics were provided with a written notice of the rights conferred by the whistleblower provisions of the Taxpayer First Act in section 7623(d);

(L) Whether all laborers and mechanics were provided with paystubs (or access to individual payroll records) reflecting the amount they were paid per pay period (including the specific hourly rate and all deductions from wages);

(M) Whether the taxpayer investigated any complaints of retaliation or adverse action resulting from, reports of suspected failures to pay prevailing wages and/or classify workers in accordance with applicable wage determinations, employment tax violations, or violations of workplace standard laws and took appropriate actions to remedy any retaliation or adverse action and prevent it from reoccurring;

(N) Whether the taxpayer, contractor, or subcontractor contracted with contractors who, at the time the work was performed, was known by the taxpayer, contractor, or subcontractor to be debarred by a municipality, State, or the U.S. Department of Labor for violations related to the underpayment of local, State, or Federal prevailing wages; and

(O) Whether the taxpayer failed to maintain and preserve records in accordance with §1.45-12 sufficient to establish compliance with the prevailing wage requirements for relevant tax years.

(iv) *Examples*. The provisions of this paragraph (c)(3) are illustrated by the following examples, which take into account certain facts and circumstances described in paragraph (c)(3)(iii) of this section, that are considered in applying the enhanced correction and penalty payment requirements in the case of intentional disregard. These examples do not take into account any possible application of the exception for wages paid before a determination by the U.S. Department of Labor under paragraph (c)(5) of this section, or the penalty waiver under paragraph (c)(6) of this section. In each example, assume that the taxpayer uses the calendar year as the taxpayer's taxable year.

(A) *Example 1*. Taxpayer D failed to satisfy the Prevailing Wage Requirements with respect to the construction of a qualified facility. Taxpayer D did not include contract language that requires the payment of prevailing wages in the contract executed with the contractor nor did it require similar contract provisions in any subcontracts. Taxpayer D did not post in a prominent place at the qualified facility or otherwise notify any laborers or mechanics that in order to claim certain tax benefits (the increased credit amount described in section 45(b)(6)(B)(iii)) taxpayers must ensure that laborers and mechanics are paid wages at rates not less than prevailing wage rates for construction of the qualified facility. Taxpayer D did not have a process for laborers and mechanics to report suspected failures to pay prevailing wages and/or suspected failures to classify workers in accordance with applicable wage determinations. Additionally, Taxpayer D did not have a procedure for the review of wages paid to laborers and mechanics to ensure that wages at rates not less than the applicable prevailing wage rate were paid, nor did Taxpayer D undertake any actual review of the wages paid to any laborers and mechanics employed in the construction of the qualified facility. Taxpayer D failed to maintain any records documenting wages paid to laborers and mechanics in connection with the construction of the facility. Considering all of the facts and circumstances, Taxpayer D's failure to satisfy the Prevailing Wage Requirements would be considered due to intentional disregard for purposes of this paragraph (c)(3) and Taxpayer D would be subject to the enhanced correction and penalty payments described in paragraph (c)(3)(i) of this section.

(B) *Example 2*. Taxpayer E failed to satisfy the Prevailing Wage Requirements with respect to the construction of a qualified facility. Taxpayer E included contract language that requires the payment of prevailing wages in the contract executed with the contractor and required similar language be included in all subcontracts. Taxpayer E posted in a prominent place at the qualified facility that in order to claim tax benefits (that is, the increased credit amount described in section 45(b)(6)(B)(iii)) employers must ensure that laborers and mechanics are paid wages at rates not less than prevailing wage rates for the construction of the qualified facility. Additionally, Taxpayer E created procedures for a quarterly review of the applicable classifications of laborers and mechanics according to the actual duties performed by those laborers and mechanics and the actual wages paid to laborers and mechanics. In cases in which reviews found any instance that a laborer or mechanic was paid wages at rates less than the applicable prevailing wage rates, Taxpayer E promptly cured the failure. Considering all of the facts and circumstances, Taxpayer E's failure to satisfy the Prevailing Wage Requirements would not be considered due to intentional disregard for purposes of this paragraph (c)(3) and Taxpayer E would not be subject to the enhanced correction and penalty payments described in paragraph (c)(3)(i) of this section. Taxpayer E would be subject to the normal correc-

tion and penalty payments described in paragraph (c)(1)(i) of this section.

(v) *Rebuttable presumption of no intentional disregard*. If a taxpayer makes the correction and penalty payments required by paragraphs (c)(1)(i) and (ii) of this section before receiving notice of an examination from the IRS with respect to a claim for the increased credit amount under section 45(b)(6), the taxpayer will be presumed not to have intentionally disregarded the Prevailing Wage Requirements in paragraph (a) of this section. The IRS may rebut this presumption based on the relevant facts and circumstances.

(4) *Limitation on the availability of cure*—(i) *180-day limit*. In the case of a final determination by the IRS with respect to any failure by the taxpayer to satisfy the Prevailing Wage Requirements in paragraph (a) of this section, the cure provision in paragraph (c)(1) of this section does not apply unless the correction and penalty payments described in paragraphs (c)(1)(i) and (ii) of this section are made by the taxpayer on or before the date that is 180 days after the date of such determination.

(ii) *Final determination*. For purposes of paragraph (c)(4)(i) of this section, a final determination occurs on the date the IRS sends to the taxpayer a notice stating that the taxpayer has failed to satisfy the Prevailing Wage Requirements under paragraph (a) of this section.

(5) *Exception for wages paid before a supplemental wage determination or additional classification and wage rate is issued by the U.S. Department of Labor Wage and Hour Division*. If a taxpayer has requested a supplemental wage determination or an additional classification and wage rate from the Wage and Hour Division in accordance with paragraph (b)(3)(ii) of this section and the Wage and Hour Division makes a wage determination or issues an additional classification and wage rate determination after the construction, alteration, or repair of a qualified facility has started, the taxpayer will not be considered to have failed to meet the Prevailing Wage Requirements under paragraph (a) of this section with respect to wages paid to any mechanic or laborer whose wage rate was subject to the request and who was paid below the prevailing wage rate before the determination by the Wage and Hour Division if the taxpayer makes a payment within 30 days of the determination to each laborer or mechanic equal to the difference between the amount of wages paid to such laborer or mechanic before the determination and the amount of wages required to be paid to such laborer or mechanic pursuant to paragraph (a) of this section during such period.

(6) *Waiver of the penalty*—(i) *Availability of waiver*. The penalty payment required by paragraph (c)(1)(ii) of this section to cure a failure to satisfy the Prevailing Wage Requirements in paragraph (a) of this section is waived with respect to a laborer or mechanic employed in the construction, alteration, or repair of a qualified facility during a calendar year if the taxpayer makes the correction payment required by paragraph (c)(1)(i) of this section by the last day of the first month that follows the end of the calendar quarter in which the failure occurred, and:

(A) The laborer or mechanic is paid wages at rates less than the amount required to be paid under paragraph (b) of this section for not more than 10 percent of all pay periods of the calendar year (or part thereof) during which the laborer or mechanic was employed in the construction, alteration, or repair of the qualified facility; or

(B) The difference between the amount the laborer or mechanic was paid during the calendar year (or part thereof) and the amount required to be paid under paragraph (b) of this section is not greater than 5 percent of the amount required to be paid under paragraph (b) of this section.

(ii) *Project labor agreements*. The penalty payments required by paragraphs (c)(1)(ii) and (c)(3)(i)(B) of this section to cure a failure to satisfy the Prevailing Wage Requirements in paragraph (a) of this section do not apply with respect to a laborer or mechanic employed in the construction, alteration, or repair work of a qualified facility if the work is done pursuant to a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project (Qualifying Project Labor Agreement) and any correction payment owed to any laborer or mechanic is paid on or before the date on which the increased credit amount is claimed under section 45(b)(6). In order to be considered a Qualifying Project Labor Agreement, such agreement must at a minimum:

(A) Bind all contractors and subcontractors on the construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents;

(B) Contain guarantees against strikes, lockouts, and similar job disruptions;

(C) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement;

(D) Contain provisions to pay wages at rates not less than the prevailing rates in accordance with subchapter IV of chapter 31 of title 40 of the United States Code;

(E) Contain provisions for referring and using qualified apprentices consistent with section 45(b)(8)(A) through (C) and guidance issued thereunder; and

(F) Be a collective bargaining agreement with one or more labor organizations (as defined in 29 U.S.C. 152(5)) of which building and construction employees are members, as described in 29 U.S.C. 158(f).

(iii) *Transition Waiver*. The penalty payment required by paragraph (c)(1)(ii) of this section to cure a failure to satisfy the Prevailing Wage Requirements in paragraph (a) of this section is waived with respect to a laborer or mechanic who performed work in the construction, alteration, or repair of a qualified facility on or after January 29, 2023, and prior to June 25, 2024, if the taxpayer relied upon Notice 2022-61, 2022-52 I.R.B. 560, or the Proposed Regulations (REG-100908-23) (88 FR 60018), corrected in 88 FR 73807 (Oct. 27, 2023), corrected in 89 FR 25550 (April 11, 2024), to determine when the activities of any laborer or mechanic became subject to the Prevailing Wage Requirements, and the taxpayer makes the correction payments required by paragraph (c)(1)(i) of this section with respect to such laborer and mechanics within 180 days of June 25, 2024.

(iv) *Examples*. The provisions of this paragraph (c)(6) are illustrated by the following examples, which do not take into account any possible application of the enhanced correction and penalty payment requirements in the case of intentional

disregard under paragraph (c)(3) of this section or the exception for wages paid before a determination by the U.S. Department of Labor under paragraph (c)(5) of this section. In each example, assume that the taxpayer uses the calendar year as the taxpayer's taxable year.

(A) *Example 1*. Taxpayer F starts construction of a qualified facility on February 1, 2023. The facility is placed in service on October 10, 2023, and Taxpayer F claims the increased credit amount under section 45(b)(6)(B)(iii) on its 2023 tax return filed on April 15, 2024. Taxpayer F employs Laborer Z in the construction of the facility for a total of 36 weekly pay periods. Taxpayer F pays Laborer Z wages at the prevailing wage rate for all pay periods except for the pay periods ending on April 8, April 22, and May 20. Under the applicable prevailing wage rate, Laborer Z should have been paid a total of $35,000 in 2023, but was instead paid only $30,000. Taxpayer F ensures that all other laborers and mechanics employed in the construction, alteration, or repair of the facility are paid wages at the prevailing wage rate. Taxpayer F becomes aware of the failure on June 1, 2023. On June 19, 2023, Taxpayer F pays Laborer Z the correction payment required by paragraph (c)(1)(i) of this section. The penalty waiver applies to Taxpayer F. Although the difference between the amount Laborer Z was paid in 2023 and the amount required to be paid under the applicable prevailing wage rate was greater than five percent ($5,000/$35,000 = 14.29%), Laborer Z was paid below the prevailing wage rate for only three out of 36 pay periods, or 8.3% of the applicable pay periods. Furthermore, Taxpayer F made the correction payment before the last day of the first month that follows the end of the calendar quarter in which the failure occurred.

(B) *Example 2*. Taxpayer G starts construction of a qualified facility on February 1, 2024. The facility is placed in service on October 10, 2024, and Taxpayer G claims the increased credit under section 45(b)(6)(B)(iii) on its 2024 tax return filed on April 15, 2025. Taxpayer G hires Contractor M to assist in the construction, and Contractor M employs Laborer Y in the construction of the facility for a total of 36 pay periods. Contractor M pays Laborer Y wages at the prevailing wage rate for all pay periods except for the pay periods ending on February 24 and March 2 of 2024. Under the applicable prevailing wage rate, Laborer Y should have been paid a total of $50,000 in 2024, but was instead paid only $49,000. All other laborers and mechanics employed in the construction, alteration, or repair of the facility are paid wages at the prevailing wage rate. Taxpayer G learns on January 1, 2025, that Laborer Y was paid wages at rates that were less than the prevailing wage rates, and on January 19, 2025, Taxpayer G pays Laborer Y the correction payment required by paragraph (c)(1)(i) of this section. The penalty waiver does not apply to Taxpayer G. Laborer Y was paid wages at rates below the prevailing wage rate for two out of 36 pay periods, or 5.5% of the applicable pay periods, and the difference between the amount Laborer Y was paid in 2024 and the amount required to be paid under the applicable prevailing wage rate was $1,000, which is only 2% of the amount required to be paid under the applicable prevailing wage rate. However, because Taxpayer G did not make the correction payments until January 19, 2025, which was later than the last day of the first month that followed the end of the calendar quarter in which the failure occurred, Taxpayer G does not qualify for the penalty waiver. Taxpayer G must pay a penalty of $5,000 with respect to the failure.

(C) *Example 3*. Taxpayer H starts the construction of a qualified facility on April 8, 2024. The facility is placed in service on December 1, 2024, and Taxpayer H claims the increased credit amount under section 45(b)(6)(B)(iii) on its 2024 tax return filed on April 15, 2025. Taxpayer H employs Laborer X in the construction of the facility for a total of 34 pay periods. Due to a failure to classify workers in accordance with the wage determination, Taxpayer H pays Laborer X wages at rates below the prevailing wage rates for the first 12 pay periods. Under the applicable prevailing wage rate, Laborer X should have been paid $20,000 during those 12 pay periods, but was instead paid only $17,000. All other laborers and mechanics employed in the construction, alteration, or repair of the facility were paid wages at the prevailing wage rates. Taxpayer H becomes aware of the failure on July 15, 2024, and on July 30, 2024, Taxpayer H pays Laborer X the correction payments required by paragraph (c)(1)(i) of this section. For the 22 pay periods from July 1, 2024, through December 1, 2024, Taxpayer H pays Laborer X the correct prevailing wage rate in amounts that total $41,000. The penalty waiver applies to Taxpayer H. Taxpayer H made the correction payment on July 30, 2024, which was before the last day of the first month that followed the end of the quarter in which the failures occurred. Although Laborer X was paid wages at a rate below the prevailing wage rate for 35% (12 pay periods with underpayments/34 total pay periods) of the applicable pay periods, the difference between the total amount Laborer X was paid in 2024 and the amount required to be paid under the applicable prevailing wage rate was $3,000, which is only 4.9% of the total amount required to be paid to Laborer X under the applicable prevailing wage rate ($3,000/$61,000).

(D) *Example 4*. Taxpayer I begins construction of a qualified facility on August 29, 2024. The facility is placed in service on June 30, 2025, and Taxpayer I claims the increased credit amount under section 45(b)(6)(B)(iii) on its 2025 tax return. Taxpayer I employs Laborer W in the construction of the facility for a total of 25 weekly pay periods in 2025. Taxpayer I pays Laborer W wages at or above the prevailing wage rate for all pay periods except for the pay periods ending on April 12, May 10, and June 14. Under the applicable prevailing wage rate, Laborer W should have been paid $25,000 in 2025, but was instead paid only $20,000. Taxpayer I ensures that all other laborers and mechanics employed in the construction, alteration, or repair of the facility are paid at the prevailing wage rate. Taxpayer I has in place a pre-hire collective bargaining agreement, but the agreement does not contain a provision for referring and using qualified apprentices. Taxpayer I becomes aware of the failure to pay Laborer W at the prevailing wage rate on June 30, 2025, and on July 4, 2025, Taxpayer I pays Laborer W the correction payment required by paragraph (c)(1)(i) of this section. The penalty waiver does not apply to Taxpayer I. The difference between the amount Laborer W was paid in 2025 and the amount required to be paid under the applicable prevailing wage rate was $5,000, which is 20% of the amount required to be paid under the applicable prevailing wage rate. Laborer W was paid below the prevailing wage rate for three out of 25 pay periods, or 12% of the applicable pay periods. Taxpayer I does not have in place a Qualifying Project Labor Agreement because the pre-hire collective bargaining agreement does not contain a provision for referring and using qualified apprentices as required by paragraph (c)(6)(ii)(E) of this section.

(E) *Example 5*. Taxpayer J intends to construct a qualified facility and claim the increased credit amount under section 45(b)(6)(B)(iii). Taxpayer J executes a contract for the construction of the facility and engages in construction activities as defined in paragraph (d)(3) of this section starting August 1, 2023. Taxpayer J began construction as of September 1, 2023, pursuant to the Physical Work Test in Notice 2022-61. During the period of August 1 to September 1 of 2023, Taxpayer J paid all laborers and mechanics wages at rates below the applicable prevailing wage rates in reliance on Notice 2022-61 regarding when construction began for purposes of satisfying the requirements of section 45(b)(7). After September 1, 2023, Taxpayer J paid all laborers and mechanics wages at the prevailing wage rate for the appropriate classification for work performed on the facility. Within 180 days of June 25, 2024, Taxpayer J makes correction payments to all affected laborers and mechanics for the period of August 1, 2023, to September 1, 2023, equal to the amount described in paragraph (c)(1)(i) of this section. Pursuant to paragraph (c)(6)(iii) of this section, the penalty under paragraph (c)(1)(ii) of this section is waived.

(d) *Definitions*. Solely for purposes of this section, the following definitions apply:

(1) *Apprentice.* The term *apprentice* has the same meaning as *qualified apprentice* in §1.45-8(g)(8).

(2) *Bona fide fringe benefits*. The term *bona fide fringe benefits* means fringe benefits described in 29 CFR part 5. Bona fide fringe benefits include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits (each as described in 29 CFR part 5 and other U.S. Department of Labor guidance). Consistent with 29 CFR 5.29, bona fide fringe benefits do not include benefits required by other Federal, State, or local law.

(3) *Construction, alteration, or repair*. The term *construction, alteration, or repair* generally means those activities, described in 29 CFR 5.2 as being construction, prosecution, completion, or repair that are performed with respect to a qualified facility as defined under section 45. Construction, alteration, or repair does not include any activities that are excluded from the requirement to pay prevailing wages under the definitions described in 29 CFR 5.2. Repair work normally includes an activity that improves the facility, either by fixing something that is not functioning properly or by improving upon the facility's existing condition; involves the correction of individual problems or defects as separate and segregable incidents and is not continuous or recurring; or improves the facility's structural strength, stability, safety, capacity, efficiency, or usefulness. Construction, alteration, or repair does not include work that is ordinary and regular in nature that is designed to maintain and preserve existing functionalities of a facility after it is placed in service. Work designed to maintain and preserve functionality of a facility after it is placed in service includes basic maintenance such as regular inspections of the facility, regular cleaning and janitorial work, regular replacement of materials with limited lifespans such as filters and light bulbs, and the regular calibration of equipment. However, such work that occurs before the facility is placed in service may constitute construction for which prevailing wages must be paid in order to claim the increased credit amount. Maintenance generally includes work that is needed to keep the facility in its current condition so that it may continue to be used and work that does not improve the current condition or function of a facility. Maintenance is routinely scheduled and continuous or recurring. Ultimately, the determination of whether an activity can be categorized as construction, alteration, or repair is dependent on the facts and circumstances. This definition has no bearing on any other sections of the Code, including any determination of construction, alteration, repair, or maintenance under sections 162 or 263 of the Code, unless specified otherwise in the Code or in this chapter.

(4) *Contractor*. The term *contractor* means any person that enters into a contract directly with the taxpayer (or the taxpayer's designee, assignee, or agent) for the construction, alteration, or repair of a qualified facility.

(5) *Employed*. The term *employed* means performing the duties of a laborer or mechanic for the taxpayer, contractor, or subcontractor (as applicable), regardless of whether the individual would be characterized as an employee or an independent contractor for other Federal tax purposes.

(6) *General wage determination*. The term *general wage determination* means a wage determination issued by the U.S. Department of Labor and published on the approved website. A general wage determination provides the minimum hourly wage rates (both the basic hourly rate of pay and bona fide fringe benefit rates) that the U.S. Department of Labor has determined are prevailing for laborers and mechanics in specified types of construction in a given geographic area.

(7) *Geographic area and locality.* The terms *geographic area* and *locality* mean the county, independent city, or other civil subdivision of the State in which a qualified facility is located. The terms geographic area and locality also include areas located offshore of the United States and within the outer continental shelf of the United States and the U.S. territories. If construction, alteration, or repair work is performed in multiple counties, independent cities, or other civil subdivisions, the geographic area may include all counties, independent cities, or other civil subdivisions in which the work will be performed. The locality in which a facility is located is defined as the physical place or places where the facility will be placed in service and remain. The locality of the facility also includes secondary locations where a significant portion of the facility is constructed, altered, or repaired provided that such construction is for specific use at that facility and does not simply reflect the manufacture or construction of a product made available to the general public, and provided further that the site is either established specifically for, or dedicated exclusively for a specific period of time to, the construction, alteration, or repair of the facility. A significant portion means one or more entire portion(s) or module(s) of the facility, such as a completed room or structure, with minimal construction work remaining other than the installation and/or final assembly of the portions or modules at the place where the facility will be placed in service and remain. A significant portion does not include materials or prefabricated component parts delivered to the location of a facility. A specific period of time means a period of weeks, months, or more, and does not include circumstances in which a site at which multiple facilities are in progress is shifted exclusively to a single facility for a few hours or days in order to meet a deadline. The locality of the facility also includes any adjacent or virtually adjacent dedicated support sites, including job headquarters, tool yards, batch plants, borrow pits, and similar facilities of a taxpayer, contractor, or subcontractor that are established specifically for or dedicated exclusively to the construction, alteration, or repair of the facility, and adjacent or virtually adjacent to either a primary construction site or a secondary construction site.

(8) *Laborer and mechanic*—(i) *In general.* The terms *laborer* and *mechanic* mean those individuals whose duties are manual or physical in nature (including those individuals who use tools or who are performing the work of a trade). The terms laborer and mechanic include apprentices and helpers. The terms do not apply to individuals whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR part 541 are not deemed to be laborers or mechanics. Working forepersons who devote more than 20 percent of their time during a workweek to laborer or mechanic duties, and who do not meet the criteria for exemption of 29 CFR part 541, are considered laborers and mechanics for the time spent conducting laborer and mechanic duties.

(ii) *Examples*—(A) *Individual working in professional capacity*. Taxpayer hires an architect (Architect) to design a qualified facility and general layout of the site including access roads and ancillary buildings to support the facility. Taxpayer engages a general contractor (Contractor) to construct the qualified facility based on the drafting plans of Architect. Contractor hires an electrical engineer (Engineer)

to assist Architect and Contractor with design and placement of the electrical systems necessary to support the qualified facility. Engineer oversees and inspects construction of the electrical systems to ensure the systems conform to the facility's specifications and Architect's drafting plans. Architect and Engineer do not perform any actual duties of a laborer or mechanic during their employment with Taxpayer and Contractor. Architect and Engineer are working in a professional capacity as defined under 29 CFR part 541 and are exempt employees under the DBA. Architect and Engineer are not considered laborers and mechanics for the duration of their employment for purposes of this section and Taxpayer does not need to ensure they are paid wages at rates not less than the prevailing wage rates for purposes of claiming the increased credit amount under section 45(b)(6)(B)(iii).

