# UPDATE ON THE TAX CREDIT REVOLUTION: PREVAILING WAGE AND APPRENTICESHIP CLOCK STARTS SOON

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**U.S. Energy, Infrastructure, and Resources Alert**

The U.S. Treasury Department released a preliminary draft of Notice 2022-61 (the Notice) on 29 November 2022 and the final on 30 November 2022. Taxpayers now have 59 days to begin construction on qualified projects without causing those projects to be subject to the new prevailing wage and apprenticeship requirements. The U.S. Department of Labor also released companion FAQs on the prevailing wage and apprenticeship rules 29 November 2022. The Notice generally applies to credits under Code[1] Sections 30C (alternative fuel infrastructure), 45Y (post-2024 electricity PTC[2]), 48E (post-2024 electricity ITC[3]), 45V (hydrogen PTC), 45 (current electricity PTC), 48 (current electricity ITC), 45Q (carbon capture), 45L (energy efficient homes), 45U (zero-emission nuclear power), 48C (advanced energy manufacturing facilities), and 179D (energy efficient commercial buildings), but the beginning of construction rules apply more narrowly.

For projects that can begin construction using either of the traditional methods available, now is a good time to complete contracts for that work. If it is not possible to begin construction within the next 59 days, we suggest that developers begin creating a robust compliance program with appropriate document management procedures and that investors begin evaluating the minimum compliance requirements they need to see to make an investment in a project that qualifies for tax credits.

The prevailing wage and apprenticeship rules are largely as expected. Briefly:

1. Prevailing wage rules will be posted on www.sam.gov. If a rate for a specific locality or job classification is not posted, a taxpayer may apply to Department of Labor for a wage. The process used is the same as that typically used by Department of Labor, but it appears that Department of Labor intends to devote resources specifically to tax credit related prevailing wage applications. Department of Labor has also issued a specific email address for this purpose (IRAprevailingwage@dol.com).

2. The apprenticeship rules are largely as printed in the Code.

3. Various specific terms used in the Code Sections listed above are defined by reference to 29 C.F.R. 5.2, which is promulgated under the Davis-Bacon Act. This is good news for predictability. Highlights include:

a. Construction is clearly only on-site work. It does not include manufacture or furnishing of materials, articles, supplies, or equipment unless that activity occurs in connection with, and at the site of, the work (generally, a place that exists specifically for purposes of the construction job, not a routine commercial manufacturing or fabrication facility). However, construction does include transportation in some circumstances.

b. The term “laborer or mechanic” (pertinent to prevailing wage, not apprenticeship rules) includes workers whose duties are manual or physical in nature and includes apprentices, trainees, and helpers. Working foremen who

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devote more than 20% of their time during a workweek to mechanic or laborer duties will be treated as such for the time spent in those roles. The term laborer or mechanic does not include people employed in a "bona fide" executive, administrative, or professional capacity.

c. An individual is employed by a taxpayer, contractor, or subcontractor if the individual performs services for that person in exchange for remuneration, regardless of whether the individual is otherwise treated as an employee or independent contractor for any other U.S. federal tax purpose (including employment tax purposes)

4. For purposes of determining whether a project is subject to the wage and apprenticeship rules, a project will be deemed to have begun construction as follows:

a. In the case of Code Sections 30C, 45V, 45Y, and 48E, rules previously issued in the context of Code Sections 45 and 48 (specifically, Notice 2013-29 in respect of beginning of construction and Notice 2016-31 in respect of continuous construction) will govern.

b. In the case of Code Sections 45, 48, and 45Q, beginning of construction and continuous construction rules previously issued in the context of those sections will apply.

c. In both cases, a four-year continuous construction safe harbor will generally be available. By referring to prior guidance for Code Sections 45, 48, and 45Q, it seems Treasury intends that the COVID-19 continuous construction safe harbor periods for certain projects will continue to apply.

***We note that beginning of construction guidance does *not* apply to Code Section 45Z. This is a serious oversight because many of the Code Section 48 biogas production facilities that will be built in the near term will be intended to produce Code Section 45Z transportation fuel or sustainable aviation fuel. It is critical that the same beginning of construction rules apply in the case of both Code Sections 48 and 45Z. Taxpayers should urge Treasury to apply this guidance to Code Section 45Z and may do so in the current comment period. (See Notice 2022-58.)

5. Taxpayers *must* maintain records of compliance with the wage and apprenticeship rules and any use of the good faith effort exception under the apprenticeship rules. This should include, at minimum, records of the total hours of work performed by all people during the relevant phase of work, total hours of work performed by apprentices, total hours of work performed by laborers and mechanics, and data necessary to demonstrate that apprentice-to-journey worker ratios were met. In addition, the Department of Labor stated in one of its FAQs that "taxpayers intending to rely on the good faith effort exception would need to keep records reflecting those good faith efforts, such as documents showing the requests for apprentices and the response, if any, from" a registered apprenticeship program.

We are actively working with a variety of clients in the energy and efficiency industries on the interpretation of and compliance with this rule. Please be in touch with any questions.

## FOOTNOTES

[1] References to the "Code" herein are to the Internal Revenue Code of 1986, as amended and restated.

[2] References to "PTC" herein are to a production tax credit style of credit.

[3] References to "ITC" herein as to an investment tax credit style of credit.

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