



November 19, 2018

U.S. Department of Labor, Employment and Training Administration
Office of Apprenticeship
Room C-5321
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Submitted via the Federal eRulemaking Portal at <http://www.regulations.gov>

RE: Agency Information Collection Activities; Comment Request; Data Collections
from Industry-Recognized Apprenticeship Program Accreditors

To Whom It May Concern:

The Signatory Wall and Ceiling Contractors Alliance (SWACCA) is a national alliance of wall and ceiling contractors committed to working in partnership with their workers and their customers to provide the highest-quality, most efficient construction services. Through the superior training, skill, and efficiency of their workforce – which begins at apprenticeship – SWACCA contractors provide high-quality and cost-effective construction services to their customers and solidly middle-class jobs to their employees. SWACCA prides itself on representing construction contractors that accept responsibility for paying fair wages and benefits, and abide by health and safety standards, workers compensation laws, and unemployment insurance requirements.

SWACCA submits the following comments concerning proposed authority to conduct the voluntary information collection request (ICR) titled, “Industry-Recognized Apprenticeship Programs Accrediting Information”:

1. Training and Employment Notice 03-18 and the related form constitute a rule covered by the Congressional Review Act (“CRA”).

Training and Employment Notice 03-18 (TEN 03-18), Creating Industry-Recognized Apprenticeship Programs to Expand Opportunity in America, and the related form, “Industry-Recognized Apprenticeship Programs, Accrediting Entity Information” (“Accrediting Entity Information Form”, or the “Form”), establish the initial framework through which Industry Recognized Apprenticeship Programs (“IRAPs”) would be established and operated. Moreover, they create a framework through which the Department would determine whether applicants are qualified to act as accreditors of industry-recognized apprenticeship programs. TEN 03-18 and the related Form are a rule subject to the Congressional Review Act.

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Congressional Review of Agency Rulemaking or the Congressional Review Act (CRA) is designed to keep Congress informed about the rulemaking activities of federal agencies, allow for congressional review of rules, and takes precedence over any other provision of law.¹

Section 804(3) of the CRA provides that the term “rule”, notwithstanding three exceptions, has the meaning given such term at section 551 of the Administrative Procedures Act (APA). Section 551 defines “rule” for purposes of the APA at 5 U.S.C. 551(4) as follows:

“rule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

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Congress intended that the CRA cover not only formal rulemaking, but also rules that are not subject to notice and comment requirements of the APA, information rulemaking under 5 U.S.C. § 553(c), rules that must be published in the Federal Register before taking effect (5 U.S.C. § 552(a)(1) and (2)), and other guidance documents.² The focus of the CRA is to require congressional review of agency actions that substantially affect the rights or obligations of outside parties.³

TEN 03-18 “provides information on the policies and procedures third-party certifiers should have in place” to certify IRAPs. It sets out five criteria that potential certifiers must meet to receive a favorable determination from the Department. It provides that a certifier that receive a favorable determination from the Department must request an updated determination from the Department upon making substantive changes to its process or five years after receipt of its most recent favorable determination, whichever is sooner. And it provides that the Department, at its sole discretion, may re-evaluate at any time the program certifiers it has previous accredited.

¹ *Opinion on Whether Trinity River Record of Decision is a Rule*, B-287557 at 1 (U.S. General Accounting Office, May 14, 2001) *citing* 5 U.S.C. 806(a).

² *Id.* at 7, *citing* Cong. Rec. S3687 (daily ed. April 19, 1996) (Joint Explanatory Statement of House Sponsors).

³ *Id.*

- a. TEN 03-18 and the related Accrediting Entity Information Form have a substantial effect on the rights and obligations of non-agency parties.

TEN 03-18 and the related Accrediting Entity Information Form have a substantial effect on the rights and obligations of outside parties that engage in the IRAP framework. It would most obviously impact the entities seeking accreditation to certify IRAPs, who must file an application based on the Accrediting Entity Information Form when they first seek a determination from the Department to act as an accreditor (a.k.a. “certifier”) of IRAPs. The form is four pages long and estimated to average approximately 82 to minutes to complete. It requires several affirmations from the applicant, including affirmations that the applicant will retain certain documentation for the period of time it holds the DOL approved determination as an IRAP certifier.

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TEN 03-18 and the related Form affect the rights and obligations of employers and employees that would participate in an IRAP. Through the recordkeeping obligations described in affirmations articulated in the Accrediting Entity Information Form, the accrediting entity or certifier is required to receive and record information from program participants, including completion rate, median length of time for program completion, employer retention rate for apprentices who successfully complete the program, information on the return on investment for each program sponsor, post-apprenticeship employment rate of apprentices, and pre and post program wage rates. To meet its obligations as an IRAP certifier, the entity must obligate program participants to provide this information pursuant to the Department’s requirements.