(B) *Working foreperson*. A supervisory employee who is a working foreperson (Foreperson) spends 60% of the time during the workweek (24 hours of a 40 hour workweek) performing administrative functions such as preparing timecards, supervising work on the qualified facility and arranging for deliveries. Foreperson spends the remaining 40% (16 hours) of the time performing the duties of an electrician with respect to construction of a qualified facility. Because Foreperson devoted more than 20% of their time during the workweek to laborer or mechanic duties, Foreperson must be paid wages at rates not less than the electrician's applicable prevailing wage rate for the 16 hours spent doing the duties of an electrician for purposes of the Prevailing Wage Requirements.

(9) *Subcontractor*. The term *subcontractor* means any person that enters into a contract with a contractor for the construction, alteration, or repair of a qualified facility. The term *subcontractor* also includes any person that agrees to perform or be responsible for the performance of any part of a contract entered into between the taxpayer (or the taxpayer's designee, assignee, or agent) and a contractor (or between a contractor and another subcontractor) with respect to the construction, alteration, or repair of a qualified facility.

(10) *Taxpayer*. The term *taxpayer* means any taxpayer as defined in section 7701(a)(14), including applicable entities described in section 6417(d)(1)(A). In the case of a credit transferred under section 6418, the term *taxpayer* means the eligible taxpayer that determines the eligible credit to be transferred and makes a transfer election under section 6418 to transfer any specified credit portion (including 100 percent) of an eligible credit determined with respect to any eligible credit property of such eligible taxpayer for any taxable year.

(11) *Type of construction*. The *type of construction* is the general category of construction as established by the U.S. Department of Labor for the publication of general wage determinations as defined in 29 CFR 1.2.

(12) *Wages*. The term *wages* generally means wages as defined in 29 CFR 5.2. In general, wages means the basic hourly rate of pay; any contribution irrevocably made by a taxpayer, contractor, or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the taxpayer, contractor, or subcontractor that may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program, provided the commitment was communicated in writing to the laborers and mechanics affected. Whether amounts are wages for prevailing wage purposes is not relevant in determining whether amounts are wages or compensation for other Federal tax purposes.

(e) *Applicability date*. This section applies to qualified facilities placed in service in taxable years ending after June 25, 2024, and the construction of which begins after June 25, 2024. Taxpayers may apply this section to qualified facilities placed in service in taxable years ending on or before June 25, 2024, and qualified facilities placed in service in taxable years ending after June 25, 2024, the construction of which begins before June 25, 2024, provided that taxpayers follow this section in its entirety and in a consistent manner.

§1.45-8 Apprenticeship requirements.

(a) *Apprenticeship requirements*—(1) *In general*. Except as provided in paragraphs (a)(2) and (f) of this section, a taxpayer claiming or transferring (under section 6418) the increased credit amount under section 45(b)(6)(B)(iii) with respect to any qualified facility must satisfy the requirements of section 45(b)(8) and this section with respect to the construction of such facility (Apprenticeship Requirements). The taxpayer is solely responsible for ensuring that the Apprenticeship Requirements are satisfied. See paragraph (g) of this section for definitions of terms used in this section.

(2) *Transition relief*. Taxpayers are excepted from the Apprenticeship Requirements with respect to any activities that would be considered construction, alteration, or repair of the qualified facility and that occurred prior to January 29, 2023.

(b) *Labor hours requirement*—(1) *Percentage of total labor hours*. A taxpayer claiming or transferring (under section 6418) the increased credit amount under section 45(b)(6) must ensure that qualified apprentices (hired by the taxpayer, contractor, or subcontractor) perform not less than the applicable percentage of the total labor hours of the construction, alteration, or repair work (including work performed by any contractor or subcontractor) with respect to any qualified facility prior to the facility being placed in service, subject to the apprentice-to-journeyworker ratio described in paragraph (c) of this section. The percentage of total labor hours is calculated on a per qualified facility basis, aggregating all hours worked by all laborers and mechanics (including the hours of qualified apprentices) during construction of the facility and dividing the total hours worked by all laborers and mechanics by the hours of the qualified apprentices.

(2) *Applicable percentage*. For purposes of paragraph (b)(1) of this section, and subject to paragraph (b)(3) of this section, the applicable percentage is—

(i) 10 percent in the case of a qualified facility, the construction of which begins before January 1, 2023;

(ii) 12.5 percent in the case of a qualified facility, the construction of which begins after December 31, 2022, and before January 1, 2024; and

(iii) 15 percent in the case of a qualified facility, the construction of which begins after December 31, 2023.

(3) *Transition rule*. Taxpayers may apply the rules set forth in Notice 2022-61, 2022-52 I.R.B. 560, or these regulations for determining when construction began for purposes of the applicable percentage of labor hours performed by qualified apprentices required under section 45(b)(8)(A) and paragraph (b)(2) of this section.

(c) *Ratio requirement*—(1) *In general*. The labor hours requirement under paragraph (b) of this section is subject to any applicable requirements for apprentice-to-journeyworker ratios of the U.S. Department of Labor or the applicable State apprenticeship agency.

(2) *Ratio*. The allowable ratio of apprentices to journeyworkers on the job site in any occupation and its corresponding classification on any day must comply with the applicable apprentice-to-journeyworker ratio of the registered apprenticeship program in accordance with 29 CFR part 29. If a taxpayer, contractor, or subcontractor is performing construction, alteration, or repair work on a qualified facility in a geographic area other than the geographic area in which an apprenticeship program is registered, the taxpayer, contractor, or subcontractor must comply with the apprentice-to-journeyworker ratios applicable within the geographic area in which the construction, alteration, or repair work is being performed. If there is no applicable ratio for the geographic area of the qualified facility, the ratio specified in the registered apprenticeship program standard must be observed.

(3) *Failure to meet ratio requirements*. For purposes of section 45(b)(8)(B) and paragraph (b) of this section, if on any day the ratio of apprentices to journeyworkers exceeds the ratio established in accordance with paragraph (c)(2) of this section, subject to the requirements of the registered apprenticeship program, the labor hours performed by any qualified apprentice in excess of the ratio may not be counted as hours performed by qualified apprentices for purposes of the labor hours requirement. The hours devoted to the performance of construction, alteration, or repair work by any qualified apprentice in excess of the ratio will be counted towards the total labor hours, but will not be counted as hours performed by qualified apprentices for purposes of the labor hours requirement under paragraph (b) of this section.

(d) *Participation requirement*. 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 must employ one or more qualified apprentices to perform work with respect to the construction, alteration, or repair of the qualified facility prior to the facility being placed in service. The participation requirement applies if a taxpayer, contractor, or subcontractor employs four or more individuals in the construction of the qualified facility over the entire course of the construction, regardless of whether they are employed at the same location or at the same time.

(e) *Examples*. The provisions of paragraphs (b) through (d) of this section are illustrated by the following examples. For purposes of the following examples, assume that each taxpayer has a calendar year taxable year.

(i) *Example 1*. Taxpayer A starts construction of a qualified facility on April 1, 2023. Accordingly, Taxpayer A must ensure that at least 12.5% of the total labor hours are performed by qualified apprentices. The facility is placed in service on April 1, 2025, and Taxpayer A claims the increased credit amount under section 45(b)(6)(B)(iii) on its 2025 tax return. A total of eight individuals performed construction, alteration, or repair work during the construction of the facility, all of whom were employed directly by Taxpayer A. Taxpayer A employed four journeyworkers and no qualified apprentices from April 1, 2023 through October 31, 2024. Taxpayer A hired four qualified apprentices and retained three journeyworkers to perform construction on the facility for the period of November 1, 2024 through March 31, 2025. The registered apprenticeship program from which Taxpayer A requested the apprentices required a ratio of one journeyworker for every apprentice. In the first year of construction, a total of 10,000 labor hours were performed on construction, alteration, or repair work of the facility, with each journeyworker working 2,500 hours. In the second year of construction, 7,000 labor hours were performed on construction, alteration, or repair work of the facility, with each qualified apprentice and journeyworker working 1,000 hours during this time. On each day of work during the second year of construction, the three journeyworkers oversaw the work of the four qualified apprentices. A total of 17,000 labor hours were spent on the construction, alteration, or repair work of the facility, requiring that 2,125 labor hours be performed by qualified apprentices. Only 3,000 labor hours performed by qualified apprentices count towards the labor hours requirement because the ratio requirement was only satisfied with respect to the work of three qualified apprentices. Taxpayer A satisfied the labor hours requirement under paragraph (b)(2) of this section because more than 12.5% (3,000 qualified apprentice hours/17,000 total labor hours = 17.6%) of the total labor hours were performed by qualified apprentices. Taxpayer A was also subject to the participation requirement because four or more individuals employed by Taxpayer A performed construction work on the facility. Taxpayer A satisfied the participation requirement because Taxpayer A hired at least one qualified apprentice to perform construction, alteration, or repair with respect to the facility.

(ii) *Example 2*. Taxpayer B intends to construct a qualified facility to claim the increased credit amount under section 45(b)(6)(B)(iii) and executes a contract for the construction of the facility. On December 31, 2023, Taxpayer B expends sufficient funds to meet the 5 Percent Safe Harbor for beginning of construction in reliance on Notice 2022-61. Construction activities as defined in paragraph (d)(3) of this section start on January 1, 2024. In reliance on Notice 2022-61, Taxpayer B employs qualified apprentices for 12.5% of the total construction hours to complete the qualified facility. Because Taxpayer B applies the 12.5% applicable percentage in reliance on Notice 2022-61 for construction beginning before January 1, 2024, but after December 31, 2022, Taxpayer B has satisfied the Labor Hours Requirement, assuming all other provisions of the Labor Hours Requirement are also satisfied.

(iii) *Example 3*. Taxpayer C starts construction of a qualified facility on April 1, 2023, and complies with the Labor Hours Requirement, the Ratio Requirement, and the Participation Requirement with respect to the construction of the facility before it is placed in service on April 1, 2025. Taxpayer C claims the increased credit amount under section 45(b)(6)(B)(iii) on its 2025 tax return. The qualified facility was repaired from September 1, 2025, through October 31, 2025. No qualified apprentices were employed for the repairs. Taxpayer C did not fail the Apprenticeship Requirements because the Apprenticeship Requirements do not apply after the qualified facility is placed in service.

(iv) *Example 4*. Taxpayer D starts construction of a qualified facility on April 1, 2023. Accordingly, Taxpayer D must ensure that at least 12.5% of the total labor hours are performed by qualified apprentices. The facility is placed in service on April 1, 2025, and Taxpayer D claims the increased credit amount under section 45(b)(6)(B)(iii) on its 2025 tax return. Taxpayer D employed 12 individuals to perform the construction, alteration, and repair work on the qualified facility. Taxpayer D is subject to the participation requirement. For the first year of construction, a total of 25,000 labor hours were performed on the construction, alteration, or repair of the facility, 3,000 of which were performed by qualified apprentices. For the second year of construction, an additional 25,000 labor hours were performed on the construction, alteration, or repair of the facility, 3,250 of which were performed by qualified apprentices. The ratio requirement was satisfied for all labor hours performed by qualified apprentices. Taxpayer D has satisfied the labor hours requirement because 12.5% (6,250 labor hours divided by 50,000 labor hours) of the total labor hours were performed by qualified apprentices.

(v) *Example 5*. Taxpayer E starts construction of a qualified facility on January 1, 2024. Accordingly, Taxpayer E must ensure that at least 15% of the total labor hours are performed by qualified apprentices. The facility is placed in service on June 1, 2026. Taxpayer E claims the increased credit amount under section 45(b)(6)(B)(iii) on its 2026 tax return. All individuals who performed the construction, alteration, or repair work were employed directly by Taxpayer E. A total of 50,000 labor hours were spent on the construction, alteration, or repair work of the facility, 7,000 of which were performed by qualified apprentices and the ratio requirement was met for all 7,000 labor hours. Qualified apprentices also spent 500 hours in classroom training at a location other than the location of the qualified facility in preparation for the performance of construction, alteration, or repair work at the qualified facility. Taxpayer E did not satisfy the labor hours requirement under paragraph (b)(2) of this section because less than 15% of the total labor hours were performed by qualified apprentices. The hours spent on classroom training at a location other than the location of the qualified facility in preparation for the construction, alteration, or repair of the facility are not considered labor hours performed by qualified apprentices.

(f) *Exceptions to the apprenticeship requirements*. If a taxpayer fails to satisfy the Apprenticeship Requirements in paragraph (a) of this section with respect to the construction, alteration, or repair of any qualified facility prior to the facility being placed in service, the taxpayer will nonetheless be deemed to have satisfied the Apprenticeship Requirements if the taxpayer has made a good faith effort to meet the Apprenticeship Requirements as described in paragraph (f)(1) of this section (Good Faith Effort Exception) or made the penalty payment provided in paragraph (f)(2) of this section (Apprenticeship Cure Provision) for any failures to which the Good Faith Effort Exception does not apply.

(1) *Good faith effort exception*—(i) *In general*. A taxpayer is deemed to have satisfied the Apprenticeship Requirements of this section with respect to a request for qualified apprentices if the taxpayer meets the following requirements:

(A) *Request for qualified apprentices*. The taxpayer, contractor, or subcontractor must submit a written request for qualified apprentices to at least one registered apprenticeship program that has a geographic area of operation that includes the location of the qualified facility; trains qualified apprentices in the occupation(s) needed to perform construction, alteration, or repair with respect to the facility; and has a usual and customary business practice of entering into agreements with employers for the placement of qualified apprentices in the occupation for which they are training, consistent with the standards and requirements set forth in 29 CFR parts 29 and 30, and any subsequent guidance issued by the Department of Labor. Such request must be in writing and sent electronically or by registered mail. The initial request to a registered apprenticeship program for qualified apprentices must be made no later than 45 days before the qualified apprentices are requested to start work. Any subsequent requests for qualified apprentices made to the same registered apprenticeship program after the initial request must be made no later than 14 days before the qualified apprentices are requested to start work. If there is no registered apprenticeship program that has a geographic area of operation that includes the location of the qualified facility; trains qualified apprentices in the occupation(s) needed to perform construction, alteration, or repair with respect to the facility; and has a usual and customary business practice of entering into agreements with employers for the placement of qualified apprentices in the occupation for which they are training, consistent with the standards and requirements set forth in 29 CFR parts 29 and 30, and any subsequent guidance issued by the Department of Labor, the taxpayer will be deemed to satisfy the Good Faith Effort Exception with respect to the qualified apprentices that the taxpayer, contractor, or subcontractor would have requested.

(*1*) *Content of valid request*. The request of the taxpayer, contractor, or subcontractor must include the proposed dates of employment, occupation of qualified apprentices needed, location of the work to be performed, number of qualified apprentices needed, the number of labor hours expected to be performed by the qualified apprentices, and the name and contact information of the taxpayer, contractor, or subcontractor requesting employment of qualified apprentices from the registered apprenticeship program. Reasonable estimates of the foregoing information are permissible. The request must also state that the request for qualified apprentices is made with an intent to employ qualified apprentices in the occupation for which they are being trained and in accordance with the requirements and standards of the registered apprenticeship program and to employ qualified apprentices consistent with the expected number of hours and dates of employment specified in the request. If the employer of the requested qualified apprentices is not the same as the taxpayer, contractor, or subcontractor submitting the request for qualified apprentices, then the request must include the name of the employer.

(*2*) *Duration of request*. If the taxpayer, contractor, or subcontractor submits a request in accordance with paragraph (f)(1)(i)(A) of this section and the request is denied or not responded to, the taxpayer will be deemed to have exercised a Good Faith Effort with respect to the request for the period described in the request but not exceeding 365 days (366 days in case of a leap year). For requests that are denied or not responded to and include a period of employment for qualified apprentices that exceeds 365 days (366 days in case of a leap year), the taxpayer, contractor, or subcontractor must submit one or more additional requests with respect to the period of such request in excess of 365 days (366 days in case of a leap year). The taxpayer will not be deemed to have exercised a Good Faith Effort beyond 365 days (366 days in case of a leap year) of a previously denied request unless the taxpayer submits an additional request. There is no limit on the number of requests a taxpayer, contractor, or subcontractor may submit to one or more registered apprenticeship programs for purposes of the Good Faith Effort Exception and the taxpayer, contractor, or subcontractor is not required to make subsequent requests to the same registered apprenticeship program in order to qualify for the Good Faith Effort Exception. The 365 day (366 days in case of a leap year) duration of requests for qualified apprentices also applies in circumstances in which there is no registered apprenticeship program with a geographic area of operation that includes the location of the facility at the time a taxpayer, contractor, or subcontractor attempts to requests qualified apprentices from a registered apprenticeship program.

(B) *Denial of request*. If a taxpayer, contractor, or subcontractor submits a request in accordance with paragraph (f)(1)(i)(A) of this section and the request is

denied (including after an initial acceptance and before the scheduled qualified apprentice work starts), the taxpayer will be deemed to satisfy the requirements of section 45(b)(8)(A) through (C), and paragraphs (b) through (d) of this section, provided that such denial is not the result of a refusal by the taxpayer or any contractors or subcontractors engaged in the performance of construction, alteration, or repair work with respect to such qualified facility to comply with the established standards and requirements of the registered apprenticeship program. The denial of a request is only valid for purposes of establishing a Good Faith Effort with respect to the portion(s) of the request that were denied. In the case of a partial denial, a taxpayer, contractor, or subcontractor must accept the qualified apprentices offered in response to the request to satisfy the Good Faith Effort with respect to the portion of the request that was denied. If a request is partially denied, the qualified apprentice labor hours specified in the request that were denied that qualify for the Good Faith Effort Exception are considered to be labor hours performed by qualified apprentices. Subject to the requirements of paragraph (f)(1)(i)(A)(*2*) of this section, the taxpayer, contractor, or subcontractor does not need to follow up with the registered apprenticeship program after the initial request or after the receipt of a non-substantive response. The date on which a registered apprenticeship program received a request for qualified apprentices is determined by the date the electronic request is sent to the registered apprenticeship program or the date of delivery shown on a receipt from the registered mail delivery.

(C) *Response to a valid request*. A response to a valid request for qualified apprentices is a substantive written reply to the request that agrees, in whole or in part, to the specific requirements in the taxpayer's, contractor's, or subcontractor's request. If the registered apprenticeship program fails to provide a response to a request submitted in accordance with paragraph (f)(1)(i)(A) of this section within five business days after the date on which such registered apprenticeship program received the taxpayer's (or its contractor or subcontractor) request, then such request is deemed to be denied.

(D) *Employer sponsored apprenticeship programs*. A taxpayer, contractor, or subcontractor that sponsors one or more internal registered apprenticeship programs and that is unable to employ a sufficient number of qualified apprentices through such programs to meet the Apprenticeship Requirements must submit a request for qualified apprentices to at least one registered apprenticeship program that it does not sponsor in order to satisfy the Good Faith Effort Exception.

(ii) *Examples*. The provisions of this paragraph (f)(1) are illustrated by the following examples.

(A) *Example 1*. Taxpayer F submits a request to a registered apprenticeship program by email. The registered apprenticeship program responds three days later indicating that it has qualified apprentices ready to start work, but the reply email from the registered apprenticeship program is automatically forwarded to Taxpayer F's spam or junk mail folder, and Taxpayer F does not see the email response. Taxpayer F would not qualify for the Good Faith Effort Exception with respect to this request because the registered apprenticeship program provided a substantive reply to the request that agreed to the specific requirements in Taxpayer F's request within five business days.

(B) *Example* 2. Contractor G submits a request for qualified apprentices from a registered apprenticeship program with an area of operation outside of the geographic area of the qualified facility. Contractor G's request is denied because the registered apprenticeship program does not operate in the geographic area where the qualified facility is located. Contractor G's request would not qualify for the Good Faith Effort Exception because the registered apprenticeship program does not have a geographic area of operation that includes the location of the qualified facility.

(C) *Example 3*. Contractor H submits a request for qualified apprentices to a registered apprenticeship program. Under its established standards and requirements, the registered apprenticeship program requires contractors to enter into an agreement to partner with that registered apprenticeship program. Contactor H refuses to enter into the agreement, and as a result, the registered apprenticeship program denies Contractor H's request for qualified apprentices. The requirement to enter into the agreement to partner with the registered apprenticeship program applies to all employers who request apprentices from the registered apprenticeship program. Neither the Department of Labor nor a recognized State apprenticeship agency has found the requirement to enter into such an agreement to be contrary to Department of Labor guidance regarding the administration of registered apprenticeship programs. Contractor H's request would not qualify for the Good Faith Effort Exception because Contractor H refused to comply with the established standards and requirements of the registered apprenticeship program.

(D) *Example 4*. Contractor I submits a request for qualified apprentices from a registered apprenticeship program on November 15, 2024. Contractor I's request states that it seeks to employ four qualified apprentices for the period starting on January 2, 2025, and ending June 30, 2025, for a total of 4,160 hours (1,040 hours x four qualified apprentices). On November 18, 2024, the registered apprenticeship program informs Contractor I that it can supply four qualified apprentices for the requested time period. On December 29, 2024, the registered apprenticeship program informs Contractor I that it is only able to supply two of the four qualified apprentices. Contractor I does not submit any additional requests for qualified apprentices from a registered apprenticeship program. Contractor I's request would qualify for the Good Faith Effort Exception for 2,080 hours (1,040 hours for each of the two requested qualified apprentices that were denied after the request was initially accepted), provided Contractor I accepted the two qualified apprentices that were offered for the requested period.

(E) *Example 5*. Contractor J submits a written request for qualified apprentices from a registered apprenticeship program on June 1, 2025. Contractor J's request states that it seeks to employ three qualified apprentices for a period starting September 1, 2025, and ending December 31, 2026. The registered apprenticeship program denies the request on June 2, 2025. Contractor J's request satisfies the Good Faith Effort Exception with respect to the three qualified apprentices that were denied for the period beginning September 1, 2025, and ending August 31, 2026. Contractor J's request does not satisfy the Good Faith Effort Exception with respect to the period beginning September 1, 2026, and ending December 31, 2026, because that is the portion of the denied request that exceeded 365 days (366 days in case of a leap year) and Contractor J did not submit an additional valid request for that period.

(2) *Apprenticeship cure provision*—(i) *In general*. A taxpayer that fails to satisfy the Apprenticeship Requirements in paragraph (a) of this section with respect to the construction, alteration, or repair of any qualified facility prior to the facility being placed in service, will be deemed to satisfy the Apprenticeship Requirements if the taxpayer pays the IRS a penalty equal to $50 multiplied by the total labor hours for which the requirements described in paragraph (b) or (d) of this section were not satisfied with respect to the construction, alteration, or repair work on such qualified facility.

(A) *Total labor hours for which the labor hours requirement is not met*. For failures to meet the percentage of the total labor hours requirement in paragraph (b)(1) of this section, the total labor hours for which the requirement was not satisfied is calculated as the difference between the total labor hours performed by qualified apprentices that would be required to meet the applicable percentage under paragraph

(b)(2) of this section and the sum of the labor hours actually worked by all qualified apprentices consistent with the applicable ratio of apprentices to journeyworkers and the hours qualifying for the Good Faith Effort Exception.

(B) *Total labor hours for which the participation requirement is not met*. For failures to meet the participation requirement in paragraph (d) of this section, the total labor hours for which the requirement was not satisfied is calculated as the total labor hours of construction, alteration, or repair work with respect to the facility performed by all laborers or mechanics employed by the taxpayer, contractor, or subcontractor that failed to meet the participation requirement of the qualified facility divided by the number of laborers or mechanics employed by such taxpayer, contractor, or subcontractor that performed construction, alteration, or repair work on the facility.

(C) *Penalty payment not required if taxpayer ineligible for increased credit amount under section 45*(*b*)(*6*)(*B*)(*iii*). If the taxpayer claims the increased credit amount under section 45(b)(6)(B)(iii) and does not satisfy the Apprenticeship Requirements for the claimed increased credit amount, then the obligation to make the penalty payment under paragraph (f)(2)(i) of this section applies. If the IRS determines that a taxpayer claiming the increased credit amount under section 45(b)(6)(B)(iii) failed to meet the Apprenticeship Requirements and the taxpayer does not make the penalty payment required under paragraph (f)(2)(i) of this section, then no penalty is assessed under paragraph (f)(2)(i) of this section, and the taxpayer is not eligible for the increased credit amount under section 45(b)(6)(B)(iii). Taxpayers that are not eligible to claim the increased credit amount may still be eligible to claim the base amount of the renewable electricity production credit under section 45(a) if they meet the requirements to claim the credit.

(D) *Examples*. The provisions of paragraph (f)(2)(i) of this section are illustrated by the following examples, which do not take into account any possible application of the exception for Good Faith Effort Exception under paragraph (f)(1) of this section, the enhanced penalty payment requirement in the case of intentional disregard under paragraph (f)(2)(ii) of this section, or the inapplicability of the penalty in the case of a Qualifying Project Labor Agreement under paragraph (f)(2)(v) of this section. In each example, assume that the taxpayer uses the calendar year as the taxpayer's taxable year.

(*1*) *Example 1*. Taxpayer K starts construction of a qualified facility on April 1, 2023. Accordingly, Taxpayer K must ensure that at least 12.5% of the total labor hours are performed by qualified apprentices. The facility is placed in service on April 1, 2025, and Taxpayer K claims the increased credit amount under section 45(b)(6)(B)(iii) on its 2025 tax return. All individuals who performed the construction, alteration, or repair work were employed directly by Taxpayer K, including two qualified apprentices. Taxpayer K employed enough journeyworkers to satisfy the Ratio Requirement. A total of 50,000 labor hours were spent on the construction, alteration, or repair work of the facility, 6,000 of which were performed by qualified apprentices. Taxpayer K has satisfied the participation requirement because Taxpayer K has employed at least one qualified apprentice. Taxpayer K failed to satisfy the labor hours requirement under paragraph (b)(2) of this section because less than 12.5% of the total labor hours were performed by qualified apprentices. Qualified apprentices must have performed at least 6,250 labor hours (50,000 x 12.5%), so the total labor hours by which the labor hours requirement was not satisfied is 250 (6,250-6,000). To cure Taxpayer K's failure to meet the labor hours requirement, Taxpayer K must pay a penalty of $12,500 (250 x $50).

(*2*) *Example 2*. Taxpayer L starts construction of a qualified facility on February 10, 2023. Accordingly, Taxpayer L must ensure that at least 12.5% of the total labor hours are performed by qualified apprentices. The facility is placed in service on February 10, 2026, and Taxpayer L claims the increased credit amount under section 45(b)(6)(B)(iii) on its 2026 tax return. Taxpayer L employs 10 individuals to perform construction, alteration, or repair work of the facility, two of whom are qualified apprentices. Taxpayer L employed enough journeyworkers to satisfy the Ratio Requirement. Taxpayer L also hires Contractor M, who employs five individuals to perform construction, alteration, or repair work of the facility, none of whom are qualified apprentices. A total of 50,000 labor hours were spent on the construction, alteration, or repair work of the facility, 6,500 of which were performed by qualified apprentices. Of the total 50,000 labor hours, 33,000 labor hours were performed by individuals employed by Taxpayer L and 17,000 labor hours were performed by individuals employed by Contractor M. Taxpayer L has satisfied the labor hours requirement under paragraph (b)(2) of this section because more than 12.5% of the total labor hours were performed by qualified apprentices. However, Taxpayer L failed to satisfy the participation requirement under paragraph (d) of this section because Contractor M employed five individuals but no qualified apprentices. The total labor hours for which the participation requirement was not satisfied is equal to the total labor hours performed by individuals employed by Contractor M (17,000) divided by the number of individuals employed by Contractor M (5) on the construction of the qualified facility, which is 3,400 hours (17,000/5). To cure the failure to meet the Apprenticeship Requirements, Taxpayer L must pay a penalty of $170,000 (3,400 x $50).

(*3*) *Example 3*. Taxpayer N starts construction of a qualified facility on January 1, 2024. Accordingly, Taxpayer N must ensure that at least 15% of the total labor hours are performed by qualified apprentices. The facility is placed in service on January 1, 2025, and Taxpayer N claims the increased credit amount under section 45(b)(6)(B)(iii) on its 2025 tax return. Taxpayer N employs 15 individuals to perform construction, alteration, or repair work of the facility, none of whom is a qualified apprentice. Taxpayer N also hires Contractor O, who employs five individuals to perform construction, alteration, or repair work of the facility, one of whom is a qualified apprentice. At the time Taxpayer N claims the increased credit amount, a total of 20,000 labor hours were spent on the construction, alteration, or repair work of the facility, 1,000 of which were performed by the qualified apprentice. Of the 20,000 total labor hours, 15,000 labor hours were performed by individuals employed by Taxpayer N and 5,000 labor hours were performed by individuals employed by Contractor O. Taxpayer N failed to satisfy the labor hours requirement under paragraph (b)(2) of this section because less than 15% of the total labor hours were performed by qualified apprentices. Qualified apprentices must have performed at least 3,000 labor hours, so the total labor hours by which the labor hours requirement was not satisfied is 2,000. Taxpayer N also failed to satisfy the participation requirement under paragraph (d) of this section because Taxpayer N employed 15 individuals but no qualified apprentices. The total labor hours for which the participation requirement was not satisfied is 1,000, which is equal to the total labor hours performed by individuals employed by Taxpayer N (15,000) divided by the number of individuals employed by Taxpayer N (15), which is 1,000 (15,000/15). The total labor hours by which Taxpayer N failed to meet the labor hours and participation requirements is 3,000 (2,000 + 1,000). To cure Taxpayer N's failure to meet the Apprenticeship Requirements, Taxpayer N must pay a penalty of $150,000 (3,000 x $50).

(*4*) *Example 4*. Taxpayer P starts construction of a qualified facility on April 1, 2023. Accordingly, Taxpayer P must ensure that at least 12.5% of the total labor hours are performed by qualified apprentices. The facility is placed in service on January 5, 2024, and Taxpayer P claims the increased credit amount under section 45(b)(6)(B)(iii) on its 2024 tax return. Taxpayer P hires Contractors Q, R, and S to perform the construction, alteration, and repair of the qualified facility. Contractor Q employs 10 journeyworkers who work 10,000 hours and one qualified apprentice who works 400 hours. Contractor R employs four journeyworkers who work 4,000 hours and five qualified apprentices who work 2,000 hours. Contractor S employs three journeyworkers who work 3,000 hours and one qualified apprentice who works 400 hours. The registered apprenticeship program for all of the qualified apprentices has prescribed a 1:1 apprentice-to-journeyworker ratio. For each day, all journeyworkers and qualified apprentices employed by the contractors are on the job site. The contrac-

tors have satisfied the participation requirement under paragraph (d) of this section because they each employed one or more qualified apprentices. The total labor hours are 19,800 hours, and the total hours worked by qualified apprentices are 2,800. However, Contractor R employed one qualified apprentice in excess of the apprentice-to-journeyworker ratio (five qualified apprentices: four journeyworkers) that was prescribed by the apprenticeship program. Because Contractor R employed one qualified apprentice in excess of the apprentice-to-journeyworker ratio on each day that Contractor R performed work on the facility, 400 of the qualified apprentice hours worked by Contractor R do not count towards the labor hour requirement. Thus, Taxpayer P has failed to meet the labor hours requirement under paragraph (b)(2) of this section because only 2,400 hours worked by qualified apprentices are counted for purposes of the labor hours requirement. The total labor hours by which Taxpayer P failed to meet the labor hours requirement is 75 (2,475 required hours (19,800 x 12.5%) – 2,400 qualified apprentice hours worked). To cure Taxpayer P's failure to meet the Apprenticeship Requirements, Taxpayer P must pay a penalty of $3,750 (75 x $50).

(ii) *Intentional disregard*—(A) *Application of section 45*(*b*)(*8*)(*D*)(*iii*). If the IRS determines that any failure to satisfy the Apprenticeship Requirements in paragraph (b) or (d) of this section is due to intentional disregard of those requirements, the amount of the penalty payment under paragraph (f)(2) of this section is increased to $500 multiplied by the total labor hours for which the requirements described in paragraph (b) or (d) of this section were not satisfied with respect to the construction, alteration, or repair work on such qualified facility.

(B) *Meaning of intentional disregard*. A failure to satisfy the Apprenticeship Requirements of paragraph (b) or (d) of this section is due to intentional disregard if it is knowing or willful.

(C) *Facts and circumstances considered*. The facts and circumstances that are considered in determining whether a failure to satisfy the Apprenticeship Requirements is due to intentional disregard include, but are not limited to—

(*1*) Whether the failure was part of a pattern of conduct that includes repeated or systemic failures to ensure compliance with the Apprenticeship Requirements;

(*2*) Whether the taxpayer took steps to determine or review the applicable percentage of labor hours required to be performed by qualified apprentices;

(*3*) Whether the taxpayer sought to promptly cure any failures;

(*4*) Whether the taxpayer has been required to make a penalty payment under paragraph (f)(2) of this section in previous years;

(*5*) Whether the taxpayer included provisions in any contracts entered into with contractors that required the employment of qualified apprentices by the contractor and any subcontractors consistent with the labor hour requirement of section 45(b)(8)(A) and the participation requirement of section 45(b)(8)(C) and whether taxpayers regularly reviewed contractors' and subcontractors' use of qualified apprentices;

(*6*) Whether the taxpayer required contractors and subcontractors to forward to the taxpayer requests to registered apprenticeship programs within five business days of when requests were made;

(*7*) Whether the taxpayer made no attempt to comply with the Apprenticeship Requirements;

(*8*) Whether the taxpayer developed and used a plan to utilize qualified apprentices in the construction, alteration, or repair of the qualified facility;

(*9*) Whether the taxpayer, contractor, or subcontractor regularly followed up with registered apprenticeship programs regarding requests for qualified apprentices;

(*10*) Whether the taxpayer, contractor, or subcontractor contacted the Department of Labor's Office of Apprenticeship or relevant State apprenticeship agency for assistance in locating a registered apprenticeship program;

(*11*) Whether the taxpayer had in place procedures whereby individuals could report suspected failures to comply with the Apprenticeship Requirements, without retaliation or adverse action, whether taxpayer investigated such reports by individuals, and whether the taxpayer had internal controls to prevent the failures to comply with the Apprenticeship Requirements;

(*12*) Whether the taxpayer investigated complaints of retaliation or adverse action resulting from reports of suspected failures to comply with the Apprenticeship Requirements, and took appropriate actions to remedy any retaliation or adverse action and prevent it from reoccurring; and

(*13*) Whether taxpayer failed to maintain and preserve records sufficient to establish compliance with the Apprenticeship Requirements for relevant tax years.

(D) *Examples*. The provisions of paragraph (f)(2)(ii) of this section are illustrated by the following examples, which take into account certain facts and circumstances described in paragraph (f)(2)(ii)(C) of this section, that are considered in applying the enhanced penalty payment requirement in the case of intentional disregard. These examples do not take into account any possible application of the exception for Good Faith Effort Exception under paragraph (f)(1) of this section or the inapplicability of the penalty in the case of a Qualifying Project Labor Agreement under paragraph (f)(2)(v) of this section. In each example, assume that the taxpayer uses the calendar year as the taxpayer's taxable year.

(*1*) *Example 1*. Taxpayer T failed to satisfy the labor hours requirement of section 45(b)(8)(A), the participation requirement of section 45(b)(8)(C), and the requirements described in paragraphs (b) and (d) of this section. Taxpayer T did not create a plan to utilize qualified apprentices in the construction, alteration, or repair of the qualified facility. Taxpayer T did not include contract provisions that require the hiring of qualified apprentices and the compliance with the labor hours requirement described in section 45(b)(8)(A) and the participation requirement described in section 45(b)(8)(C), nor did Taxpayer T require those contract provisions in any subcontracts. Neither Taxpayer T nor any contractors or subcontractors made any requests to a registered apprenticeship program for qualified apprentices. Taxpayer T also did not have procedures in place to audit whether contractors or subcontractors made a request to a registered apprenticeship program. Taxpayer T's failures to satisfy the labor hours requirement of section 45(b)(8)(A), the participation requirement of section 45(b)(8)(C), and the requirements described in paragraphs (b) and (d) of this section would be considered due to intentional disregard for purposes of paragraph (f)(2)(ii) of this section. After considering all of the facts and circumstances, Taxpayer T would be subject to the enhanced penalty payment described in paragraph (f)(2)(ii)(A) of this section.

(*2*) *Example 2*. Taxpayer U failed to satisfy the labor hours requirement of section 45(b)(8)(A), the participation requirement of section 45(b)(8)(C), and the requirements described in paragraphs (b) and (d) of this section. Taxpayer U created a plan to utilize qualified apprentices in the construction, alteration, or repair of a qualified facility. Taxpayer U included contract provisions that required the hiring of qualified apprentices and the compliance with the labor hours requirement described in section 45(b)(8)(A) and the participation requirement described in section 45(b)(8)(C) and required those contract provisions in any subcontracts. Taxpayer U and all contractors and subcontractors of Taxpayer U requested relevant qualified apprentices from registered apprenticeship programs. Taxpayer U also created procedures to

audit whether contractors or subcontractors made a request to a registered apprenticeship program and ensured that the registered apprenticeship programs were contacted in writing. In cases in which a registered apprenticeship program replied to a proper request described in paragraph (f)(1)(i)(A)(*1*) of this section with a non-substantive response, Taxpayer U encouraged follow-ups to the registered apprenticeship program. Additionally, Taxpayer U contacted and encouraged contractors and subcontractors to contact the Department of Labor's Office of Apprenticeship and the State apprenticeship agency in cases in which Taxpayer U, or any contractors or subcontractors, experienced difficulty in locating a registered apprenticeship program. After considering all of the facts and circumstances, Taxpayer U's failure to satisfy the labor hours requirement of section 45(b)(8)(A), the participation requirement of section 45(b)(8)(C), and the requirements described in paragraphs (b) and (d) of this section would not be considered due to intentional disregard for purposes of paragraph (f)(2)(ii) of this section.

(E) *Rebuttable presumption of no intentional disregard*. If a taxpayer makes the penalty payment required by this paragraph (f)(2) before receiving notice of an examination from the IRS with respect to a claim for the increased credit amount under section 45(b)(6), the taxpayer will be presumed not to have intentionally disregarded the Apprenticeship Requirements in paragraphs (b) and (d) of this section. The IRS may rebut this presumption based on the relevant facts and circumstances.

(iii) *Deficiency procedures to apply*. The penalty payment required by this paragraph (f)(2) is subject to deficiency procedures of subchapter B of chapter 63 of the Code.

(iv) *Penalty payments in the event of a transfer pursuant to section 6418*. To the extent an eligible taxpayer, as defined in section 6418(f)(2), has determined an increased credit amount under section 45(b)(6) and transferred such increased credit amount as part of a specified credit portion, the obligation to make a penalty payment under paragraph (f)(2)(i) of this section remains with the eligible taxpayer. The obligation for an eligible taxpayer to satisfy the Apprenticeship Requirements becomes binding upon the earlier of the filing of the eligible taxpayer's return for the taxable year for which the specified credit portion is determined with respect to the eligible taxpayer, or the filing of the return of the transferee taxpayer for the year in which the specified credit portion is taken into account. If the IRS determines that the eligible taxpayer failed to meet the Apprenticeship Requirements and the eligible taxpayer does not then make the penalty payments provided in paragraph (f)(2)(i) of this section, then no penalty is assessed under paragraph (f)(2)(i) of this section, and the eligible taxpayer is not eligible for the increased credit amount determined under section 45(b)(6)(B)(iii). Section 6418 and the regulations under section 6418 control for determining the impact of an eligible taxpayer's failure to cure on any transferee taxpayer.

(v) *Project labor agreements*. The penalty payment required by this paragraph (f)(2) to cure a failure to satisfy the Apprenticeship Requirements in paragraphs (b) and (d) of this section does not apply with respect to the construction, alteration, or repair work of a qualified facility if the work is done pursuant to a Qualifying Project Labor Agreement as defined in §1.45-7(c)(6)(ii).

(g) *Definitions*. Solely for purposes of this section, the following definitions apply:

(1) *Construction, alteration, or repair*. The term *construction, alteration, or repair* has the same meaning as in §1.45-7(d)(3).

(2) *Contractor*. The term *contractor* has the same meaning as in §1.45-7(d)(4).

(3) *Employed*. The term *employed* has the same meaning as in §1.45-7(d)(5).

(4) *Established standards and requirements*. The term *established standards and requirements* means those standards of apprenticeship required by 29 CFR parts 29 and 30 for registered apprenticeship programs, as well as any additional requirements established by the registered apprenticeship program for the placement of apprentices and applicable to all employers participating in the registered apprenticeship program. Such requirements must not be found by the U.S. Department of Labor's Office of Apprenticeship or a recognized State apprenticeship agency to be contrary to Department of Labor guidance regarding the administration of registered apprenticeship programs.

(5) *Geographic area*. The term *geographic area* for purposes of determining the geographic area of operation of a registered apprenticeship program has the same meaning as the term *geographic area* and *locality* defined in §1.45-7(d)(7).

(6) *Journeyworker*. The term *journeyworker* means an individual who has attained a level of skill, abilities, and competencies recognized within an industry as having mastered the skills and competencies required for the occupation. Use of the term may also refer to a mentor, technician, specialist, or other skilled individual who has documented sufficient skills and knowledge of an occupation, either through formal apprenticeship or through practical on-the-job experience and formal training.

(7) *Labor hours*. The term *labor hours* means the total number of hours devoted to the performance of construction, alteration, or repair work by any individual employed by the taxpayer or by any contractor or subcontractor. Labor hours do not include hours worked by foremen, superintendents, owners, or persons employed in bona fide executive, administrative, or professional capacities (as defined in 29 CFR part 541).

(8) *Qualified apprentice*. The term *qualified apprentice* means an individual who is employed by the taxpayer or by any contractor or subcontractor and who is participating in a registered apprenticeship program. An individual is participating in a registered apprenticeship program if, the individual has entered into a written agreement with a registered apprenticeship program containing the terms and conditions of the employment and training of the apprentice and has been registered as an apprentice with the U.S. Department of Labor's Office of Apprenticeship or a recognized State apprenticeship agency during the time period in which work is performed by the apprentice for the taxpayer, contractor, or subcontractor, or the individual is in the first 90 days of probationary employment as an apprentice in a registered apprenticeship program and the individual has been certified by the U.S. Department of Labor's Office of Apprenticeship or a recognized State apprenticeship agency as eligible for probationary employment as an apprentice.

(9) *Registered apprenticeship program*. A *registered apprenticeship program* means a program that has been registered by the U.S. Department of Labor's Office of Apprenticeship or a recognized State apprenticeship agency, pursuant to the National Apprenticeship Act and its

implementing regulations for registered apprenticeship at 29 CFR parts 29 and 30, as meeting the basic standards and requirements of the Department of Labor for approval of such program for Federal purposes. Registration of a program is evidenced by a Certificate of Registration or other written indicia. Registered apprenticeship programs include those that taxpayers, contractors, or subcontractors sponsor, create, or partner with and include joint and non-joint programs (as those terms are used in 29 CFR part 29).

(10) *State apprenticeship agency*. The term *State apprenticeship agency* means an agency of a State government that has responsibility and accountability for apprenticeship within the State and that has been recognized and authorized by the U.S. Department of Labor's Office of Apprenticeship to register and oversee apprenticeship programs and agreements for Federal purposes.

(11) *Subcontractor*. The term *subcontractor* has the same meaning as in §1.45-7(d)(10).

(12) *Taxpayer*. The term *taxpayer* has the same meaning as in §1.45-7(d)(11).

(h) *Applicability date*. This section applies to qualified facilities placed in service in taxable years ending after June 25, 2024, and the construction of which begins after June 25, 2024. Taxpayers may apply this section to qualified facilities placed in service in taxable years ending on or before June 25, 2024, and qualified facilities placed in service in taxable years ending after June 25, 2024, the construction of which begins before June 25, 2024, provided that taxpayers follow this section in its entirety and in a consistent manner.

§§1.45-9 - 1.45.11 [Reserved]

§1.45-12 Recordkeeping and reporting.

(a) *In general*. The increased credit amount determined under section 45(b)(6) must be claimed in such form and manner as may be prescribed in IRS forms, instructions, publications, or guidance published in the Internal Revenue Bulletin. *See* §601.601 of this chapter. Consistent with sections 45 and 6001 and §1.6001-1(e), a taxpayer claiming or transferring (under section 6418) an increased credit amount under section 45(b)(6)(A) must maintain and preserve records sufficient to establish compliance with the requirements of sections 45(b)(6)(B), (b)(7), and (8), as applicable. In the case of any credit transferred under section 6418 reflecting an increased credit amount, the requirement to maintain and preserve sufficient records demonstrating compliance with the applicable prevailing wage and apprenticeship requirements remains with the eligible taxpayer that determined and transferred the credit. For definitions of terms used in this section, *see* §1.45-7(d) with respect to the prevailing wage requirements, and §1.45-8(g) with respect to the apprenticeship requirements.