TEN 03-18 and the related Form sets out the framework for IRAPs and establishes the rights and obligations of program participants – the Department’s guidance directly impacts the entities seeking certifier status and indirectly impacts program participants. TEN 03-18 and the related Form therefore constitute a rule under the CRA, which requires that the rule be submitted to each House of Congress and the Comptroller General before it can take effect.

- b. TEN 03-18 and the related Accrediting Entity Information Form are statements of policy that constitute a rule covered by the Congressional Review Act (“CRA”).

TEN 03-18 announces prospectively the manner in which the Department proposes to exercise its discretionary authority to establish IRAPs and determine whether applicants are qualified to act as accreditors of IRAPs. The Supreme Court has described “general statement of policy” as “statements issued by an agency to

advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”⁴

TEN 03-18 plainly articulates that it is a statement of policy: “This Information Notice sets out, at a high level, the policies and procedures that certifiers will be expected to have in place to ... evaluate and certify [industry-recognized apprenticeship] programs”. It states that, “The Department will soon announce an opportunity for accepting submissions from organizations interested in serving as third-party certifiers” and encourages prospective certifiers to “begin now to develop the plans, structures, and key partnerships that will form the basis for a successful submission.” The Accrediting Entity Information form states, “Based on the information submitted the U.S. Department of Labor (Department) will determine whether the applicant is qualified to act as an accreditor of high-quality industry-recognized apprenticeship programs.”

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TEN 03-18 is a statement of policy according to its own description and, combined with the related Accrediting Entity Information form, clearly states the manner in which the Department proposes to exercise its discretionary power to determine whether applicants may act as an IRAP certifier. TEN 03-18 is therefore a rule subject to the requirements of the CRA, which requires that the rule be submitted to each House of Congress and the Comptroller General before it can take effect.

2. The proposed collection of information is not just necessary but critical for the proper performance of the functions of the Department, and will have practical utility.

The Accrediting Entity Information form requires that program certifiers collect, retain and publish an appropriate minimum amount of information from the programs they certify. Specifically, the Data and Performance Metrics section of the Form – and each item described therein – is critical to the success of the IRAP framework.

The Department proposes that entities accredited by the Department to certify IRAPs will be required to submit the information requested by TEN 03-18 and the related Form generally once every five years. During the five-year period, the certifying entity will be required to make available to the public annually the following performance- and outcome-related metrics for each IRAP the certifier accredits:

⁴ *Applicability of the Congressional Review Act to Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act*, B-329129 at 4 (U.S. Govt’ Accountability Office, December 5, 2017) *citing Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (*citing Chrysler Corp. v. Brown*, 441 U.S. 201 (302) (1979) (*quoting* U.S. Dep’t of Justice, Attorney General’s Manual on the Administrative Procedure Act at 30 n.2 (1947))).

- Total number of apprentices enrolled in each program
- Total number of apprentices who successfully complete the program
- Completion rate for apprentices
- Median length of time for program completion
- Employer retention rate of apprentices who successfully complete the program
- Information on the return on investment for each program sponsor
- Post-apprenticeship employment rate of apprentices within a year of successfully completing the program
- Pre and post program wages for apprentices

This information is the minimum amount of information that should be made publicly available on an annual basis. The ready availability of this data will help interested parties – including the Department, potential employer sponsors, and potential apprentices – to evaluate the success of the individual programs and the IRAP framework as a whole.

3. The quality, utility and clarity of the information collected can be enhanced through rigorous public review.

The United States Court of Appeals for the District of Columbia Circuit has said that agencies have “much to gain from the assistance of outside parties.”⁵ This perhaps holds especially true where the agency intends to implement a new framework, as is the case here with the Department and Industry-Recognized Apprenticeship Programs. The general public can help support the success of the IRAP framework through complete and thorough public review processes that apply to program certifiers and the programs themselves.

- a. The application for accreditation to certify IRAPs should be made available for public review and comment prior to a determination by the Department.

The IRAP framework delegates program certification to third-parties that would perform a quasi-government function by certifying IRAPs and their compliance with program requirements. Through their voluntary entry into the IRAP framework the entity seeking to become an IRAP certifier should subject itself to public scrutiny. SWACCA recommends that the entirety of the information submitted by the entity seeking accreditation, including especially but not limited to each of the information items and/or affirmations described on the Accrediting Entity Information form,

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⁵ *Chamber of Commerce of the U.S. v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980).

should be made readily available to the public through the Department's website for review and comment prior to the Department's determination of whether the applicant is qualified to act an IRAP accreditor.

- b. The Department should receive and consolidate IRAP annual data and performance metrics, and make that information readily available for public review.