(b) *Recordkeeping for the prevailing wage and apprenticeship requirements*. With respect to each qualified facility for which a taxpayer is claiming or transferring (under section 6418) a credit reflecting an increased credit amount under section 45(b)(6)(A)(iii), the taxpayer must maintain and preserve records sufficient to demonstrate compliance with the applicable prevailing wage and apprenticeship requirements in sections 45(b)(7) and (8) and §§1.45-7 and 1.45-8, respectively. At a minimum, those records include payroll records for each laborer and mechanic (including each qualified apprentice) employed by the taxpayer, contractor, or subcontractor in the construction, alteration, or repair of the qualified facility. If work is done pursuant to a Qualifying Project Labor Agreement as defined in §1.45-7(c)(6)(ii), the taxpayer should also maintain and preserve records related to that Qualifying Project Labor Agreement.

(c) *Recordkeeping for the prevailing wage requirements*. In addition to payroll records otherwise maintained by the taxpayer, records sufficient to demonstrate compliance with the applicable prevailing wage requirements in section 45(b)(7) and §1.45-7 may include Forms WH-347 completed fully and correctly with information for each laborer and mechanic (including each qualified apprentice) employed by the taxpayer, a contractor, or subcontractor with respect to each qualified facility. Records sufficient to demonstrate compliance with the applicable prevailing wage requirements in section 45(b)(7) and §1.45-7 may also include the following other documents and records with respect to each qualified facility:

(1) Identifying information for each laborer and mechanic who worked on the construction, alteration, or repair of the qualified facility, including the name, the last four digits of a social security or tax identification number, address, telephone number, and email address;

(2) The location and type of construction of the qualified facility;

(3) The labor classification(s) the taxpayer applied to each laborer and mechanic for determining the prevailing wage rate and documentation supporting the applicable classification, including the applicable wage determination and copies of executed contracts for construction, alteration, or repair of the qualified facility with any contractor or subcontractor;

(4) The hourly rate(s) of wages paid (including rates of contributions or costs for bona fide fringe benefits or cash equivalents thereof) for each applicable labor classification described in paragraph (c)(3) of this section;

(5) Records to support any contribution irrevocably made on behalf of each laborer or mechanic to a trustee or other third person pursuant to a bona fide fringe benefit program, and the rate of costs that were reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a plan or program described in 40 U.S.C. 3141(2)(B), including records demonstrating that the enforceable commitment was provided in writing to the laborers and mechanics affected;

(6) The total number of hours worked by each laborer and mechanic per pay period;

(7) The total wages paid to each laborer and mechanic for each pay period (including identifying any deductions from wages);

(8) Records to support wages paid to any qualified apprentices at less than the applicable prevailing wage rates, including records reflecting an individual's participation in a registered apprenticeship program and the applicable wage rates and apprentice- to-journeyworker ratios prescribed by the registered apprenticeship program;

(9) The amount and timing of any correction and penalty payments and documentation reflecting the calculation of the

correction and penalty payments, including records to demonstrate eligibility for the penalty waiver in §1.45-7(c)(6);

(10) Records to document any failures to pay prevailing wages and the actions taken to prevent, mitigate, or remedy the failure (for example, records demonstrating that the taxpayer (or an independent third party engaged by the taxpayer) regularly reviewed payroll practices, included requirements to pay prevailing wages in contracts with contractors, and posted prevailing wage rates in a prominent place on the job site); and

(11) Records related to any complaints received by the taxpayer, contractor, or subcontractor that the taxpayer, contractor, or subcontractor was paying wages less than the applicable prevailing wage rate for work performed by laborers and mechanics with respect to the qualified facility.

(d) *Recordkeeping for the apprenticeship requirements*. Records sufficient to demonstrate compliance with the applicable apprenticeship requirements in section 45(b)(8) and §1.45-8 may include the following information with respect to each qualified facility:

(1) Any written requests for the employment of qualified apprentices from registered apprenticeship programs, including any contacts with the U.S. Department of Labor's Office of Apprenticeship or a State apprenticeship agency regarding requests for qualified apprentices from registered apprenticeship programs;

(2) Any agreements entered into with registered apprenticeship programs with respect to the construction, alteration, or repair of the facility;

(3) Documents reflecting the standards and requirements of all registered apprenticeship programs from which taxpayers, contractors, or subcontractors employed qualified apprentices with respect to the construction, alteration, or repair of the facility (including the applicable ratio requirement prescribed by each registered apprenticeship program);

(4) The total number of labor hours worked with respect to the construction, alteration, or repair of the qualified facility, including and identifying hours worked by each qualified apprentice;

(5) Records reflecting the daily ratio of apprentices to journeyworkers;

(6) Records demonstrating compliance with the Good Faith Effort Exception in §1.45-8(f)(1) (including requests for qualified apprentices, correspondence with registered apprenticeship programs, and denials of requests);

(7) The amount and timing of any penalty payments and documentation reflecting the calculation of the penalty payments;

(8) Records to document any failures to satisfy the apprenticeship requirements under section 45(b)(8) and §1.45-8 and the actions taken to prevent, mitigate, or remedy the failure; and

(9) Records related to any complaints received by the taxpayer, contractor, or subcontractor that the taxpayer, contractor, or subcontractor was not satisfying the apprenticeship requirements under section 45(b)(8) and §1.45-8.

(e) *Satisfaction of the recordkeeping requirements.* Taxpayers may satisfy the recordkeeping requirements in this section as follows:

(1) Taxpayers may collect and physically retain relevant records from every contractor and subcontractor. The records may have personally identifiable information (PII) redacted to comply with applicable privacy laws. Unredacted information must be made available to the IRS upon request;

(2) Taxpayers, contractors, and subcontractors may provide relevant records to a third party vendor to physically retain on behalf of the taxpayer. The records may have PII redacted to comply with applicable privacy laws. Unredacted records must be made available to the IRS upon request; or

(3) Taxpayers, contractors, and subcontractors may each physically retain the relevant unredacted records for their own employees. Unredacted records must be made available to the IRS upon request.

(f) *Applicability date*. This section applies to qualified facilities placed in service in taxable years ending after June 25, 2024, and the construction of which begins after June 25, 2024. Taxpayers may apply this section to qualified facilities placed in service in taxable years ending on or before June 25, 2024, and qualified facilities placed in service in taxable years ending after June 25, 2024, the construction of which begins before June 25, 2024, provided that taxpayers follow this section in its entirety and in a consistent manner.

Par. 4. Sections 1.45L-1 through 1.45L-3 are added to read as follows:

§§1.45L-1 - 1.45L-2 [Reserved]

§1.45L-3 Rules relating to the increased credit amount for prevailing wage.

(a) *In general*. With respect to a qualified residence described in section 45L(a)(2)(B), the credit determined under section 45L(a)(2)(B)(i) is $2,500 and the credit determined under section 45L(a)(2)(B)(ii) is $5,000 if the qualified residence described in section 45L(a)(2)(B)—

(1) Meets the requirements under section 45L(c)(1)(A) or 45L(c)(1)(B), as applicable;

(2) Is constructed by an eligible contractor;

(3) Is acquired by a person for use as a residence during the taxable year; and

(4) Satisfies the prevailing wage requirements of section 45(b)(7) and §1.45-7, and the recordkeeping and reporting requirements of §1.45-12, with respect to the construction of the qualified residence before such residence is acquired by a person for use as a residence.

(b) *Definitions*—(1) *Qualified residence*. For purposes of this section, a *qualified residence* means a qualified new energy efficient home as defined in section 45L(b)(2).

(2) *Eligible contractor*. For purposes of this section, an *eligible contractor* means an eligible contractor as defined in section 45L(b)(1).

(c) *Applicability date*. This section applies to any qualified new energy efficient home acquired for use as a residence in taxable years ending after June 25, 2024, and the construction of which begins after June 25, 2024. Taxpayers may apply this section to any qualified new energy efficient home acquired for use as a residence in taxable years ending on or before June 25, 2024, and any qualified new energy efficient home acquired for use as a residence in taxable years ending after June 25, 2024, the construction of which begins before June 25, 2024, provided that taxpayers follow this section in its entirety and in a consistent manner.

Par. 5. Section 1.45Q-6 is added to read as follows:

§1.45Q-6 Rules relating to the increased credit amount for prevailing wage and apprenticeship.

(a) *In general*. If the requirements in paragraph (b) of this section are satisfied with respect to any qualified facility or any carbon capture equipment placed in service at that facility, then the credit determined under section 45Q(a) is multiplied by five.

(b) *Qualified facility and carbon capture equipment requirements*. The requirements of this paragraph (b) are satisfied if any of the following requirements are met—

(1) With respect to a qualified facility within the meaning of section 45Q the construction of which begins on or after January 29, 2023, and any carbon capture equipment within the meaning of section 45Q placed in service at such facility, the taxpayer meets the prevailing wage requirements of section 45(b)(7) and §1.45-7 with respect to the construction of such facility and equipment and with respect to the alteration or repair of such facility and equipment for any taxable year, for any portion of such taxable year that is within the period described in section 45Q(3)(A) or (4)(A) after the facility or equipment was originally placed in service, the apprenticeship requirements of section 45(b)(8) and §1.45-8, and the recordkeeping and reporting requirements of §1.45-12;

(2) With respect to any carbon capture equipment within the meaning of section 45Q the construction of which begins on or after January 29, 2023, and that is installed at a qualified facility the construction of which began prior to January 29, 2023, the taxpayer meets the prevailing wage requirements of section 45(b)(7) and §1.45-7 with respect to the construction of such equipment and with respect to the alteration or repair of such equipment for any taxable year, for any portion of such taxable year that is within the period described in section 45Q(3)(A) or (4)(A) after the equipment was originally placed in service, the apprenticeship requirements of section 45(b)(8) and §1.45-8, and the recordkeeping and reporting requirements of §1.45-12; or

(3) Carbon capture equipment within the meaning of section 45Q the construction of which began prior to January 29, 2023, and such equipment is installed at a qualified facility the construction of which began prior to January 29, 2023.

(c) *Applicability date*. This section applies to qualified facilities and carbon capture equipment placed in service in taxable years ending after June 25, 2024, and the construction of which begins after June 25, 2024. Taxpayers may apply this section to qualified facilities and carbon capture equipment placed in service in taxable years ending on or before June 25, 2024, and qualified facilities and carbon capture equipment placed in service in taxable years ending after June 25, 2024, the construction of which begins before June 25, 2024, provided that taxpayers follow this section in its entirety and in a consistent manner.

Par. 6. Sections 1.45U-1 through 1.45U-3 are added to read as follows:

§§1.45U-1 - 1.45U-2 [Reserved]

§1.45U-3 Rules relating to the increased credit amount for prevailing wage.

(a) *In general*. If a qualified nuclear power facility satisfies the prevailing wage requirements of section 45(b)(7) and §1.45-7 for any alteration or repair with respect to such qualified nuclear power facility within the meaning of section 45U(b)(1), and the recordkeeping and reporting requirements of §1.45-12, then the amount of the zero-emission nuclear power production credit for the taxable year is equal to the credit amount determined under section 45U(a) multiplied by five.

(b) *Qualifying Project Labor Agreement for a qualified nuclear power facility.* For the purposes of section 45U and §1.45-7(c)(6)(ii), in order to be a Qualifying Project Labor Agreement, such agreement must, at a minimum:

(1) Be a collective bargaining agreement with one or more labor organizations (as defined in 29 U.S.C. 152(5)) of which employees of the qualified nuclear power facility are members and such agreement establishes the terms and conditions of employment at the qualified nuclear power facility;

(2) Contain guarantees against strikes, lockouts, and similar job disruptions;

(3) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the collective bargaining agreement; and

(4) Contain provisions to pay wages at rates not less than the prevailing rates in accordance with subchapter IV of chapter 31 of title 40 of the United States Code.

(c) *Applicability date*. This section applies to alterations and repairs of qualified nuclear power facilities that are performed after June 25, 2024, for taxable years beginning after June 25, 2024. Taxpayers may apply this section to alterations and repairs of qualified nuclear power facilities that are performed prior to June 25, 2024, provided that taxpayers follow this section in its entirety and in a consistent manner.

Par. 7. Sections 1.45V-1 through 1.45V-3 are added to read as follows:

§§1.45V-1 - 1.45V-2 [Reserved]

§1.45V-3 Rules relating to the increased credit amount for prevailing wage and apprenticeship.

(a) *In general*. If any qualified clean hydrogen production facility (as defined in section 45V(c)(3)) satisfies the requirements in paragraph (b) of this section, then the amount of the credit for producing qualified clean hydrogen determined under section 45V(a) with respect to qualified clean hydrogen described in section 45V(b)(2) is equal to the credit amount determined under section 45V(a) multiplied by five.

(b) *Qualified clean hydrogen production facility requirements*. A qualified clean hydrogen production facility satisfies the requirements of this paragraph (b) if it is one of the following –

(1) A facility the construction of which began prior to January 29, 2023, and that meets the prevailing wage requirements of section 45(b)(7) and §1.45-7 with respect to alterations or repairs of a qualified facility within the meaning of section 45V that occur after January 29, 2023 (to the extent applicable), and that meets the recordkeeping and reporting requirements of §1.45-12; or

(2) A facility that meets the prevailing wage requirements of section 45(b)(7) and §1.45-7, the apprenticeship requirements of section 45(b)(8) and §1.45-8, and the recordkeeping and reporting requirements of §1.45-12 with respect to the construction, alteration, or repair of a qualified facility within the meaning of section 45V.

(c) *Applicability date*. This section applies to qualified clean hydrogen production facilities placed in service in taxable years ending after June 25, 2024, and the construction of which begins after June 25, 2024. Taxpayers may apply this section to qualified clean hydrogen production facilities placed in service in taxable years ending on or before June 25, 2024, and qualified clean hydrogen production facilities placed in service in taxable years ending after June 25, 2024, the construction of which begins before June 25, 2024, provided that taxpayers follow this section in its entirety and in a consistent manner.

Par. 8. Sections 1.45Y-1 through 1.45Y-3 are added to read as follows:

§§1.45Y-1 - 1.45Y-2 [Reserved]

§1.45Y-3 Rules relating to the increased credit amount for prevailing wage and apprenticeship.

(a) *In general*. If any qualified clean electricity production facility satisfies the requirements in paragraph (b) of this section, the amount of the credit for producing clean electricity determined under section 45Y(a) is the alternative amount described in section 45Y(a)(2)(B), subject to adjustment provided by section 45Y(c).

(b) *Qualified clean electricity production facility requirements*. A qualified facility satisfies the requirements of this paragraph (b) if it is one of the following—

(1) A facility with a maximum net output of less than one megawatt (as measured in alternating current);

(2) A facility the construction of which began prior to January 29, 2023; or

(3) A facility that meets the prevailing wage requirements of section 45(b)(7) and §1.45-7, the apprenticeship requirements of section 45(b)(8) and §1.45-8, and the recordkeeping and reporting requirements of §1.45-12 with respect to the construction, alteration, or repair of a qualified clean electricity production facility within the meaning of section 45Y.

(c) *Applicability date*. This section applies to qualified clean electricity production facilities placed in service in taxable years ending after June 25, 2024, and the construction of which begins after June 25, 2024. Taxpayers may apply this section to qualified clean electricity production facilities placed in service in taxable years ending on or before June 25, 2024, and qualified clean electricity production facilities placed in service in taxable years ending after June 25, 2024, the construction of which begins before June 25, 2024, provided that taxpayers follow this section in its entirety and in a consistent manner.

Par. 9. Sections 1.45Z-1 through 1.45Z-3 are added to read as follows:

§§1.45Z-1 - 1.45Z-2 [Reserved]

§1.45Z-3 Rules relating to the increased credit amount for prevailing wage and apprenticeship.

(a) *In general*. If any qualified facility (as defined in section 45Z(d)(4)) satisfies the requirements in paragraph (b) of this section, the applicable amount used to calculate the clean fuel production credit determined under section 45Z(a) is the alternative amount described in section 45Z(a)(2)(B) or 45Z(a)(3)(A)(ii), as applicable, subject to the inflation adjustment provided by section 45Z(c).

(b) *Qualified facility for clean fuel production requirements*. A qualified facility (as defined in section 45Z(d)(4)) satisfies the requirements of this paragraph (b) if it is one of the following—

(1) A qualified facility that is placed in service after December 31, 2024, that meets the prevailing wage requirements of section 45(b)(7) and §1.45-7, the apprenticeship requirements of section 45(b)(8) and §1.45-8, and the recordkeeping and reporting requirements of §1.45-12 with respect to the construction, alteration, or repair of such qualified facility; or

(2) A qualified facility that is placed in service before January 1, 2025, that meets the prevailing wage requirements of section 45(b)(7) and §1.45-7 with respect to any alteration or repair of such qualified facility that is performed in taxable years beginning after December 31, 2024, the apprenticeship requirements of section 45(b)(8) and §1.45-8 with respect to the construction of such qualified facility, and the recordkeeping and reporting requirements of §1.45-12.

(3) *Special transition rule for facilities placed in service before January 1, 2025*. Solely for purposes of the apprenticeship requirements of section 45(b)(8) and §1.45-8, taxpayers that place a qualified facility in service before January 1, 2025, must satisfy the apprenticeship requirements with respect to construction of the facility that occurs 90 days after June 25, 2024.

(c) *Applicability date*. This section applies to qualified facilities for clean fuel production placed in service in taxable years ending after June 25, 2024, and the construction of which begins after June 25, 2024. Taxpayers may apply this section to qualified facilities for clean fuel production placed in service in taxable years ending on or before June 25, 2024, and qualified facilities for clean fuel production placed in service in taxable years ending after June 25, 2024, the construction of which begins before June 25, 2024, provided that taxpayers follow this section in its entirety and in a consistent manner.

Par. 10. Sections 1.48C-1 through 1.48C-3 are added to read as follows:

§§1.48C-1 - 1.48C-2 [Reserved]

§1.48C-3 Rules relating to the increased credit amount for prevailing wage and apprenticeship.

(a) *In general*. If any qualifying advanced energy project (as defined in section 48C(c)(1)(A)) satisfies the prevailing wage requirements of section 45(b)(7) and §1.45-7, the apprenticeship requirements of section 45(b)(8) and §1.45-8, and the recordkeeping and reporting requirements of §1.45-12, with respect to the re-equipping, expansion, or establishment of a qualifying advanced energy project within the meaning of section 48C, the qualifying advanced energy project credit determined under

section 48C(a) for any taxable year with respect to credits allocated pursuant to section 48C(e) is an amount equal to 30 percent of the qualified investment for the taxable year. For purposes of this section, the term re-equipping, expansion, or establishment means those activities described in §§1.45-7(d)(3) and 1.45-8(g)(1) that are performed with respect to a qualifying advanced energy project within the meaning of section 48C before such project is placed in service.

(b) *Applicability date*. This section applies to qualifying advanced energy projects placed in service in taxable years ending after June 25, 2024, and the re-equipping, expansion, or establishment of which begins after June 25, 2024. Taxpayers may apply this section to qualifying advanced energy projects placed in service in taxable years ending on or before June 25, 2024, and qualifying advanced energy projects placed in service in taxable years ending after June 25, 2024, the re-equipping, expansion, or establishment of which begins before June 25, 2024, provided that taxpayers follow this section in its entirety and in a consistent manner.

Par. 11. Sections 1.179D-1 through 1.179D-3 are added to read as follows:

§§1.179D-1 - 1.179D-2 [Reserved]

§1.179D-3 Rules relating to the increased deduction for prevailing wage and apprenticeship.

(a) In general. If any energy efficient commercial building property (as defined in section 179D(c)(1)), energy efficient building retrofit property (as defined in section 179D(f)(3)), or property installed pursuant to a qualified retrofit plan (as defined in section 179D(f)(2)) satisfies the requirements in paragraph (b) of this section, the applicable dollar value for determining the maximum amount of the deduction determined under section 179D(b)(2) is the increased amount described in section 179D(b)(3)(A). For purposes of this section, installation means those activities described in §§1.45-7(d)(3) and 1.45-8(g)(1) that are performed with respect to energy efficient commercial building property, energy efficient building retrofit property, or property installed pursuant to a qualified retrofit plan within the meaning of section 179D before such property is placed in service.

(b) *Certain energy efficient commercial building property requirements*. Energy efficient commercial building property, energy efficient building retrofit property, or property installed pursuant to a qualified retrofit plan satisfies the requirements of this paragraph (b) if it is one of the following—

(1) Property the installation of which began prior to January 29, 2023; or

(2) Property that meets the prevailing wage requirements of section 45(b)(7) of the Code and §1.45-7, the apprenticeship requirements of section 45(b)(8) of the Code and §1.45-8, and the recordkeeping and reporting requirements of §1.45-12, all with respect to the installation of any property.

(c) *Applicability date*. This section applies to energy efficient commercial building property, energy efficient building retrofit property, or property installed pursuant to a qualified retrofit plan installed in taxable years ending after June 25, 2024, and the installation of which begins after June 25, 2024. Taxpayers may apply this section to energy efficient commercial building property, energy efficient building retrofit property, or property installed pursuant to a qualified retrofit plan installed in taxable years ending on or before June 25, 2024, and energy efficient commercial building property, energy efficient building retrofit property, or property installed pursuant to a qualified retrofit plan installed in taxable years ending after June 25, 2024, the installation of which begins before June 25, 2024, provided that taxpayers follow this section in its entirety and in a consistent manner.

Douglas W. O'Donnell,
Deputy Commissioner.

Approved: June 9, 2024

Aviva R. Aron-Dine,
Acting Assistant Secretary of the Treasury (*Tax Policy*).

(Filed by the Office of the Federal Register June 18, 2024, 8:45 a.m., and published in the issue of the Federal Register for June 25, 2024, 89 FR 53184)

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26 CFR 1.430(h)(3)-2

T.D. 10005

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Plan-Specific Substitute Mortality Tables for Determining Present Value

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document sets forth final regulations that update the requirements that a plan sponsor of a single-employer defined benefit plan must meet to obtain IRS approval to use mortality tables specific to the plan in calculating present value for minimum funding purposes (as a substitute for the generally applicable mortality tables). These regulations affect participants in, and beneficiaries of, certain retirement plans and employers maintaining those plans.

DATES: *Effective date:* These regulations are effective July 31, 2024.

Applicability date: These regulations apply for plan years beginning on or after January 1, 2025.

FOR FURTHER INFORMATION CONTACT: Arslan Malik or Linda S. F. Marshall, Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes) at (202) 317-6700 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 412 of the Internal Revenue Code (Code) prescribes minimum funding requirements for defined benefit pension plans. Section 430 specifies the minimum funding requirements that apply generally

to defined benefit plans that are single-employer plans (that is, not multiemployer plans).[1] For a plan subject to section 430, section 430(a) defines the minimum required contribution for a plan year by reference to the plan's funding target for the plan year. Under section 430(d)(1), a plan's funding target for a plan year generally is the present value of all benefits accrued or earned under the plan as of the first day of that plan year.

Section 430(h)(3) provides rules regarding the mortality tables to be used under section 430. Under section 430(h)(3)(A), except as provided in section 430(h)(3)(C) or (D), the Secretary is to prescribe by regulation mortality tables to be used in determining any present value or making any computation under section 430. Section 430(h)(3)(C) prescribes rules for a plan sponsor's use of substitute mortality tables reflecting the specific mortality experience of a plan's population instead of using the generally applicable mortality tables. Under section 430(h)(3)(C), the plan sponsor may request the Secretary's approval to use plan-specific substitute mortality tables that meet requirements specified in section 430(h)(3)(C)(iii). If the Secretary determines that the proposed tables meet the statutory standards and approves the request, the substitute mortality tables are used to determine present values and make computations under section 430 during the period of consecutive plan years (not to exceed 10) specified in the request.

Under section 430(h)(3)(C)(iii), a substitute mortality table may be used for a plan only if: (1) the plan has a sufficient number of plan participants and has been maintained for a sufficient period of time to have credible mortality information necessary to create a substitute mortality table; and (2) the table reflects the actual mortality experience of the plan's participants and projected trends in general mortality experience. Except as provided by the Secretary, a plan sponsor may not use substitute mortality tables for any plan unless substitute mortality tables are established and used for each plan maintained by the plan sponsor or a member of its controlled group.

Final regulations (TD 9826) under section 430(h)(3) were published in the **Federal Register** on October 5, 2017 (82 FR 46388). The final regulations issued in 2017 include rules regarding generally applicable mortality tables under section 430(h)(3)(A), which are set forth in §1.430(h)(3)-1, as well as rules regarding substitute mortality tables under section 430(h)(3)(C), which are set forth in §1.430(h)(3)-2. Section 1.430(h)(3)-2(d)(2) provides that substitute mortality tables must be based on the plan's mortality experience during an experience study period that consists of 2, 3, 4, or 5 consecutive 12-month periods. In conjunction with the 2017 issuance of §1.430(h)(3)-2, the Department of the Treasury (Treasury Department) and the IRS issued Rev. Proc. 2017-55, 2017-43 IRB 373, which sets forth the procedure by which a plan sponsor of a defined benefit plan may request and obtain approval for the use of plan-specific substitute mortality tables.

Beginning in 2020 and extending into the first part of 2023, for many defined benefit pension plans, the mortality experience of the plan participants was significantly higher than expected due to the COVID-19 pandemic. The Treasury Department and the IRS are concerned that, if a plan sponsor applied for approval of plan-specific substitute mortality tables using an experience study period that reflects the actual mortality experience for the plan's population during those years, then unless there is a change in the rules that are used for generating those tables, the resulting plan-specific substitute mortality tables would overstate the expected future mortality for the plan's population. This is because §1.430(h)(3)-2(d)(4)(i) provides that substitute mortality tables are constructed using a mortality ratio calculated for the plan's population, which is determined by dividing the amounts-weighted number of actual deaths for plan participants during the experience study period by the amounts-weighted number of expected deaths for those participants under the generally applicable mortality tables. In the absence of any changes to the rules and procedures for generating plan-specific substitute mortality tables, a mortality ratio developed using an experience study period that includes the period in which the COVID-19 pandemic occurred (COVID-19 pandemic period) will likely be unusually high, as the numerator of the mortality ratio will reflect the actual number of deaths for the plan population during this period, while the denominator of that ratio will be based on the expected number of deaths from the generally applicable mortality tables (which reflect only a small fraction of the significant short-term increase in mortality rates that occurred during the COVID-19 pandemic period). The Treasury Department and the IRS are concerned that if a substitute mortality table constructed using that mortality ratio is used for a plan's actuarial valuation, then the plan's liabilities will be understated.

To address this concern, proposed regulations that provide rules regarding the use of mortality experience data for the COVID-19 pandemic period in the construction of substitute mortality tables were published in the **Federal Register** on October 20, 2023 (88 FR 72409) (the proposed regulations). On the same date that the proposed regulations were issued, the Treasury Department and the IRS issued final regulations amending §1.430(h)(3)-1 to update the generally applicable mortality tables under section 430(h)(3)(A) (88 FR 72357) (2023 final mortality regulations).

Under §1.430(h)(3)-2(c)(6)(ii)(E), approval to use a previously approved substitute mortality table terminates in conjunction with the replacement of the generally applicable mortality tables under section 430(h)(3)(A) and §1.430(h)(3)-1 as of the date specified in guidance published in the Internal Revenue Bulletin. The preamble to the 2023 final mortality regulations indicated that the Treasury Department and the IRS will not require that the use of any previously approved plan-specific substitute mortality tables be

[1] Section 302 of the Employee Retirement Income Security Act of 1974, Public Law No. 93-406, 88 Stat. 829 (1974), as amended (ERISA), sets forth funding rules that are parallel to those in section 412 of the Code, and section 303 of ERISA sets forth additional funding rules for defined benefit plans (other than multiemployer plans) that are parallel to those in section 430 of the Code. Pursuant to section 101 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App., as amended, the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these regulations for purposes of ERISA, as well as the Code. Thus, these regulations issued under section 430 of the Code also apply for purposes of section 303 of ERISA.

terminated in conjunction with the replacement of the generally applicable mortality tables until amendments to the substitute mortality regulations are finalized and an updated revenue procedure that reflects those final regulations is issued.

Four comments on the proposed regulations were received. No commenters requested to speak at a public hearing. The Treasury Department and IRS considered the comments that were received and are finalizing the proposed regulations with certain revisions, as explained in the following summary of comments and explanation of revisions. In addition, the Treasury Department and IRS are issuing Rev. Proc. 2024-32, 2024-34 IRB __, which updates the procedures set forth in Rev. Proc. 2017-55 to reflect the amendments to §1.430(h)(3)-2 made by this Treasury decision.

Summary of Comments and Explanation of Revisions

These regulations provide rules regarding the use of mortality experience data for the COVID-19 pandemic period that supplement the methodology for developing substitute mortality tables provided in §1.430(h)(3)-2. These rules have the same structure as the rules that were included in the proposed regulations (under which the expected probability of death must be adjusted to reflect the generally higher mortality that occurred during the COVID-19 pandemic period) but eliminate the adjustment for 2023 and provide for a different adjustment for 2022.

To develop a mortality ratio that is more accurately predictive of future mortality experience for a plan population, these regulations provide that the expected deaths for the plan population used in determining the denominator in the mortality ratio are calculated by adjusting the mortality rates in the generally applicable mortality tables. Specifically, the regulations provide that, for each 12-month period that is included in the experience study period and that begins after 2019 and before 2023, the expected mortality rate for an individual is determined by multiplying the expected mortality rate for that individual from the standard mortality tables by an adjustment factor.

The proposed regulations provided for an adjustment factor for each 12-month period that is included in the experience study period and that began after 2019 and before 2024. The proposed adjustment factor for each of those years approximated the ratio (as reported by the National Center for Health Statistics, which is part of the Centers for Disease Control and Prevention) of (1) the actual number of deaths for the general population for the year to (2) the expected number of deaths for the general population for that year.[2] Under the proposed regulations, the adjustment factor for a 12-month period beginning in 2020 or 2021 was 1.15, for a 12-month period beginning in 2022 was 1.10, and for a 12-month period beginning in 2023 was 1.05.

The Treasury Department and IRS received four comments regarding the adjustment factors set forth in the proposed regulations. The four commenters stated that a single adjustment factor for each year inadequately captured the age, gender, and regional variances in excess mortality during the COVID-19 pandemic. In addition, three commenters suggested that the adjustment factor for 2023 be eliminated (because preliminary data from 2023 showed a decline in excess mortality such that no adjustment may be needed for 2023), and that the adjustment factor for 2022 be reduced. After considering these comments and the most recent mortality data available, the Treasury Department and IRS are eliminating the adjustment for 2023 and reducing the adjustment for 2022. However, the Treasury Department and IRS concluded that providing adjustment factors based on age would be inconsistent with the overall model for developing substitute mortality tables, and that providing separate adjustment factors based on gender or geography would add a degree of complexity that would outweigh any potential increase in precision that these adjustment factors may provide.

The four commenters also suggested that, as an alternative to applying the adjustment factors, plan sponsors be permitted to construct substitute mortality tables without taking into account any mortality experience from the COVID-19 pandemic period. The Treasury Department and IRS have considered this approach but rejected it because providing for such an approach would mean that the mortality experience used to construct the substitute mortality table could be so out of date that it would be less reliable in predicting future mortality for the plan population. For example, if a plan sponsor was applying for approval of a substitute mortality table in 2024 using calendar year mortality experience without taking into account mortality experience for 2020, 2021, and 2022, the most recent mortality experience would be from 2019, which is more than 4 years prior to the application for approval.

Under a transition rule in the proposed regulations, substitute mortality tables that were previously approved for use for a plan year beginning in 2025 would be treated as satisfying the rules for developing substitute mortality tables that apply for that plan year. This transition rule, which is included in these regulations, addresses plans with previously approved substitute mortality tables that were based on a mortality experience study that included data from the COVID-19 pandemic period (and therefore do not satisfy the requirements specified in these regulations).

One commenter requested clarification as to the extent to which other previously approved substitute mortality tables may continue to be used for the remainder of their approval period even if that approval period extends beyond 2025. The Treasury Department and IRS considered this comment and decided to continue to allow the use of previously approved substitute mortality tables that were developed based on an experience study that did not include data from the COVID-19 pandemic period for the original duration of the approval, provided that there has not been a significant change in plan cover-

[2] *See* Excess Deaths Associated with Covid-19 at https://www.cdc.gov/nchs/nvss/vsrr/covid19/excess_deaths.htm

age, as described in the first sentence of §1.430(h)(3)-2(c)(6)(iii)(A).[3] Thus, if the experience study for a substitute mortality table that has been approved for use for a plan year beginning in 2025 includes mortality data from 2020, 2021, or 2022 (or the number of individuals covered by the substitute mortality table is less than 80 percent or more than 120 percent of the average number of individuals in that population over the years covered by the experience study), then the substitute mortality table may be used for a plan year beginning in 2025 (but may not be used for later years).

These regulations also include a transition rule that applies to requests for approval to use substitute mortality tables for a plan year beginning in 2025. Under that rule, a request for approval to use substitute mortality tables for that plan year will be considered timely if it is submitted on or before October 31, 2024, provided that the plan sponsor agrees to a 90-day extension under §1.430(h)(3)-2(b)(2)(iv) of the 180-day review period under §1.430(h)(3)-2(b)(2)(iii).

Applicability Date

These regulations apply for plan years beginning on or after January 1, 2025.

Statement of Availability of IRS Documents

IRS Revenue Rulings, Revenue Procedures, and Notices cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at www.irs.gov.

Special Analyses

I. *Regulatory Planning and Review*

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

II. *Regulatory Flexibility Act*

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. Small employers generally cannot use plan-specific substitute mortality tables because their defined benefit pension plans do not have credible mortality experience (which is defined as a minimum number of deaths during the experience study period) as is required to use substitute mortality tables. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required.

Pursuant to section 7805(f), the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business, and no comments were received.

III. *Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. These regulations do not include any rule that include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

IV. *Executive Order 13132: Federalism*

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. These regulations do not include rules that have federalism implications, impose substantial direct compliance costs on State and local governments, or preempt State law within the meaning of the Executive order.

V. *Congressional Review Act*

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

Drafting Information

The principal authors of these regulations are Arslan Malik and Linda S. F. Marshall of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from Treasury and the IRS participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, the Treasury Department and the IRS amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.430(h)(3)-2 is amended by:

a. In paragraph (a), removing the language "§ 601.601(d)(2)(ii)(b)" and add-

[3] The termination of the use of previously approved substitute mortality tables is described in section 12 of Rev. Proc. 2024-32. Under that revenue procedure, if there has been a significant change in plan coverage, a previously approved substitute mortality table cannot be used for a plan year that begins on or after January 1, 2026, even if the plan actuary certifies that the table continues to be accurately predictive of future mortality of the plan population.

ing the language "§ 601.601(d)(2)" in its place;

b. In paragraph (d)(2)(ii)(B), removing the language "January 1, 2019 year is" and adding the language "January 1, 2019 is" in its place;

c. Revising paragraphs (d)(4)(iii) and (g).

The revisions read as follows:

§1.430(h)(3)-2 Plan-specific substitute mortality tables used to determine present value.

* * * * *

(d) * * *

(4) * * *

(iii) *Standard mortality table*—(A) *Projection of base table*. Except as otherwise provided in this paragraph (d)(4)(iii), the standard mortality table for a year is the mortality table determined by applying cumulative mortality improvement factors determined under §1.430(h)(3)-1(b)(2)(ii) to the base mortality table under §1.430(h)(3)-1(d) for the period beginning with the base year for that mortality table and ending in the base year for the base substitute mortality table determined under paragraph (c)(3)(ii) of this section. For purposes of the preceding sentence, the cumulative mortality improvement factors are determined using the mortality improvement rates described in §1.430(h)(3)-1(b)(1)(iii) that apply for the calendar year during which the plan sponsor submits the request for approval to use substitute mortality tables.

(B) *Adjustments to standard mortality table for 2020, 2021, and 2022*. If a 12-month period in the experience study period begins after December 31, 2019, and before January 1, 2023, the probability of death for an individual under paragraph (d)(4)(ii)(A)(*2*)(*i*) of this section is determined as the mortality rate for the individual's age (at the beginning of the year) and gender from the standard mortality table determined under paragraph (d)(4)(iii)(A) of this section multiplied by the adjustment factor in Table 1 for the calendar year that includes the first day of the 12-month period. For example, for an experience study period that begins April 1, 2019, and ends March 31, 2023, the probability of death for the year beginning April 1, 2022, for a male annuitant who is age 65 as of that date is the probability of death from the base mortality table (0.01087), multiplied by the cumulative mortality improvement factor for the period from 2012 to 2021 (1.02292) and by the adjustment factor for the 2022 calendar year of 1.075, resulting in a probability of death of 0.01195.

Table 1 to paragraph (d)(4)(iii)(B):

Calendar Year	*Adjustment Factor*
2020	1.15
2021	1.15
2022	1.075

(C) *Selection of base table.* If the population consists solely of annuitants, the annuitant base mortality table set forth in § 1.430(h)(3)-1(d) must be used for purposes of paragraph (d)(4)(iii)(A) of this section. If the population consists solely of nonannuitants, the nonannuitant base mortality table set forth in § 1.430(h)(3)-1(d) must be used for that purpose. If the population includes both annuitants and nonannuitants, a combination of the annuitant and nonannuitant base tables set forth in § 1.430(h)(3)-1(d) must be used for that purpose. The combined table is constructed using the weighting factors for small plans that are set forth in § 1.430(h)(3)-1(d). The weighting factors are applied to develop the combined table using the following equation: Combined mortality rate = [nonannuitant rate * (1 − weighting factor)] + [annuitant rate * weighting factor].

* * * * *

(g) *Applicability date*—(1) *General rule*. This section applies for plan years beginning on or after January 1, 2025. Except as provided in paragraph (g)(2) or (3) of this section, the substitute mortality table used for a plan for such a plan year must comply with the rules of paragraphs (a) through (f) of this section.

(2) *Transition rule for previously approved substitute mortality tables*. If a plan sponsor has received approval from the Commissioner to use substitute mortality tables for a plan year beginning in 2025, then the plan's base substitute mortality tables that were approved are treated as satisfying the requirements of paragraph (d) or (e) of this section, as applicable, for that plan year.

(3) *Transition rule for requests for approval to use substitute mortality tables.* A written request described in paragraph (b)(1)(i) of this section to use substitute mortality tables for a plan year that begins during 2025 does not fail to satisfy the timing requirement of paragraph (b)(1)(ii) of this section if it is submitted no later than October 31, 2024, provided that the plan sponsor agrees to a 90-day extension of the 180-day review period in accordance with paragraph (b)(2)(iv) of this section.

Douglas W. O'Donnell,
Deputy Commissioner.

Approved: July 8, 2024

Aviva R. Aron-Dine,
Acting Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register July 30, 2024, 8:45 a.m., and published in the issue of the Federal Register for July 31, 2024, 89 FR 61343)

Part III

Required Procedures to Claim a Section 45Q Credit for Utilization of Carbon Oxide

Notice 2024-60

SECTION 1. PURPOSE

This notice describes the information that must be included in a written report described in § 1.45Q-4(c)(2) of the Income Tax Regulations (LCA Report) and provides the procedures a taxpayer must follow to submit the LCA Report and required supporting information to the Internal Revenue Service (IRS) and the Department of Energy (DOE) for review under § 1.45Q-4(c)(5) before any credit for carbon oxide sequestration allowed under § 45Q(a)(2)(B)(ii) or (a)(4)(B)(ii) of the Internal Revenue Code (Code) is determined for qualified carbon oxide utilized by the taxpayer in the manner described in § 45Q(f)(5) (§ 45Q utilization credit).[1] As required by § 1.45Q-4(c)(6), the IRS must approve the lifecycle analysis (LCA) of greenhouse gas emissions (as defined in § 1.45Q-4(c)(1)) documented in the LCA Report with respect to carbon capture equipment placed in service on or after February 9, 2018, before any § 45Q utilization credit otherwise satisfying the applicable requirements of § 45Q and §§ 1.45Q-1, 1.45Q-2, and 1.45Q-4 is determined. Accordingly, the IRS must approve the taxpayer's LCA before the taxpayer may claim any § 45Q utilization credit determined with respect to a taxpayer on any federal income tax return for a taxable year beginning on or after January 13, 2021 (that is, the taxable years to which § 1.45Q-4 applies).[2]

The Department of the Treasury (Treasury Department) and the IRS anticipate issuing proposed regulations to update §§ 1.45Q-1 through 1.45Q-4 for amendments made by § 13104 of Public Law 117–169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA), as well as to adopt certain aspects of the guidance provided by this notice. The Treasury Department and the IRS published final regulations (REG-101607-23) in the *Federal Register* (89 FR 17546) under §§ 1.6417-1 through 1.6417-6 with respect to any § 45Q utilization credit determined with respect to a taxable year beginning after December 31, 2022, as an applicable credit for purposes of making an elective payment election under § 6417. Additionally, on June 21, 2023, the Treasury Department and the IRS published a notice of proposed rulemaking (REG-101610-23) in the *Federal Register* (88 FR 40496), with respect to any § 45Q utilization credit determined with respect to a taxable year beginning after December 31, 2022, as an eligible credit for purposes of making an election under § 6418.[3]

SECTION 2. BACKGROUND

.01 Congress enacted the credit for the sequestration of carbon dioxide under § 45Q in § 115 of the Energy Improvement and Extension Act of 2008, Public Law 110-343, Div. B, Title I, 122 Stat. 3765, 3829 (October 3, 2008). Congress amended § 45Q several times thereafter, including significantly by § 41119 of the Bipartisan Budget Act of 2018, Public Law 115-123, Div. D, Title II, 132 Stat. 64, 162 (February 9, 2018), to apply to all carbon oxides, and most recently on August 16, 2022, by § 13104 of the IRA, 136 Stat. 1924.

.02 Section 45Q(a)(2)(B)(ii) allows a § 45Q utilization credit of $10 per metric ton of qualified carbon oxide captured by the taxpayer using carbon capture equipment that is originally placed in service at a qualified facility before February 9, 2018, and utilized by the taxpayer in a manner described in § 45Q(f)(5).

.03 Section 45Q(a)(4)(B)(ii) allows a § 45Q utilization credit of the applicable dollar amount (as determined under § 45Q(b)(1)) per metric ton of qualified carbon oxide captured by the taxpayer using carbon capture equipment that is originally placed in service at a qualified facility on or after February 9, 2018, during the 12-year period beginning on the date the equipment was originally placed in service, and utilized by the taxpayer in a manner described in § 45Q(f)(5).

.04 Section 45Q(f)(5)(A) provides that "utilization of qualified carbon oxide" means (i) the fixation of such qualified carbon oxide through photosynthesis or chemosynthesis, such as through the growing of algae or bacteria; (ii) the chemical conversion of such qualified carbon oxide to a material or chemical compound in which such qualified carbon oxide is securely stored; or (iii) the use of such qualified carbon oxide for any other purpose for which a commercial market exists (with the exception of use as a tertiary injectant in a qualified enhanced oil or natural gas recovery project), as determined by the Secretary of the Treasury or her delegate (Secretary).

.05 Section 45Q(f)(5)(B)(i) provides a methodology to determine the amount of qualified carbon oxide utilized by the taxpayer. Such amount is equal to the metric tons of qualified carbon oxide that the taxpayer demonstrates, based upon an LCA of greenhouse gas emissions and subject to such requirements as the Secretary, in consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency (EPA), determines appropriate, were (i) captured and permanently isolated from the atmosphere,

[1] Unless otherwise specified, all "Section" or "§" references are to sections of the Code or the Income Tax Regulations (26 CFR part 1).

[2] Pursuant to § 1.45Q-4(e), taxpayers may choose to apply the rules in § 1.45Q-4 for taxable years beginning on or after January 1, 2018, provided the taxpayer applies §§ 1.45Q-1, 1.45Q-2, 1.45Q-3, 1.45Q-4, and 1.45Q-5 in their entirety and in a consistent manner. Alternatively, taxpayers may choose to rely on the rules in § 1.45Q-4 as contained in the notice of proposed rulemaking (REG-112339-19) published in the *Federal Register* (85 FR 34050) on June 20, 2020 (2020 proposed regulations), for taxable years beginning on or after February 9, 2018, and before January 15, 2021, provided the taxpayer follows proposed §§ 1.45Q-1, 1.45Q-2, 1.45Q-3, 1.45Q-4, and 1.45Q-5 of the 2020 proposed regulations in their entirety and in a consistent manner.

[3] Pursuant to § 13801(g) of the IRA, §§ 6417 and 6418 apply to taxable years beginning after December 31, 2022. See 136 Stat. at 2013.

or (ii) displaced from being emitted into the atmosphere, through use of a process described in § 45Q(f)(5)(A).

.06 Section 45Q(f)(5)(B)(ii) provides that for purposes of determining the amount of qualified carbon oxide utilized by the taxpayer for purposes of § 45Q(a)(2)(B)(ii) or (a)(4)(B)(ii), the term "lifecycle greenhouse gas emissions" has the same meaning given such term under § 211(o)(1)(H) of the Clean Air Act (42 U.S.C. 7545(o)(1)(H)), as in effect on February 9, 2018, except that "product" is substituted for "fuel" each place it appears in 42 U.S.C. 7545(o)(1)(H).

.07 On June 2, 2020, the Treasury Department and the IRS published a notice of proposed rulemaking under § 45Q (REG-112339-19, 85 FR 34050) (proposed regulations). After consideration of all comments received in response to the proposed regulations, on January 15, 2021, the Treasury Department and the IRS published final regulations under § 45Q in the *Federal Register* (T.D. 9944; 86 FR 4728).