The practical utility of the information collected from IRAP certifiers will be greatly enhanced if it is consolidated to one database that is readily available for public review through the Department's website. It is not sufficient that program certifiers make data and performance metrics publicly available independent of the Department; such a structure would require interested parties to request program data directly from certifiers, thereby supporting a burden associated with obtaining the data and making it exceptionally difficult to compare and contrast data across the IRAP universe.

In order to facilitate review by interested third-parties outside the Department, including potential employer sponsors and potential apprentices, and to enhance the utility of the information collected, the Department should require that program data and performance metrics be submitted to the Department annually for publication online at the Department's website.

In addition to facilitating review by interested third-parties, an annual reporting structure with a public review component should encourage program compliance and support the Department's oversight of program certifiers during the five-year term of their accreditation.

- c. The Department should make IRAP certifier information and program data and performance metrics readily available on in a dedicated section of the Department's website.

The Department should establish a distinct section of its website that is dedicated to IRAPs, including an online database, readily accessible to the public, where IRAP certifier applications and information, along with IRAP data and performance metrics, are published for review. This structure will help ensure program and program certifier compliance and greatly enhance the utility of the information collected by making that information readily available to interested parties in an easily accessible format.

4. The Construction Industry should be clearly defined in the Industry Recognized Apprenticeship Program framework.

Apprenticeship programs are already effective and substantially widespread in the construction industry. TEN 03-18 at page 9 states that construction industry apprenticeships account for approximately 25% of Federal Registered Apprenticeships. According to USDOL Employment and Training Administration's apprenticeship data and statistics website, there were 175,195 active apprentices in the construction industry during fiscal year 2017⁶, which is nearly double the second leading industry figure of 89,301 active apprentices in the U.S. Military. Based on the high concentration of apprenticeships in the construction industry, TEN 03-18 does not make IRAPs available within the construction industry sector.

The construction industry is a broad sector that includes many disciplines and related apprenticeship programs. Due to the breadth of the industry, there is a risk that without a clear definition there could be confusion or disagreement as to whether certain apprenticeship programs would be eligible for certification as IRAPs. The Department should define "construction industry" in the IRAP framework to ensure a common understanding and an effective proscription of construction industry IRAPs.

- a. The IRAP framework should refer to the "Building and Construction Industry" definition used to identify Building and Construction Industry multiemployer plans for purposes of the Employee Retirement Income Security Act of 1974 (ERISA).

SWACCA recommends that, for the purpose of proscribing "construction industry" IRAPs, the Department adopt the "building and construction industry" definition used to identify building and construction industry multiemployer plans under ERISA for purposes of multiemployer plan withdrawal liability pursuant to 29 U.S.C. § 1383(b). The Department is already familiar with this definition through its Employee Benefits Security Administration, which is responsible for administering and enforcing certain provisions of ERISA.

ERISA does not itself define the term "Building and Construction Industry", but courts have concluded that it should be defined by case law under section 8(f) of the Taft-Hartley Act.⁷

The National Labor Relations Board has generally defined the term "building and construction industry" as "subsuming the provision of labor whereby materials and

⁶ United States Department of Labor Employment and Training Administration, Apprenticeship Data and Statistics, Federal Apprenticeship Data, *Federal Data: Active Apprentices by Industry for Fiscal Year 2017*, https://doleta.gov/oa/data_statistics.cfm (last visited Nov. 14, 2018).

⁷ See, *Union Asphalts and Road oils, Inc. v. MO-KAN Teamsters Pension Fund*, 857 F.2d 1230, 1234 (8th Cir. 1988).

constituent parts may be combined on the building site to form, make, or build a structure.”⁸ This definition has been cited in several decisions.⁹

Following are examples of work that has been found to be part of the building and construction industry:

- Installation work at job sites is building and construction industry work.¹⁰
- The dismantling of an industrial complex is building and construction industry work.¹¹
- General contracting through subcontractors is building and construction industry work.¹²
- Construction, modernization and repair of elevators in commercial and industrial buildings is building and construction industry work.¹³

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The building and construction industry definition is well-defined in NLRB and ERISA caselaw. The Department should not incorporate, modify or otherwise cause or encourage a reinterpretation of the caselaw definition. Instead, the IRAP framework should proscribe IRAPs within to building and construction industry as defined for purposes of 29 U.S.C. § 1381(b) to ensure a consistent application of the definition that can be reasonably anticipated by interested parties now and going forward.

5. The Proscription of Construction Industry IRAPs should be made permanent.

The Education and Training Administration’s apprenticeship data and statistics website provides active apprentice data by industry title for 2015, 2016, and 2017.¹⁴ In each of those years, the construction industry is the leading industry for active apprentices by a large margin. Moreover, the number of active apprentices, and the margin by which the construction industry leads other industries, has increased in each of the three years for which industry-level data is available. During prior periods, the ETA data and statistics page provides active apprentice data by occupation title. It is clear from that data that construction is the leading industry

⁸ *Carpet, Linoleum, and Soft Tile Local Union No. 1247*, 156 N.L.R.B. 951, 959 (1966).