.08 For purposes of § 45Q(a)(2)(B)(ii) or (a)(4)(B)(ii) and § 1.45Q-1(b)(ii) and (c)(2)(ii), § 1.45Q-4(b)(2) provides that the amount of qualified carbon oxide determined to be utilized by the taxpayer for purposes of computing the § 45Q utilization credit cannot exceed the amount of qualified carbon oxide measured at the source of capture.

.09 Section 1.45Q-4(c)(1) provides that for purposes of determining the amount of qualified carbon oxide utilized by the taxpayer, the term "lifecycle greenhouse gas emissions" means the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes)[4] related to the full product life cycle, including all stages of product and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished product to the ultimate consumer, with the mass values for all greenhouse gases adjusted to account for their relative global warming potential according to Table A-1 of 40 CFR Part 98 subpart A. Such emissions are expressed in carbon dioxide equivalent (CO_2-e).

.10 Section 1.45Q-4(c)(2) provides that the taxpayer verifies the amount of qualified carbon oxide utilized through an LCA. An LCA must demonstrate that the proposed system, inclusive of the taxpayer's process, results in a net reduction of CO_2-e compared to a comparison system.

SECTION 3. LCA REPORT STANDARDS AND REQUIREMENTS

.01 *LCA Report*. Section 1.45Q-4(c)(2) requires that the results of a taxpayer's LCA be documented in a written LCA Report. In the case of a taxpayer that owns multiple qualified facilities for which it wishes to claim a § 45Q utilization credit, a separate LCA Report is required for each qualified facility.

.02 *LCA Report Standards*. Section 1.45Q-4(c)(3) requires that an LCA Report be prepared in conformity with and contain documentation that conforms with International Organization for Standardization (ISO) 14040:2006*, Environmental management – Life cycle assessment – Principles and framework* and ISO 14044:2006*, Environmental management — Life cycle assessment — Requirements and guidelines*. To ensure conformity with these ISO standards, the LCA Report must be completed in accordance with the most current revision, as of the beginning of the year in which the LCA is submitted, of the DOE's National Energy Technology Laboratory's (NETL) *Carbon Dioxide Utilization (CO2U) Life Cycle Analysis Guidance for the U.S. DOE Office of Fossil Energy and Carbon Management* and *45Q Addendum to the CO2U LCA Guidance Document*: https://www.netl.doe.gov/LCA/CO2U (NETL CO2U LCA Guidance Document) and https://www.netl.doe.gov/LCA/CO2U/45Q (NETL 45Q Addendum).[5] Section 1.45Q-4(c)(3) further provides that an LCA may consist of direct and indirect data in conformity with ISO 14040:2006 and 14044:2006. Direct and indirect data are also generally known within ISO standards as primary and secondary data. For purposes of § 45Q, an LCA must rely upon direct, or primary, data to address the actual operational performance of the taxpayer's system for the taxable year for which the LCA Report is submitted.

.03 *Independent Third-Party Statement*. Section 1.45Q-4(c)(4) provides that an LCA Report must be performed or verified by an independent third party. If an independent third-party review is conducted, then it must include an assessment of an LCA model and supporting data and be performed in accordance with ISO 14071:2014, *Environmental management — Life cycle assessment — Critical review processes and reviewer competencies: Additional requirements and guidelines to ISO 14044:2006*. An LCA Report also must provide a statement documenting the qualifications of the independent third party, including proof of appropriate U.S. or foreign professional license, and an affidavit from the third party stating that it is independent from the taxpayer. If a § 45Q(f)(3)(B) election has been made, then the affidavit must state that the third party is independent from both the electing taxpayer and the credit claimant. In addition, the statement must be made under penalties of perjury.

.04 *LCA Report Cover Page Requirements*. The LCA Report must include a cover page that includes the following information:

(1) Name and location of the facility where the qualified carbon oxide is utilized (utilization facility);

(2) Name and Taxpayer Identification Number (TIN) (for example, Employer Identification Number (EIN)) of the taxpayer claiming the credit based on the LCA Report;

(3) Name and TIN (for example, EIN) of the operator of the utilization facility (if other than the taxpayer);

(4) Taxable year for which the LCA Report is being submitted;

(5) Name, relationship to the taxpayer, mailing address, email address, and phone number of a person whom the IRS can contact regarding the LCA Report. If this person is not an employee of the taxpayer, an IRS Form 2848, *Power of Attorney and Declaration of Representative*, must accompany the LCA Report;

[4] *See* 42 U.S.C. 7545(o)(1)(H) (Clean Air Act).

[5] See the preamble to T.D 9944, 89 FR 4728, 4745.

(6) An attestation that the applicable requirements of § 45Q and §§ 1.45Q-1, 1.45Q-2, and 1.45Q-4 are satisfied. Such attestation must include confirmation of the following:

(a) the carbon oxide for which the § 45Q utilization credit is being claimed is qualified carbon oxide within the meaning of § 45Q(c);

(b) the qualified carbon oxide for which the § 45Q utilization credit is being claimed is captured by a qualified facility within the meaning of § 45Q(d);

(c) the qualified carbon oxide for which the § 45Q utilization credit is being claimed was captured in the United States (within the meaning of § 638(1)), or a U.S. territory (within the meaning of the term "possession" set forth in § 638(2));

(d) in the case of a resubmission of an LCA Approval Request under section 6.02 of this notice, that there has been no Material Change (within the meaning of section 6.04 of this notice) since the prior LCA was approved; and

(7) A declaration, applicable to the LCA Approval Request (including the LCA and the cover page information required by section 3.04 of this notice) signed by a person currently authorized to bind the taxpayer in these matters, in the following form:

> "Under penalties of perjury, I declare that I have examined the information contained in this affirmative statement and the documents that substantiate this affirmative statement, and to the best of my knowledge and belief, it is true, correct, and complete."

SECTION 4. LCA APPROVAL REQUEST PROCEDURES

.01 *Overview*. A taxpayer satisfies the procedural requirements of § 1.45Q-4(c)(5) by submitting an LCA Approval Request to the IRS and a duplicate to the DOE for its technical review. An LCA Approval Request must include:

(1) An LCA Report meeting all applicable requirements of section 3 of this notice;

(2) Supplemental information that supports the LCA Report data (as described in section 4.02 of this notice);

(3) An Independent Third-Party Statement (as defined in section 3.03 of this notice); and

(4) If an independent third party has performed the LCA analysis and prepared the LCA Report, an LCA model.

.02 *Supplemental Information*. For purposes of section 4.01(2) of this notice, the supplemental information that supports the LCA Report data must contain all necessary details supporting the LCA Report data, calculations, and conclusions. For example, supplemental information may include (as applicable) the proposed system's production and maintenance schedules, periods of other stoppages and interruptions, the actual throughput while in production, changes in the supplied input energy and materials and ingredients (such as chemical composition, concentration, and system-poisoning impurities), and deviations from the actual process technology from the description in the LCA Report. Additionally, a taxpayer must disclose (to the IRS only) whether any previously-filed claim for the § 45Q utilization credit was adjusted and why it was adjusted.

.03 *Submission of the LCA Approval Request*. The IRS and the DOE will accept LCA Approval Requests submitted by taxpayers on a rolling basis. A taxpayer must submit a LCA Approval Request to the IRS and a copy to the DOE using the procedures provided in this section 4.

(1) *Submissions to the IRS*. Taxpayers must mail the LCA Approval Request (including the model if the LCA Report was not verified by an independent third party) on a USB thumb drive, to:

Internal Revenue Service
Office of Associate Chief Counsel (PSI)
1111 Constitution Ave, N.W.
Branch 6 (CC:PSI:6), Room 5114
Washington, DC 20224

Taxpayers also must fax or e-fax a complete LCA Approval Request to the IRS at (844) 255-4817.

(2) *Submissions to the DOE*. When a taxpayer submits an LCA Approval Request to the IRS, the taxpayer also must send an email to the DOE at LCA45Q@hq.doe.gov indicating the taxpayer's intent to submit an LCA for DOE technical review. The DOE will respond with instructions for submitting a copy of the LCA Approval Request and any subsequent information directly to the DOE.

SECTION 5. LCA APPROVAL REQUEST REVIEW

.01 *Overview of LCA Approval Request Review*. The IRS will first review the LCA Approval Request for completeness and adequacy of the materials provided. This review is based on (i) the material provided in the LCA Report and (ii) any other materials provided by the taxpayer as required under sections 3 and 4 of this notice. If the IRS finds that the LCA Approval Request is complete, then the IRS will request a technical review by DOE (DOE Technical Review). The LCA Approval Request Review generally will be completed within four (4) months of the date of receipt of a complete LCA Approval Request (Review Period). If the LCA Approval Request is incomplete, or either the DOE or the IRS need to request any additional or clarifying information from the taxpayer, then the LCA Approval Request Review may not be completed within the Review Period.

.02 *Incomplete LCA Approval Request*.

(1) If any required information is missing from an LCA Approval Request, then the IRS will contact the taxpayer directly by fax, e-fax, or phone. The taxpayer will have forty-five (45) calendar days from the date of this request by the IRS to provide the required information to both the IRS and DOE.

(2) Taxpayers should submit any supplemental information requested by the IRS by fax or e-fax at (844) 255-4817.

(3) If the taxpayer does not furnish the supplemental information to the IRS and DOE within forty-five (45) calendar days from the date of the IRS request, then the IRS generally will deny the taxpayer's LCA Approval Request in writing. The IRS may grant an extension to the 45-day response period on a case-by-case basis if a taxpayer experienced a force majeure event. The taxpayer must request an extension in writing before the end of the 45-day period and provide an explanation of why an extension is necessary.

(4) Taxpayers should also submit any supplemental information requested by the IRS to the DOE at LCA45Q@hq.doe.gov.

.03 *DOE Technical Review Process*. Section 1.45Q-4(c)(6) provides that an LCA Report will be subject to a DOE Technical Review. The DOE Technical Review may be either a Conformance Review or a Critical Review.

(1) *Conformance Review*.

(a) *Defined*. A Conformance Review is a type of DOE Technical Review conducted to ensure that an LCA conforms to applicable ISO 14040:2006 and ISO 14044:2006 standards and the latest revision, as of the beginning of the year in which the LCA is submitted, of *NETL's Carbon Dioxide Utilization (CO2U) Life Cycle Analysis Guidance for the U.S. DOE Office of Fossil Energy and Carbon Management* and *45Q Addendum to the CO2U LCA Guidance Document*.

(b) *Procedure*. The DOE will perform a Conformance Review if a taxpayer's LCA Approval Request includes an LCA Report that has been verified by an independent third party as adhering to applicable standards and best practices. Upon performing a Conformance Review, the DOE may determine that a Critical Review is warranted.

(2) *Critical Review*.

(a) *Defined*. A Critical Review is a type of DOE Technical Review conducted to ensure that an LCA Approval Request conforms to applicable ISO 14040:2006 and ISO 14044:2006 standards and the *NETL's Carbon Dioxide Utilization (CO2U) Life Cycle Analysis Guidance for the U.S. DOE Office of Fossil Energy and Carbon Management* and *45Q Addendum to the CO2U LCA Guidance Document*. The scope of the Critical Review is expanded beyond the scope of the Conformance Review to include a detailed technical assessment of the LCA model and supporting data.

(b) *Procedure*. The DOE will perform a Critical Review if a taxpayer's LCA Approval Request includes an LCA Report that has not been verified by an independent third party. Additionally, the DOE may perform a Critical Review if the DOE determines that further review is warranted after performing a Conformance Review.

(3) *DOE Requests for Supplemental Information*. Upon receipt of an LCA Approval Request, the DOE will review the LCA Approval Request for completeness and identify any questions for the taxpayer. The DOE will contact the taxpayer if additional or clarifying information is needed to complete the Technical Review and will send questions directly to the taxpayer by email to expedite the review process. In response to the DOE's request for additional information, taxpayers must provide all supplemental information to both the DOE and the IRS within forty-five (45) calendar days from the date of the DOE request (in the manner described in section 4 of this notice). If the taxpayer does not furnish the supplemental information to the DOE and to the IRS (in the manner described in section 4 of this notice) within forty-five (45) calendar days from the date of the DOE request, then the IRS generally will deny the taxpayer's LCA Approval Request in writing. The IRS may grant an extension to the 45-day response period on a case-by-case basis if a taxpayer experienced a force majeure event. The taxpayer must request an extension in writing before the end of the 45-day period and provide an explanation of why an extension is necessary. The DOE will not otherwise communicate with taxpayers about the status of a pending LCA Approval Request.

(4) Upon completion of its Technical Review, the DOE will notify the IRS whether it concurs with the results of the Taxpayer's LCA Report.

.04 *IRS Determination* – (1) In General. Section 1.45Q-4(c)(6) provides that the IRS will determine whether to approve the LCA and will notify the taxpayer. The taxpayer must receive approval of the taxpayer's LCA prior to claiming the § 45Q utilization credit on any federal income tax return. The IRS will determine whether to approve a complete LCA based on its review and the results of the DOE Technical Review.

(2) *Effect of LCA Review and Determination*. Review of the LCA is neither an examination nor an inspection of books for purposes of § 7605(b) and will not preclude or impede (under § 7605(b) or any administrative provisions adopted by the IRS) the IRS from later examining a return or inspecting books or records with respect to any taxable year for which the § 45Q utilization credit is claimed. Approval of the LCA does not mean that the IRS has determined that all of the requirements of § 45Q have been satisfied.

.05 *Notification of Approval or Denial of LCA*. The IRS will notify the taxpayer of the approval or denial of the taxpayer's LCA in writing.

.06 *Resubmission after Denial of LCA*.

(1) *Allowance*. If an LCA is denied, and the deficiencies in the LCA can be cured, then the taxpayer may revise the taxpayer's LCA Approval Request and resubmit it to the IRS and DOE (in the manner described in section 4 of this notice).

(2) *Procedures for Resubmission After Denial*. A resubmission under this section 5.06 must state in the cover page of its LCA Report (described in section 3.04 of this notice) that the LCA Approval Request is being resubmitted after a denial by the IRS. The resubmitted LCA Approval Request should explain in detail the reasons why the original LCA Approval Request was denied and how the resubmitted LCA Approval Request differs from the original LCA Approval Request.

.07 *IRS Administrative Review*. If an LCA is denied solely on the basis of the IRS review in section 5.01 of this notice (excluding a denial on the basis of completeness), then the taxpayer will have an opportunity to request an IRS administrative review of that denial.

SECTION 6. REQUIREMENTS FOR REAPPROVAL OF AN APPROVED LCA

.01 *Overview*. Except as provided in sections 6.03 and 6.04 of this notice, a taxpayer may treat an approved LCA as approved for the taxable year for which the LCA Report was submitted and the following two taxable years (three-year approval period). Alternatively, a taxpayer may choose to submit a new LCA Approval Request to the IRS and the DOE (in the manner described in section 4 of this notice) for any taxable year.

.02 *Periodic Resubmissions*. A taxpayer wishing to claim the § 45Q utilization credit after the three-year approval period must submit a new LCA Approval Request to the IRS and the DOE (in the manner described in section 4 of this notice). If the IRS approves this LCA, then a new three-year approval period will

apply (unless the LCA analyzes a period of less than six months or there is a Material Change (as defined in section 6.04(1) of this notice)).

(1) *Example*. X, a calendar year taxpayer, utilizes qualified carbon oxides in 2022 in the manufacture of a product for which a commercial market exists. In 2023, X submits an LCA Approval Request to the IRS and the DOE analyzing X's utilization data for all twelve months of 2022. The IRS approves the LCA in 2023. X claims a § 45Q utilization credit on X's 2022 tax return. X may rely on the LCA to claim a § 45Q utilization credit for 2023 and 2024 provided that it follows the requirements in section 6.04(3) of this notice. If X wishes to claim a § 45Q utilization credit for 2025, it will need to submit a new LCA Approval Request to the IRS and the DOE for 2025.

(2) *Procedures for Periodic Resubmissions*. A resubmission under this section 6.02 must state in its cover report (described in section 3.04 of this notice) that the LCA Approval Request is being resubmitted under section 6.02 of this notice.

.03 *Resubmission after Limited Initial Period*. If a taxpayer submits the taxpayer's initial LCA Approval Request for an LCA that analyzes a period of less than six (6) months, then the taxpayer may treat the approved LCA as approved for the taxable year for which the LCA Report is submitted and the following taxable year (two-year approval period). A taxpayer wishing to claim the § 45Q utilization credit after the two-year approval period must submit a new LCA Approval Request to the IRS and the DOE (in the manner described in section 4 of this notice). If the IRS approves this new LCA, then a new three-year approval period will apply (unless the LCA analyzes a period of less than six months or there is a Material Change (as defined in section 6.04(1) of this notice)).

(1) *Example*. X, a calendar year taxpayer, begins utilizing qualified carbon oxides in August 2022 in the manufacture of a product for which a commercial market exists. In 2023, X submits an LCA Approval Request to the IRS and the DOE analyzing X's utilization data for five months of 2022. The IRS approves the LCA in 2023. X claims a § 45Q utilization credit on X's 2022 tax return. X may rely on the LCA to claim a § 45Q utilization credit for 2023 provided that it follows the requirements in section 6.04(3) of this notice. If X wishes to claim a § 45Q utilization credit for 2024, then it will need to submit a new LCA Approval Request to the IRS and the DOE for 2024. Thereafter, X will be subject to the periodic resubmission requirements in section 6.02 of this notice.

(2) *Procedures for Resubmissions after Limited Initial Period*. A resubmission under this section 6.03 must state in the cover page of its LCA Report (described in section 3.04 of this notice) that the LCA Approval Request is being resubmitted under section 6.03 of this notice.

.04 *Resubmission due to Material Change*.

(1) *Material Change Defined*. A Material Change is any change to the taxpayer's process described in the LCA that reduces the "Life Cycle Displacement Factor" (DF) by an amount greater than 0.05 from the value of that metric from the taxable year in which the original LCA was approved by the IRS (Original DF).

(a) *Life Cycle Displacement Factor*. The value of the DF is a ratio that measures the amount of carbon dioxide equivalents displaced per unit of carbon oxide captured and utilized as defined in the *NETL's 45Q Addendum to the CO2U LCA Guidance Document*. The change in the DF is calculated separately for each of the two subsequent taxable years after the Original DF is determined. The change in the DF is calculated as the difference between the Original DF and the DF for the applicable subsequent taxable year (DF_n). A Material Change occurs if the Original DF exceeds the DF for the applicable subsequent taxable year by an amount greater than 0.05 of the Original DF as shown in the following formula:

$$\text{Original DF} - DF_{n\ \text{(subsequent taxable year 1 or 2)}} > 0.05$$

(b) *Calculation of Displacement Factor in Taxable Years Subsequent to Approval of Original LCA for Determination of Material Change*. The taxpayer must calculate DFs for subsequent taxable years using only the changes that have affected the per unit carbon oxide utilization product direct inputs and outputs (and the associated emissions) for the taxpayer's process described in the proposed system in the original LCA to determine whether there has been a Material Change. This Material Change determination will be subject to review by the IRS and the DOE.

(2) *Procedures for Resubmission due to Material Change*. If a Material Change (as defined in section 6.04(1) of this notice) occurs, then a taxpayer must resubmit the taxpayer's LCA to the IRS and the DOE (in the manner described in section 4 of this notice). The taxpayer must receive approval of the taxpayer's resubmitted LCA from the IRS and DOE before a § 45Q utilization credit may be determined for any additional taxable year on Form 8933, *Carbon Oxide Sequestration Credit*. A resubmission under this section 6.04 must state in the cover page of its LCA Report (described in section 3.04 of this notice) that the LCA is being resubmitted due to a Material Change and explain the Material Change.

(3) *Procedures if no Material Change Exists*. A taxpayer must calculate DFs as provided in section 6.04(1)(b) of this notice to determine whether a Material Change has occurred during each taxable year between required resubmissions to the IRS and the DOE. Based on this annual self-assessment, if the taxpayer finds that no Material Change has occurred, the taxpayer may treat the approved LCA as approved for the remainder of the three-year approval period in section 6.01 of this notice or the two-year approval period in section 6.03 of this notice as long as the taxpayer continues to use the Original DF in that approved LCA for calculating the taxpayer's § 45Q utilization credit. The taxpayer must make an affirmative statement that no Material Change has occurred within the taxable year and append the statement to the Form 8933 on which the § 45Q utilization credit is claimed. The taxpayer must satisfy the recordkeeping requirements of § 6001 and § 1.6001–1 to support the taxpayer's determination that no Material Change has occurred. After review of the affirmative statement, the IRS may contact the taxpayer stating that an updated LCA submission is necessary. The affirmative statement must provide the following information:

(a) The date on which the LCA was previously approved by the IRS;

(b) A statement that the taxpayer has determined that no Material Change (as defined in section 6.04(1) of this notice) has occurred;

(c) A penalty of perjury statement that provides the following:

"Under penalties of perjury, I declare that I have examined the information contained in this affirmative statement and the documents that substantiate this affirmative statement, and to the best of my knowledge and belief, it is true, correct, and complete."

(d) The following additional statement:

> "I further declare that I have authority to sign this document on behalf of the taxpayer."

SECTION 7. APPLICABILITY DATE

This notice applies with respect to LCA Reports submitted on or after **[the date that this notice is published in the Internal Revenue Bulletin]**. Taxpayers that received an approval of an LCA Report submitted before **[the date that this notice is published in the Internal Revenue Bulletin]** may rely on the provisions of section 6 of this notice (including the three-year approval period in section 6.01 of this notice and the two-year approval period in section 6.03 of this notice) if they follow all of the provisions of that section.

SECTION 8. PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control numbers 1545-2132, 1545-0074, and 1545-0123.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information in this notice are in sections 3, 4, 5, and 6 of this notice. This information is required to obtain an approval of an LCA, which is required before a § 45Q utilization credit may be determined for a taxpayer. This information will be used by the IRS and the DOE to verify that the taxpayer is eligible for the § 45Q utilization credit. The collection of information is required to obtain a benefit. The likely respondents are businesses or other for-profit institutions.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by § 6103.

SECTION 9. DRAFTING INFORMATION

The principal authors of this notice are David Selig and Maggie Stehn of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Mr. Selig or Ms. Stehn at (202) 317-6853 (not a toll-free number).

2024 Section 43 Inflation Adjustment

Notice 2024-61

Section 43(a) of the Internal Revenue Code provides that for purposes of section 38, the enhanced oil recovery credit for any taxable year is an amount equal to 15 percent of the taxpayer's qualified enhanced oil recovery costs for such taxable year.

Section 43(b)(1) provides that the amount of the credit determined under subsection (a) for any taxable year shall be reduced by an amount which bears the same ratio to the amount of such credit (determined without regard to this paragraph) as — (A) the amount by which the reference price for the calendar year preceding the calendar year in which the taxable years begins exceeds $28, bears to (B) $6.

Section 43(b)(3)(B) requires the Secretary to publish an inflation adjustment factor. The enhanced oil recovery credit under § 43 for any taxable year is reduced if the "reference price," determined under § 45K(d)(2)(C), for the calendar year preceding the calendar year in which the taxable year begins is greater than $28 multiplied by the inflation adjustment factor the current calendar year.

The term "inflation adjustment factor" means, with respect to any calendar year, a fraction the numerator of which is the GNP implicit price deflator for the preceding calendar year and the denominator of which is the GNP implicit price deflator for 1990.

Because the reference price for the 2023 calendar year ($76.10) exceeds $28 multiplied by the inflation adjustment factor for the 2024 calendar year ($28 multiplied by 2.0615= $57.72) by $18.38, the enhanced oil recovery credit for qualified costs paid or incurred in 2024 is phased out completely.

Table 1 contains the GNP implicit price deflator used for the 2023 calendar year, as well as the previously published GNP implicit price deflators used for the 1991 through 2022 calendar years.

Notice 2024-61 TABLE 1
GNP IMPLICIT PRICE DEFLATORS

Calendar Year	*GNP Implicit Price Deflator*
1990	112.9 (used for 1991)
1991	117.0 (used for 1992)
1992	120.9 (used for 1993)
1993	124.1 (used for 1994)
1994	126.0 (used for 1995)*
1995	107.5 (used for 1996)
1996	109.7 (used for 1997)**
1997	112.35 (used for 1998)
1998	112.64 (used for 1999)***
1999	104.59 (used for 2000)
2000	106.89 (used for 2001)
2001	109.31 (used for 2002)
2002	110.63 (used for 2003)
2003	105.67 (used for 2004)****
2004	108.23 (used for 2005)
2005	112.129 (used for 2006)
2006	116.036 (used for 2007)
2007	119.656 (used for 2008)
2008	122.407 (used for 2009)
2009	109.764 (used for 2010)*****
2010	110.654 (used for 2011)
2011	113.347 (used for 2012)******
2012	115.387 (used for 2013)
2013	106.710 (used for 2014)*******
2014	108.407 (used for 2015)********
2015	109.868 (used for 2016)
2016	111.528 (used for 2017)
2017	113.500 (used for 2018)
2018	110.308 (used for 2019)*********
2019	112.257 (used for 2020)
2020	113.586 (used for 2021)
2021	118.586 (used for 2022)**********
2022	127.194 (used for 2023)
2023	122.179 (used for 2024)***********

* Beginning in 1995, the GNP implicit price deflator was rebased relative to 1992. The 1990 GNP implicit price deflator used to compute the 1996 § 43 inflation adjustment factor is 93.6.
** Beginning in 1997, two digits follow the decimal point in the GNP implicit price deflator. The 1990 GNP price deflator used to compute the 1998 § 43 inflation adjustment factor is 93.63.
*** Beginning in 1999, the GNP implicit price deflator was rebased relative to 1996. The 1990 GNP implicit price deflator used to compute the 2000 § 43 inflation adjustment factor is 86.53.
**** Beginning in 2003, the GNP implicit price deflator was rebased, and the 1990 GNP implicit price deflator used to compute the 2004 § 43 inflation adjustment factor is 81.589.
***** Beginning in 2009, the GNP implicit price deflator was rebased, and the 1990 GNP implicit price deflator used to compute the 2010 § 43 inflation adjustment factor is 72.199.
****** Beginning in 2011, the 1990 GNP implicit price deflator used to compute the 2012 § 43 inflation adjustment factor is 72.260.
******* Beginning in 2013, the GNP implicit price deflator was rebased, and the 1990 GNP implicit price deflator used to compute the 2014 § 43 inflation adjustment factor is 66.803.
******** Beginning in 2014, the 1990 GNP implicit price deflator used to compute the 2015 § 43 inflation adjustment factor is 66.732.
********* Beginning in 2018, the 1990 GNP implicit price deflator used to compute the 2019 § 43 inflation adjustment factor is 63.637.
********** Beginning in 2021, the 1990 GNP implicit price deflator used to compute the 2022 § 43 inflation adjustment factor is 63.604.
*********** Beginning in 2023, the 1990 GNP implicit price deflator used to compute the 2024 § 43 inflation adjustment factor is 59.266.

Table 2 contains the inflation adjustment factor and the phase-out amount for taxable years beginning in the 2024 calendar year as well as the previously published inflation adjustment factors and phase-out amounts for taxable years beginning in the 1991 through 2023 calendar years.

Notice 2024-61 TABLE 2

INFLATION ADJUSTMENT FACTORS AND PHASE-OUT AMOUNTS

Calendar Year	*Inflation Adjustment Factor*	*Phase-out Amount*
1991	1.0000	0
1992	1.0363	0
1993	1.0708	0
1994	1.0992	0
1995	1.1160	0
1996	1.1485	0
1997	1.1720	0
1998	1.1999	0
1999	1.2030	0
2000	1.2087	0
2001	1.2353	0
2002	1.2633	0
2003	1.2785	0
2004	1.2952	0
2005	1.3266	0
2006	1.3743	100 percent
2007	1.4222	100 percent
2008	1.4666	100 percent
2009	1.5003	100 percent
2010	1.5203	100 percent
2011	1.5326	100 percent
2012	1.5686	100 percent
2013	1.5968	100 percent
2014	1.5974	100 percent
2015	1.6245	100 percent
2016	1.6464	0
2017	1.6713	0
2018	1.7008	1.069 percent
2019	1.7334	100 percent
2020	1.7640	100 percent
2021	1.7849	0
2022	1.8607	100 percent
2023	1.9998	100 percent
2024	2.0615	100 percent

DRAFTING INFORMATION

The principal author of this notice is Whitney Brady of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice, contact Ms. Brady at (202) 317-6853 (not a toll-free number).

Rev. Proc. 2024-32

SECTION 1. PURPOSE

.01 This revenue procedure sets forth the procedure by which the sponsor of a defined benefit plan that is subject to the funding requirements of § 430 of the Internal Revenue Code (Code) may request approval from the Internal Revenue Service (IRS) for the use of plan-specific substitute mortality tables in accordance with § 430(h)(3)(C) and § 1.430(h)(3)-2 of the Treasury Regulations.[1]

.02 This revenue procedure updates the procedures set forth in Rev. Proc. 2017-55, 2017-43 IRB 373, and reflects the amendments to § 1.430(h)(3)-2 that were published in the Federal Register on July 31, 2024 (TD 10005, 89 FR 61343).

.03 In accordance with § 1.430(h)(3)-2(c)(6)(ii)(E), this revenue procedure also specifies the date by which the use of a previously approved substitute mortality table must be terminated in conjunction with the replacement of the generally applicable mortality tables specified in § 430(h)(3)(A) and § 1.430(h)(3)-1.

SECTION 2. BACKGROUND INFORMATION

.01 *Statutory background*. Section 412 sets forth minimum funding requirements for defined benefit pension plans. In accordance with § 412(a)(2)(A), § 430 specifies the minimum funding requirements for a defined benefit plan (other than a multiemployer plan or a CSEC plan). Section 430(h)(3)(A) sets forth rules regarding the use of generally applicable mortality tables for purposes of § 430, and § 430(h)(3)(B) requires the Secretary to make periodic revisions (at least every 10 years) to those mortality tables. Section 430(h)(3)(C) provides that the Secretary may approve plan-specific substitute mortality tables to be used for a plan for a period not to exceed 10 years in determining any present value or making any computation under § 430. Substitute mortality tables meet the requirements for approval if the pension plan has enough participants and has been maintained for a long enough period of time to have credible mortality experience, and those tables reflect the actual experience of the plan and projected trends in general mortality experience. Except as provided by the Secretary, a plan sponsor may not use substitute mortality tables for any plan unless substitute mortality tables are established and used for each plan subject to § 430 that is maintained by the plan sponsor or a member of the plan sponsor's controlled group.

.02 *Regulations regarding substitute mortality tables*. Under § 1.430(h)(3)-2(c)(2), substitute mortality tables must reflect the actual mortality experience of the pension plan for which the tables are to be used, and that mortality experience must be credible. Separate mortality tables must be established for each gender under the plan and, in general, substitute mortality tables are permitted to be established for a gender only if the plan has credible mortality experience (including partially credible mortality experience) with respect to that gender. The regulations provide an option for determining the credibility of mortality experience using the plan's combined mortality experience for both genders (and using that combined experience to develop separate substitute mortality tables for each gender).

(1) *Use of mortality ratios*. Under § 1.430(h)(3)-2(c)(3), development of substitute mortality tables under the regulations requires creation of a base substitute mortality table ("Substitute Base Table") with an associated base year, which is used in conjunction with mortality improvement factors to construct generational mortality tables. Under § 1.430(h)(3)-2(d), the Substitute Base Table must be constructed in a multiple-step process based on (a) a projection of the generally applicable mortality table to the base year for the Substitute Base Table, and (b) an amounts-weighted mortality ratio calculated from the experience study for the population. In the case of a plan with partially credible mortality experience, § 1.430(h)(3)-2(e) requires the application of a weighting factor based on the credibility of the plan's experience.

(2) *Controlled group consistency requirement*. The regulations provide certain exceptions to the general rule under § 430(h)(3)(C)(iv) and § 1.430(h)(3)-2(c)(1)(i), under which a plan sponsor may not use substitute mortality tables for any plan for a plan year unless substitute mortality tables are established and used for each other plan subject to § 430 that is maintained by the plan sponsor or a member of the plan sponsor's controlled group (as defined in § 1.430(h)(3)-2(c)(1)(i)) for that plan year. Under § 1.430(h)(3)-2(c)(1)(ii), the use of substitute mortality tables for one plan is not prohibited merely because another plan maintained by the plan sponsor (or by a member of the plan sponsor's controlled group) may not use substitute mortality tables because neither the males nor the females under that other plan have credible mortality information for a plan year. In addition, under § 1.430(h)(3)-2(f), the regulations provide a transition period for newly affiliated plans.

(3) *Treatment of disabled individuals*. If separate mortality tables are used for disabled individuals pursuant to § 430(h)(3)(D), then those individuals are disregarded for all purposes under this revenue procedure.

(4) *Treatment of multiple-employer plans*. A multiple-employer plan for which the proportion of the plan's funding target attributable to employees and former employees of the employer and members of the employer's controlled group is greater than 50 percent is treated as maintained by that employer for purposes of the controlled group consistency requirement pursuant to § 1.430(h)(3)-2(c)(7)(ii). By contrast, any other multiple-employer plan in which the employer or a member of the employer's controlled group participates is not treated as maintained by the employer for purposes of the controlled group consistency requirement and is disregarded under this revenue procedure.

.03 *Amendments to regulations relating to substitute mortality tables*. TD 10005 includes amendments to the rules used to construct substitute mortality tables under

[1] Section 302 of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, as amended (ERISA) sets forth funding rules that are parallel to those in § 412 of the Code, and section 303 of ERISA sets forth additional funding rules for defined benefit plans (other than multiemployer plans) that are parallel to those in § 430 of the Code. Section 303(h)(3)(C) of ERISA requires the approval of the Secretary of the Treasury for the use of substitute mortality tables, and this revenue procedure applies for that purpose.

§ 1.430(h)(3)-2. Under those amendments, in determining the mortality ratio used to develop plan-specific substitute mortality tables, certain adjustments to the probability of death must be made to the mortality rates from the standard mortality table. These adjustments, which are specified in § 1.430(h)(3)-2(d)(4)(iii)(B), apply for 12-month periods beginning in 2020, 2021, or 2022.

.04 *Revenue Procedure 2017-55*. Revenue Procedure 2017-55 provides the procedures for the approval of substitute mortality tables.

SECTION 3. GENERAL ADMINISTRATIVE PROCEDURES

.01 *In general*. A request for approval to use substitute mortality tables for a plan that would first apply for a plan year beginning on or after January 1, 2025, must satisfy the requirements of § 1.430(h)(3)-2 and this revenue procedure. Except as provided in this revenue procedure, the procedures set forth in Rev. Proc. 2024-4 (or its successors) apply to a request for approval to use substitute mortality tables.

.02 *Address and user fee for application*. A request for approval to use substitute mortality tables must be submitted to the address specified in section 31 of Rev. Proc. 2024-4, 2024-1 IRB 160 (or the corresponding section of its successors).

The user fee required by section 6.02(15) of Rev. Proc. 2024-4 (or the corresponding section of its successors) must be sent with the request.

.03 *Necessary procedural documents*. A request will not be considered for approval unless it complies with this section 3.03.

(1) The request (and any subsequently provided additional information) must be signed by the plan sponsor ("applicant") or an authorized representative of the applicant who is described in section 6.02(11) (a), (b), (c), (d) or (e) of Rev. Proc. 2024-4 (or the corresponding sections of its successors).[2] If an authorized representative signs the request or will appear before the IRS in connection with the request, a properly signed and dated Form 2848, *Power of Attorney and Declaration of Representative*, must be submitted with the request. An individual is not an authorized representative of the applicant merely because the individual is the administrator or a trustee of the plan.

(2) The request must include a declaration in the following form: "Under penalties of perjury, I declare that I have examined this request, or this modification to the request, including accompanying documents, and, to the best of my knowledge and belief, the request or the modification includes all the relevant facts relating to the request, and such facts are true, correct, and complete." This declaration must be signed by the applicant (for example, by an authorized officer of a corporate applicant), in compliance with section 6.02(14) of Rev. Proc. 2024-4 (or the corresponding section of its successors). The signature of an individual with a power of attorney will not satisfy the requirements of this section 3.03(2).

(3) Because a request for approval to use substitute mortality tables constitutes a request for a ruling, compliance with § 6110 of the Code is required. Section 601.201 of the Statement of Procedural Rules sets forth the requirements applicable to requests for rulings and determination letters that are subject to § 6110. Section 601.201(e) provides specific instructions to applicants.

The applicant must include with the request either a statement of proposed deletions and the statutory basis for each proposed deletion, or a statement that no information other than names, addresses, and taxpayer identifying numbers need be deleted.

(4) The checklist set forth in Appendix A of this revenue procedure must be completed, signed, and dated by the applicant or authorized representative, and included at the front of the request.

.04 *Optional use of electronic format for certain information*. In addition to providing the submission in written format, an applicant may provide the information required under sections 7.04 and 7.05 of this revenue procedure and section 10.02 or 10.03 of this revenue procedure, as applicable, in electronic format (such as a spreadsheet on a USB drive). An applicant may also include Form 15314 (TE/GE Secure Messaging Taxpayer Agreement Authorization of Disclosure to Designated Users) with their application which provides permission by the taxpayer to allow for the digital exchange of information with the IRS. Providing that information in electronic format may expedite the IRS review of the applicant's request.

SECTION 4. TIMING PROVISIONS RELATED TO REQUESTS FOR APPROVAL TO USE SUBSTITUTE MORTALITY TABLES

.01 *In general*. A request for approval to use substitute mortality tables generally must be submitted at least 7 months before the first day of the first plan year for which the substitute mortality tables are to apply. Thus, for example, if the first plan year to which substitute mortality tables are to apply is the plan year that begins January 1, 2026, then the deadline for submitting a request for approval to use substitute mortality tables is June 1, 2025.

.02 *Incomplete requests*. An incomplete request for approval to use substitute mortality tables will be denied unless the IRS and the applicant mutually agree to extend the 180-day period specified under § 430(h)(3)(C)(v)(II). If the request does not include substantially all of the applicable information specified in sections 5 through 11 of this revenue procedure, the IRS will ordinarily reject the request without considering the substance of the request (rather than agree to extend the 180-day period for review of the request) and refund the user fee.

.03 *Request for delay for other plans.* If other plans subject to § 430 maintained by the applicant (or members of the applicant's controlled group) have credible mortality information and a request for approval to use substitute mortality tables will be made for those plans in one or more separate applications, the applicant must request that the 180-day review period be extended by 90 days. Upon receiving the request for extension of the review period,

[2] It is recommended that an actuary who is able to answer technical questions about the construction of the substitute mortality tables be designated as an authorized representative. Not having an actuary available to discuss these tables with the IRS may cause a delay in the processing of a request for approval.

except as provided in section 4.02 of this revenue procedure, the IRS will agree to that extension and give the applicant 90 days to submit those additional applications (which must be submitted no later than the deadline that applies to each such separate request under section 4.01 or 4.04 of this revenue procedure). The IRS will summarily reject the initial application if it does not include a request for a 90-day extension of the 180-day review period, or if any of the additional applications are not submitted within 90 days after the submission of the initial application (on the grounds that at least one plan with credible mortality information maintained by the applicant (or a member of the applicant's controlled group) would not be using substitute mortality tables).

Example. Employer E maintains Plans A and B, each of which have credible mortality information. Plan A's plan year is the calendar year and Plan B's plan year runs from July 1 through June 30. Employer E submits a request for approval to use substitute mortality tables for Plan A for the 2026 plan year on May 31, 2025 ("Plan A Request"). To avoid denial of the Plan A Request on the grounds that substitute mortality tables would not be used for all plans with credible mortality information maintained by the applicant, Employer E requests that the 180-day review period for the Plan A Request be extended by 90 days to provide Employer E additional time to submit a separate request for approval to use substitute mortality tables for Plan B for the 2026 plan year. The IRS agrees to this extension in accordance with this section 4.03. The IRS will summarily reject the Plan A Request unless Employer E submits a separate request for approval to use substitute mortality tables for Plan B no later than August 29, 2025.

.04 *Transition rule for submissions for plan years beginning in 2025*. Notwithstanding the generally applicable deadline in section 4.01 of this revenue procedure, a request for approval to use substitute mortality tables for a plan year beginning in 2025 will be considered timely if it is submitted on or before October 31, 2024, provided that the applicant requests a 90-day extension of the 180-day review period. Except as provided in section 4.02 of this revenue procedure, the IRS will agree to such a request.

SECTION 5. GENERAL RULES

.01 *Contents of request*. A request for approval to use substitute mortality tables must include the general information described in this section 5, the plan identification information described in section 6 of this revenue procedure, the credible mortality information demonstrations described in section 7 of this revenue procedure, the population stability demonstrations described in section 8 of this revenue procedure, the information regarding other plans in the applicant's controlled group described in section 9 of this revenue procedure, the Substitute Base Table construction information described in section 10 of this revenue procedure, and the demonstrations described in section 11 of this revenue procedure.

.02 *General standard for approval*. The IRS will approve a request for approval to use substitute mortality tables that meet the requirements of § 1.430(h)(3)-2 and this revenue procedure unless the IRS determines that the Substitute Base Table does not sufficiently reflect the mortality experience of the applicable plan population.

.03 *Proposed period of use*. A separate request must be made with respect to each plan ("Plan"), or group of plans that are aggregated under § 1.430(h)(3)-2(c)(5) ("Aggregated Group"), for which approval to use substitute mortality tables is requested. The request must state the first day of the first plan year for which the substitute mortality tables are to be applicable ("Requested Effective Plan Year") and must state the term of years (not more than 10) for which the tables would be used.

.04 *Description of populations*. The request must include a description of the populations within the Plan (or the Aggregated Group) covered by the request for approval to use substitute mortality tables and a description of the populations, if any, for which the generally applicable mortality tables will be used.

For example, if approval to use substitute mortality tables is requested for nondisabled female individuals (but no other individuals) under a plan for which the mortality tables set forth in Rev. Rul. 96-7, 1996-1 CB 59, are used for disabled individuals pursuant to § 430(h)(3)(D), then the population covered by the request for approval to use substitute mortality tables would be described as "Nondisabled Females" and the population for whom the generally applicable mortality tables will be used would be described as "Nondisabled Males."

Similarly, if approval to use substitute mortality tables is requested for male annuitants (but not male nonannuitants) and for females on a combined annuitant/nonannuitant basis, in each case including disabled individuals, then the populations covered by the request for approval to use substitute mortality tables would be described as "Male Annuitants" and "Females," and the population for whom the generally applicable mortality tables will be used would be described as "Male Nonannuitants."

SECTION 6. IDENTIFICATION OF PLANS

.01 *Information for plan for which approval to use substitute mortality tables is requested*. The following plan information must be provided for the Plan (or for each plan within the Aggregated Group) for which approval to use substitute mortality tables is requested:

(1) Plan name;

(2) Plan number;

(3) Plan year (calendar year, or if a fiscal year, the first and last day of the plan year);

(4) Employer identification number;

(5) Date of plan establishment; and

(6) Copies of the actuarial valuation reports for each plan year that begins or ends during the Experience Study Period as defined in section 7.01 of this revenue procedure.

.02 *Plans for which substitute mortality tables are not intended to be used.* The following information must be provided for each plan that is subject to § 430 covering employees of the applicant, or a member of the applicant's controlled group, for which substitute mortality tables are not intended to be used:

(1) Plan name;

(2) Plan number;

(3) Plan year (calendar year, or if a fiscal year, the first and last day of the plan year);

(4) Employer identification number;

(5) Date of plan establishment;

(6) If the plan is a newly-affiliated plan under § 1.430(h)(3)-2(f)(2), the date of the merger, acquisition, or similar transaction described in § 1.410(b)-2(f), and the last day of the transition period described in § 1.430(h)(3)-2(f)(3); and

(7) If the applicant or a member of the applicant's controlled group is an employer whose employees participate in a multiple-employer plan, whether the portion of the multiple-employer plan's funding target attributable to employees and former employees of the applicant and the members of the applicant's controlled group is less than or equal to 50 percent (so that the multiple-employer plan is not treated as being maintained by the applicant or a member of the applicant's controlled group under § 1.430(h)(3)-2(c)(7)(ii)).

.03 *Other plans for which substitute mortality tables are being used or are intended to be used.* The following information must be provided for each plan that is subject to § 430 covering employees of the applicant, or a member of the applicant's controlled group (including a multiple-employer plan that is treated as maintained by the applicant or a member of the applicant's controlled group pursuant to § 1.430(h)(3)-2(c)(7)(ii)), for which substitute mortality tables are being used or for which a request for approval to use substitute mortality tables has been submitted or will be submitted:

(1) Plan name;

(2) Plan number;

(3) Plan year (calendar year, or if a fiscal year, the first and last day of the plan year);

(4) Employer identification number;

(5) Date of plan establishment;

(6) If the applicant has received previous approval to use substitute mortality tables for that plan, the date of that approval;

(7) If the applicant has requested approval to use substitute mortality tables for that plan (but not yet received approval), the date of that request; and

(8) If the applicant has not yet requested approval to use substitute mortality tables for that plan, the expected date of the submission.