⁹ See, *Union Asphalts* 857 F.2d at 1234. *Spectator Management Group v. N.L.R.B.* 320 F.3d 385, 394 (3rd Cir. 2003), *Milwaukee & Southeast Wisconsin District Council of Carpenters and Rowley-Schlimgen, Inc.*, 318 N.L.R.B. 714, 715 (1995)

¹⁰ *W.L. Rives Company* at 468-469.

¹¹ *Zidell Explorations, Inc.*, 175 N.L.R.B. 887 (1969).

¹² *Union Asphalts* 857 F.2d at 1234-1235 (citing *A.L. Adams Const. Co. v. Georgia Power Co.*, 733 F.2d 853, 857 (11th Cir. 1984).

¹³ *F.H.E. Services, Inc.*, 338 N.L.R.B. 1095 (2003).

¹⁴ See United States Department of Labor Employment and Training Administration, Apprenticeship Data and Statistics, Federal Apprenticeship Data, https://doleta.gov/oa/data_statistics.cfm (last visited Nov. 14, 2018).

with most if not all of the top occupation titles for active apprentices in each year for which data is available.

Apprenticeships have been effective and substantially widespread during all time periods for which data is available on the ETA's Data and Statistics website. Moreover, apprenticeships are becoming *more* effective and substantially widespread in the construction industry.

SWACCA member contractors rely on their construction apprenticeship programs to produce the workers that make possible the high-quality, cost-effective business model for which our members are known. Permitting the use of IRAPs in the construction industry at any point in the future could intentionally or unintentionally alter this proven model for our industry and impede our members' ability to succeed in the marketplace and to provide middle class jobs with benefits for their employees. Our current apprenticeship programs, operating under existing registration and equal opportunity regulations, work well. They don't simply train people for a job but instead offer training for a career. Construction industry apprenticeship graduates often advance to leadership positions such as foremen, project manager, superintendent, and beyond. In fact, the owners of many SWACCA-member companies began their careers as apprentices. They know the registered apprenticeship program system works very well for the construction industry.

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TEN 03-18 provides that IRAPs shall not *initially* be made available in the construction industry. It is patently clear that the current apprenticeship regulations are working well in the construction industry, both historically and through the recent period of significant growth. Note especially that the number of construction industry apprentices increased from 144,583 active apprentices in 2016 to 175,195 active apprentices in 2017.¹⁵ The current, highly successful regulatory framework should not be disrupted through the availability of IRAPs in the construction industry. The proscription of IRAPs in the construction industry should therefore be made permanent in the IRAP framework.

6. The Accrediting Entity Information form should be clearly articulate the construction industry definition, the proscription of construction industry IRAPs, and require entities seeking accreditation to affirm their understanding and commitment on any certifier application form.

The Accrediting Entity Information form does not inform the entity seeking accreditation of proscription of construction industry IRAPs. This presents the possibility that the entity applying for certifier status would not fully understand the

¹⁵ *Id.*

definition of “construction industry” and/or the fact that it may not certify construction industry programs. The Accrediting Entity Information form should prominently inform the applying entity of the construction industry definition, the proscription of construction industry IRAPs, and require the entity to affirm its understanding of, and commitment to the proscription. The Department should include a statement that it will revoke the accreditation of any entity that does not comply with the proscription of construction industry IRAPs. These measures will help ensure that third-party certifiers understand and comply with the proscription of construction industry IRAPs.

Conclusion

The construction industry has achieved tremendous success with its apprenticeship programs. In fact, the Department of Labor’s Apprenticeship Data and Statistics webpage for 2013 contains the following statement:

Registered Apprenticeship has over 1,000 apprenticeable occupations across a variety of fields, but we're quite proud of our traditionally strong showing in the construction industry.¹⁶

SWACCA shares the Department’s pride in the success of construction industry apprenticeship programs. The construction industry is *the* sector of the economy in which apprenticeship is the *most* effective and substantially widespread. SWACCA intends that these comments are mindful of the success of our industry’s apprenticeship programs and hopeful that other industries will benefit from the alternative apprenticeship structure offered by the IRAP framework.

Thank you for the opportunity to submit these comments.

Sincerely,



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¹⁶ United States Department of Labor Employment and Training Administration, Apprenticeship Data and Statistics, Federal Apprenticeship Data, *Top 30 Occupations for Fiscal Year 2013*, https://doleta.gov/oa/data_statistics2013.cfm (last visited Nov. 14, 2018).