.04 *Special rule for multiple-employer plans*. If the applicant is the plan administrator of a multiple-employer plan (who is treated as the plan sponsor under § 1.430(h)(3)-2(c)(7)(i)), the request for approval to use substitute mortality tables must include either:

(1) A statement that none of the employers whose employees participate in the plan are treated as maintaining the plan under § 1.430(h)(3)-2(c)(7)(ii); or

(2) If one or more of the participating employers is treated as maintaining the plan under § 1.430(h)(3)-2(c)(7)(ii), the information specified in section 6.02 and 6.03 of this revenue procedure, as applicable, treating each such employer as the applicant.

.05 *Spun-off plans*. The following additional information must be provided with respect to each plan that is subject to § 430 and is maintained by the applicant or a member of the applicant's controlled group, that was spun off from another plan ("original plan") maintained by the applicant or a member of the applicant's controlled group within the 5-year period preceding the date of the request:

(1) The plan name and the plan number of the spun-off plan, and the plan name and number of the original plan;

(2) The employer identification number of the employer maintaining the spun-off plan and the employer identification number of the employer maintaining the original plan;

(3) The date of the spinoff;

(4) The approximate number of individuals covered by the spun-off plan as of the date of the spinoff and the approximate number of individuals covered by the original plan immediately before the spinoff; and

(5) The reason for the spinoff.

SECTION 7. DEMONSTRATIONS OF CREDIBLE MORTALITY INFORMATION

.01 *Experience Study Period*. The applicant must identify the period of time covered by the mortality experience study ("Experience Study Period") used to develop the Substitute Base Table(s) and the base year for the Substitute Base Table(s). See § 1.430(h)(3)-2(d)(2) and (f)(4) (regarding the selection of an experience study period) and § 1.430(h)(3)-2(c)(3)(ii) (regarding identification of the base year).

.02 *Full credibility threshold*. The applicant must identify the full credibility threshold in § 1.430(h)(3)-2(d)(3) and the number of actual deaths in the Experience Study Period.

.03 *Optional rules*. (1) *Simplified rule.* The applicant must identify whether it used the simplified rule under which the determination of whether there is credible mortality information for a gender is made by only taking into account individuals who are at least age 50 and less than age 100. See § 1.430(h)(3)-2(c)(2)(ii)(B).

(2) *Combined genders rule*. The applicant must identify whether it used the rule under which a single mortality ratio is developed and applied for both genders to construct Substitute Base Tables for the Plan (or Aggregated Group). See § 1.430(h)(3)-2(d)(6).

04. *Required information.* The information required in section 7.04(1)-(12) of this revenue procedure must be provided in tabular form for all individuals within each population for whom separate approval to use substitute mortality tables is requested, for all ages between 18 and 100 (unless the applicant is using the simplified rule as provided in section 7.03(1) of this revenue procedure, in which case, only those individuals who are at least age 50 and less than age 100 are considered). This information must be provided separately for each 12-month period in the Experience Study Period and also as an aggregate amount for all 12-month periods in the Experience Study Period.

(1) The total number of individuals at that age at the beginning of the 12-month period, excluding individuals who left the population during the 12-month period for reasons other than death.

(2) The total number of individuals at that age at the beginning of the 12-month period who left the population for reasons other than death.

(3) The total number of individuals at that age at the beginning of the 12-month period who died during the 12-month period.

(4) The number of expected deaths for individuals at that age determined by multiplying the mortality rate from the stan-

dard mortality table described in section 7.05(1) of this revenue procedure by the total of the individuals determined in section 7.04(1) and (2) of this revenue procedure, adjusted for exposure periods of less than 12 months.

(5) The sum of the benefit amounts described in § 1.430(h)(3)-2(d)(2)(iii) for all individuals at that age at the beginning of the 12-month period, excluding individuals who left the population during the 12-month period for reasons other than death.

(6) The sum of the benefit amounts described in § 1.430(h)(3)-2(d)(2)(iii) for individuals at that age who left the population during the 12-month period for reasons other than death.

(7) The sum of the benefit amounts described in § 1.430(h)(3)-2(d)(2)(iii) for individuals at that age who left the population during the 12-month period on account of death.

(8) The amount determined by multiplying the mortality rate for that age from the standard mortality table described in section 7.05(1) of this revenue procedure, by the total of the amounts determined in section 7.04(5) and (6) of this revenue procedure, adjusted for exposure periods of less than 12 months.

(9) The amount determined under section 7.04(8) of this revenue procedure, except that, if the 12-month period in the experience study period begins in 2020, 2021, or 2022, then the mortality rate must be from the adjusted standard mortality table in section 7.05(2) of this revenue procedure.

(10) The sum of the squares of the benefit amounts described in § 1.430(h)(3)-2(d)(2)(iii) for all individuals at that age at the beginning of the 12-month period excluding individuals who left the population during the 12-month period for reasons other than death.

(11) The sum of the squares of the benefit amounts described in § 1.430(h)(3)-2(d)(2)(iii) for individuals at that age who left the population during the 12-month period for reasons other than death.

(12) The amount determined by multiplying the mortality rate from the standard mortality table described in section 7.05(1) of this revenue procedure by the total of the amounts determined in section 7.04(10) and (11) of this revenue procedure, adjusted for exposure periods of less than 12 months.

.05 *Standard mortality table*.

(1) The request must include the standard mortality table for the base year for the Substitute Base Table, determined pursuant to § 1.430(h)(3)-2(d)(4)(iii).

(2) If a 12-month period in the experience study period begins in 2020, 2021, or 2022, then the request must also include the standard mortality table for the calendar year in which the 12-month period begins reflecting the adjustment provided for in § 1.430(h)(3)-2(d)(4)(iii)(B) for the 12-month period.

.06 *Adjustment for exposure periods of less than 12 months*. The request must include a description of the method or methods used to make adjustments for individuals who left the population for reasons other than death to reflect exposure periods of less than 12 months.

.07 *Adjustments to make experience study predictive of future mortality experience in light of changes to the plan population.* The request must include a description of any method used to adjust the experience study data to reflect changes in the population during the Experience Study Period. For example, if an annuity purchase, lump sum window or other risk transfer activity occurred during the experience study, the request should include a description of how those populations were treated in the study.

.08 *Other data adjustments.* The request must include a description of any other method used to adjust experience study data.

.09 *Other relevant information*. The request should also note if any future risk transfer activity is anticipated, and, if so, a description of how that would affect the population.

SECTION 8. DEMONSTRATION OF POPULATION STABILITY

.01 *Required comparison of population count*. The following information must be provided in tabular form for each population within the Plan (or Aggregated Group) for which approval to use substitute mortality tables is requested, aggregating all plans that have the same plan year:

(1) The average number of individuals within the population during the Experience Study Period; and

(2) The number of individuals within the population as of the last day of the plan year immediately preceding the plan year during which approval to use substitute mortality tables is requested.

.02 *Additional requirement for significant change in participant count*. If the number of individuals described in section 8.01(2) of this revenue procedure is less than 80 percent or more than 120 percent of the number of individuals described in section 8.01(1) of this revenue procedure, then the request must provide information and analysis that shows that the mortality experience during the Experience Study Period (taking into account any adjustments described in section 7.07 or 7.08 of this revenue procedure) is accurately predictive of the future mortality of the population.

SECTION 9. INFORMATION REGARDING OTHER PLANS IN THE APPLICANT'S CONTROLLED GROUP

.01 *General rule*. Under § 1.430(h)(3)-2(e), a population lacks credible mortality information if the number of deaths during the experience study is less than 100. For all plans maintained by the applicant or a member of the applicant's controlled group (other than a plan for which approval to use substitute mortality tables is requested or used for all populations or a newly-affiliated plan with respect to which the transition period has not ended before the first day of the Requested Effective Plan Year), the applicant must identify the following information for any population for which there is a lack of credible mortality information (such that substitute mortality tables may not be used for that population):

(1) The period of time used to demonstrate a lack of credible mortality information ("Demonstration Period"), and

(2) The number of deaths during that period.

.02 *Alternative demonstrations of lack of credible mortality information*. In lieu of the information described in section 9.01(2) of this revenue procedure, a lack of credible mortality information may be

demonstrated by providing alternative information that demonstrates to the satisfaction of the Commissioner that the number of male and/or female deaths did not exceed 100 during the Demonstration Period. For example, a year-by-year reconciliation of the participant population (such as might be shown in an actuarial valuation report) might be submitted showing that the total number of participants leaving the plan during the Demonstration Period is less than 100, as this would demonstrate that the number of male and female deaths must also be less than 100 during that period. Similarly, if the total number of participants in the Plan does not exceed 100 for any year during the Demonstration Period, the year-by-year number of participants in the Plan during such period might be submitted in lieu of the information described in section 9.01(2) of this revenue procedure, as this would show that the number of male and female deaths must also be less than 100 during that period.

SECTION 10. SUBSTITUTE BASE TABLE CONSTRUCTION

.01 *Mortality ratio*. For each population for which approval to use substitute mortality tables is requested, the applicant's request must include the mortality ratio determined pursuant to § 1.430(h)(3)-2(d)(4)(ii).

.02 *Substitute Base Table for population with full credibility*. With respect to a population with mortality experience that is fully credible, the applicant's request must contain the Substitute Base Table constructed pursuant to § 1.430(h)(3)-2(d)(4).

.03 *Substitute Base Table for population with partial credibility*. With respect to a population with mortality experience that is only partially credible, the applicant's request must include:

(1) A base substitute mortality table constructed using the rules in § 1.430(h)(3)-2(d)(4) as if the population had mortality experience that is fully credible;

(2) The partial credibility weighting factor for the population determined pursuant to § 1.430(h)(3)-2(e)(2); and

(3) The Substitute Base Table constructed using the rules in § 1.430(h)(3)-2(e)(1).

SECTION 11. DEMONSTRATIONS WITH RESPECT TO BASE TABLES

.01 *Funding target comparison*. For the Plan (or each plan within the Aggregated Group) for which approval to use substitute mortality tables is requested, the applicant must provide a comparison of: (1) the plan's funding target (determined without regard to at-risk assumptions under § 430(i)) calculated using the generally applicable generational mortality tables, and (2) the amount that funding target would have been if the substitute mortality tables had been used to determine the funding target, holding all other assumptions constant.

These amounts must be determined as of the valuation date for a plan year ending no earlier than one year and one day before the first day of the Requested Effective Plan Year, using the data and interest rates that were used for that valuation. The amounts must be provided in total and separately for: (1) active participants, (2) terminated vested participants, and (3) retired participants and beneficiaries receiving payment.

.02 *Generational mortality tables*. For each population for which approval to use substitute mortality tables is requested, the applicant's request must include sample generational mortality tables, as of the Requested Effective Plan Year, for individuals whose years of birth are 1950, 1970, and 1990, respectively, constructed from the Substitute Base Table using the rules of § 1.430(h)(3)-2(c)(3).

.03 *Annuity factors*. For each population for which approval to use substitute mortality tables is requested, the applicant's request must include the following annuity factors based on the substitute mortality table for an individual whose year of birth is 20 years before the base year for the Substitute Base Table, determined using the same interest rates as those used under section 11.01 of this revenue procedure.

(1) For a Substitute Base Table that is not an annuitant Substitute Base Table, deferred to age 55 factors at quinquennial ages from 20 to 50.

(2) For a Substitute Base Table that is not a nonannuitant Substitute Base Table, immediate annuity factors at quinquennial ages from 50 to 90.

SECTION 12. EARLY TERMINATION OF PREVIOUSLY APPROVED SUBSTITUTE MORTALITY TABLES IN CONJUCTION WITH THE REPLACEMENT OF GENERALLY APPLICABLE MORTALITY TABLES

.01 *Regulatory requirement to terminate use of previously approved substitute mortality tables*. Section 1.430(h)(3)-2(c)(6)(ii)(E) provides that guidance published in the Internal Revenue Bulletin will specify the date by which the use of a plan's substitute mortality tables must be terminated in conjunction with the replacement of the generally applicable mortality tables specified in § 430(h)(3)(A) and § 1.430(h)(3)-1. The generally applicable mortality tables were replaced for plan years beginning on or after January 1, 2024, in TD 9983, 88 FR 72357.

.02 *Plans with significant changes in coverage*. If a substitute mortality table was first approved for use for a plan year that began before January 1, 2025, and the number of individuals covered by the substitute mortality table is less than 80 percent or more than 120 percent of the average number of individuals in that population over the 12-month periods covered by the experience study, then the substitute mortality table may not be used for a plan year beginning on or after January 1, 2026. This termination, which is pursuant to § 1.430(h)(3)-2(c)(6)(ii)(E), applies without regard to whether the actuary makes the certification described in § 1.430(h)(3)-2(c)(6)(iii)(A).

.03 *Other plans*. If a plan is not described in section 12.02 of this revenue procedure, there is no early termination of the use of previously approved substitute mortality tables merely because of the replacement of the generally applicable mortality tables specified in § 430(h)(3)(A) and § 1.430(h)(3)-1 described in section 12.01 of this revenue procedure.

SECTION 13. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2017-55 is superseded. Sections 24.01(11), 26.02(4), and 31.01(1) of Rev. Proc. 2024-4 are modified to refer to this revenue procedure in lieu of Rev. Proc. 2017-55.

SECTION 14. EFFECTIVE DATE

This revenue procedure is effective for all requests for approval to use plan-specific substitute mortality tables in accordance with § 430(h)(3)(C) of the Code for which the Requested Effective Plan Year begins on or after January 1, 2025.

SECTION 15. PAPERWORK REDUCTION ACT

The collection of information included in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. section 3507) under control number 1545-2073.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this revenue procedure is in sections 3 through 11 of this revenue procedure. This collection of information is required to provide sufficient information to enable the IRS to evaluate, process, and rule on the request for approval to use substitute mortality tables. This information will be used to make determinations under § 430(h)(3) of the Code. The likely respondents are businesses or other for-profit institutions and nonprofit institutions.

The estimated total annual reporting/recordkeeping burden is 4,000 hours.

The estimated burden per respondent/recordkeeper varies from 167 to 900 hours, depending on individual circumstances, with an estimated average burden of 267 hours. The estimated average number of expected respondents/recordkeepers is 15 per year.

The estimated frequency of responses is once every 10 years.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. section 6103.

DRAFTING INFORMATION

The principal author of this revenue procedure is Arslan Malik of the Office of the Associate Chief Counsel, Employee Benefits, Exempt Organizations, and Employment Taxes (CC:EEE). For further information regarding the submission of a request for approval to use substitute mortality tables, please contact Christopher Denning at (202) 317-5755.

Appendix A

REQUEST FOR APPROVAL TO USE SUBSTITUTE MORTALITY TABLES CHECKLIST

Instructions

You must include a completed copy of this checklist with your submission. Answer each question in the checklist by circling Yes, No, or N/A; explanations must be provided for "No" or "N/A" responses. If a completed checklist is not included, or if explanations are not provided for "No" and "N/A" responses, then your submission will be considered incomplete for purposes of section 4.02 of this revenue procedure.

Sign and date the checklist (as plan sponsor or authorized representative) and place it on top of your request.

Response	Item number	Description of item	Page number in application
Yes No N/A	1.	Have you included the user fee required under Rev. Proc. 2024-4 or its successors? (See section 3.02)	
Yes No N/A	2.	If you are designating an authorized representative, have you included a properly executed Form 2848 (Power of Attorney)? (See section 3.03(1))	
Yes No N/A	3.	Have you satisfied all the requirements of Rev. Proc. 2024-4 or its successors (especially concerning original signatures, penalties of perjury statement, and statement of proposed deletions)? (See section 3.03(2) and (3))	
Yes No N/A	4.	If any separate application for approval to use substitute mortality tables will be made for other plans maintained within the applicant's controlled group, have you requested that the 180-day review period be extended? (See section 4.03)	
Yes No N/A	5.	For a request for approval to use substitute mortality tables submitted for a plan year beginning during 2025 less than 7 months before the first day of the plan year, and no later than October 31, 2024, have you included a request for a 90-day extension of the 180-day review period? (See section 4.04)	
Yes No N/A	6.	Have you identified the first day of the first plan year for which approval to use substitute mortality tables is requested and the number of years for which the substitute mortality tables would be used? (See section 5.03)	
Yes No N/A	7.	Have you included a description of the populations for which approval to use substitute mortality tables is requested? (See section 5.04)	
Yes No N/A	8.	Have you included the identification information required under section 6.01 for the Plan (or for each plan in the Aggregated Group) for which approval to use substitute mortality tables is requested?	
Yes No N/A	9.	Have you provided the information required for each plan for which substitute mortality tables are not intended to be used? (See section 6.02)	
Yes No N/A	10.	Have you provided the information required for each other plan for which substitute mortality tables are being used or are intended to be used? (See section 6.03)	

Yes No N/A	11.	If the applicant is a plan sponsor of a multiple-employer plan, have you provided either (1) a statement that none of the employers whose employees participate in the plan are treated as maintaining the plan under § 1.430(h)(3)-2(c)(7)(ii); or (2) if one or more of the participating employers is treated as maintaining the plan under § 1.430(h)(3)-2(c)(7)(ii), the information specified in section 6.02 and 6.03 of this revenue procedure, as applicable, treating each such employer as the applicant? (See section 6.04)
Yes No N/A	12.	Have you provided the required information for any plans that were spun off from another plan maintained by the applicant or a member of the applicant's controlled group within the past 5 years? (See section 6.05)
Yes No N/A	13.	Have you identified the Experience Study Period and the base year for the Substitute Base Tables? (See section 7.01)
Yes No N/A	14.	Have you provided the full credibility threshold and the number of actual deaths during the Experience Study Period for each population within the Plan (or Aggregated Group) for which approval to use substitute mortality tables is requested (see section 7.02)?
Yes No N/A	15.	Have you identified whether the applicant used either or both of the optional rules specified in section 7.03?
Yes No N/A	16.	Have you included a table showing the required information for each applicable population within the Plan (or Aggregated Group), for each 12-month period of the Experience Study Period and also as an aggregate amount for all 12-month periods in the Experience Study Period? (See section 7.04)
Yes No N/A	17.	Have you included the relevant standard mortality tables (which is the base mortality table under § 1.430(h)(3)-1(d) projected with mortality improvement to the base year for the Substitute Base Tables)? (See section 7.05(1))
Yes No N/A	18.	If any 12-month period in the experience study period begins in 2020, 2021, or 2022, have you included the standard mortality table for the calendar year in which the 12-month period begins reflecting the adjustment provided for in § 1.430(h)(3)-2(d)(4)(iii)(B) for the 12-month period? (See section 7.05(2))
Yes No N/A	19.	Have you included a description of the methods used to reflect exposure periods of less than 12 months? (See section 7.06)
Yes No N/A	20.	Have you included a description of any methods used to adjust the experience study data? (See section 7.07 and 7.08)
Yes No N/A	21.	Have you included any other relevant information? (See section 7.09)
Yes No N/A	22.	Have you included a table showing the average number of individuals during the Experience Study Period and the number of individuals within the population as of the last day of the plan year immediately preceding the date of this application, for each population within the Plan (or Aggregated Group) for which the approval to use substitute mortality tables is requested? (See section 8.01)

Yes No N/A	23.	Have you provided information and analysis required if the population has had a significant change in the number of participants, as described in section 8.02?
Yes No N/A	24.	Have you identified the Demonstration Period for all plans maintained by the applicant or a member of the applicant's controlled group other than a plan for which approval to use substitute mortality tables is requested or used for all populations or a newly-affiliated plan with respect to which the transition period has not ended before the first day of the Requested Effective Plan Year? (See section 9.01(1))
Yes No N/A	25.	Have you identified the number of deaths during the Demonstration Period for all plans maintained by the applicant or a member of the applicant's controlled group (other than a plan for which approval to use substitute mortality tables is requested or used for all populations or a newly affiliated plan with respect to which the transition period has not ended before the first day of the Requested Effective Plan Year) for any population for which there is a lack of credible mortality information (such that substitute mortality tables may not be used for that population)? (See section 9.01(2)) Alternatively, have you provided other information for a population that demonstrates that the number of deaths during the Demonstration Period would not exceed 100? (See section 9.02)
Yes No N/A	26.	Have you provided the mortality ratio for each population for which approval to use substitute mortality tables is requested? (See section 10.01)
Yes No N/A	27.	For each population within the Plan (or Aggregated Group) whose mortality experience has full credibility, have you provided a full copy of the Substitute Base Table? (See section 10.02)
Yes No N/A	28.	For each population within the Plan (or Aggregated Group) for which approval to use substitute mortality tables is requested but for which mortality experience does not have full credibility, have you provided a full copy of the base substitute mortality table constructed as if the population's mortality information had full credibility, the partial credibility weighting factor, and a full copy of the Substitute Base Table reflecting credibility adjustments? (See section 10.03)
Yes No N/A	29.	Have you included a comparison of hypothetical funding targets determined using generally applicable mortality tables and the proposed substitute mortality tables? (See section 11.01)
Yes No N/A	30.	Have you included the required sample generational mortality tables as of the Requested Effective Plan Year, developed from each Substitute Base Table? (See section 11.02)
Yes No N/A	31.	Have you included annuity factors for each Substitute Base Table based on the substitute mortality table for an individual whose year of birth is 20 years before the base year for the Substitute Base Table? (See section 11.03)

Signature ________________________ **Date** __________

Title or Authority ______________________________________

Typed or printed name of person signing checklist _____________________________________

Part IV

Deletions From Cumulative List of Organizations, Contributions to Which are Deductible Under Section 170 of the Code

Announcement 2024-31

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The Internal Revenue Service has revoked its determination that the organizations listed below qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1986.

Generally, the IRS will not disallow deductions for contributions made to a listed organization on or before the date of announcement in the Internal Revenue Bulletin that an organization no longer qualifies. However, the IRS is not precluded from disallowing a deduction for any contributions made after an organization ceases to qualify under section 170(c)(2) if the organization has not timely filed a suit for declaratory judgment under section 7428 and if the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was in part responsible for or was aware of the activities or omissions of the organization that brought about this revocation.

If on the other hand a suit for declaratory judgment has been timely filed, contributions from individuals and organizations described in section 170(c)(2) that are otherwise allowable will continue to be deductible. Protection under section 7428(c) would begin on August 19, 2024, and would end on the date the court first determines the organization is not described in section 170(c)(2) as more particularly set for in section 7428(c)(1). For individual contributors, the maximum deduction protected is $1,000, with a husband and wife treated as one contributor. This benefit is not extended to any individual, in whole or in part, for the acts or omissions of the organization that were the basis for revocation.

Name Of Organization	Effective Date of Revocation	Location
Jordan's Way Charities, Corp	1/1/2018	Safety Harbor, FL

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

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[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2024–27 through 2024–52 is in Internal Revenue Bulletin 2024–52, dated December 30, 2024.

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