

SEC's Proposed Rule on Climate-Related Disclosures for Investors

Issue

On March 21, 2022, the U.S. Securities and Exchange Commission (SEC) released its [anticipated proposed rule](#), “The Enhancement and Standardization of Climate-Related Disclosures for Investors.” [Read the SEC’s [fact sheet](#).] The Roundtable issued a [fact sheet](#) summarizing the proposed rule shortly after its publication.

If finalized, the proposal would become the first-ever rule requiring all companies registered with the SEC to report, measure, and quantify GHG emissions and material risks related to climate change in their registration statements and periodic filings (such as Form 10-K). It is pertinent to all companies registered with the SEC, not just real estate registrants.

[The Roundtable submitted comments](#) on the SEC’s proposed climate-risk disclosure rule in June 2022. A final rule from the SEC has not yet been released.

The Roundtable’s comments on the SEC’s proposed rule are summarized as follows:

“Organizational” and “Operational” Boundaries

- Defining “organizational” and “operational” boundaries are critical steps for a company to categorize its GHG emissions. Emissions from sources within these boundaries would be classified as Scopes 1 and 2—and subject to mandatory reporting. Emissions from sources outside these boundaries, in a company’s “value chain,” would be categorized as indirect Scope 3 emissions.
- “Organizational boundaries” should sync with “consolidated” entities presented in a Form 10-K financial statement for any required Scope 1 and 2 disclosures, as the Commission proposes.
- However, emissions from unconsolidated investments, in which a registrant has only a minority stake and over which it has no operational control, should not be within “organizational” boundaries and thus not be subject to any Scopes 1 and 2 reporting mandate. At most, emissions from unconsolidated investments may be a registrant’s Scope 3 emissions.
- A company should only have the Scope 2 responsibility to report on emissions from electricity, steam, heating, or cooling that it consumes itself, to run its own business operations.
- Applying these definitions to the CRE context: a building owner should have no Scope 1 or 2 responsibility to report on emissions generated by metered electricity, steam, heating, or cooling consumed by a tenant that measures energy to run operations in a particular leased space.

SEC's Proposed Rule on Climate-Related Disclosures for Investors

Issue (Continued)

Create a Safe Harbor for Emissions with U.S. Government Data and Tools

- If a registrant uses data, factors, and tools developed by the U.S. Environmental Protection Agency (EPA) and other federal departments to quantify emissions, it should get peace of mind that its calculations will not be second-guessed in an enforcement action or private litigation.
- The Commission should create a “calculation safe harbor” that insulates emissions disclosures from liability when they are: (1) reasonably quantified by professionals with expertise in GHG calculations; and (2) based on the best, available, and most recent data and tools released by federal agencies.

Reporting on Scope 3 “If Material” is a Back Door Mandate and Should be Dropped

- The Proposal’s direction to disclose Scope 3 emissions “if material” is effectively a reporting mandate. Adding up emissions from all indirect sources will virtually always be “material” because they will readily exceed Scope 1 and 2 amounts in nearly every industry sector—including real estate.
- The Commission should impose no mandate—in text or effect—requiring emissions reports based on unobtainable or unverifiable data, from Scope 3 “value chain” sources outside of a registrant’s “organizational” and “operational” boundaries. The “if material” provision for Scope 3 reporting should be dropped.
- A registrant that voluntarily sets a Scope 3 reduction target should receive “safe harbor” protections, but the one proposed by the Commission needs improvement.
- Any Scope 3 “safe harbor” should protect estimates with a reasonable basis of support (not just intentionally fraudulent reports). Also, given the major challenges acknowledged by the Commission regarding Scope 3 calculations, any safe harbor should apply to a registrant’s reasonable decision to omit “value chain” estimates.

Do Not Require Filings Based on Emissions Estimates. Wait Until a Registrant has a Full Year of “Actual” Data to Support Scopes 1 and 2 Disclosures.

- The Proposal effectively requires two separate emissions disclosures: the first filed with Form 10-K based on fourth-quarter estimates, and a subsequently revised filing after the registrant possesses all “actual, determined” GHG data for the prior fiscal year.

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Issue (Continued)

- A registrant should only be required to file mandatory emissions reports—with third-party attestations—once.
- The goals of consistency and transparency for investors would be furthered if the Commission moves its proposed GHG filing deadline after a registrant (and verifiers) have all the data and sufficient time they need to quantify and verify the previous year's Scopes 1 and 2 calculations.

"Physical" and "Transition" Risks Should not be Reported Under a Prescriptive "One Percent" Impact Rule. They are Better Suited to Principles-Based MD&A Disclosures.

- A registrant should discuss the effect of floods, droughts, and similar climate-related events in Form 10-K's MD&A as a "known trend or uncertainty" under Regulation S-K reforms adopted last year.
- Such events are better suited to principles-based narrative reporting—as opposed to the Proposal's prescriptive, bright-line rule that precise metrics must be disclosed for "physical" risks, "transition" risks, and related expenditures if they have a "one-percent" or greater impact on any line item in a financial statement.

Inflation Reduction Act Clean Energy Tax Incentives: Fact Sheet

Issue

President Biden signed the [Inflation Reduction Act of 2022 \(IRA\)](#) into law on August 16, 2022. The legislation will invest almost \$370 billion over the next 10 years to tackle the climate crisis.

A number of the IRA's changes to the federal tax code may help the U.S. real estate sector reduce its carbon footprint, particularly:

- A deduction to help make commercial and multifamily buildings more energy efficient (Section 179D);
- A credit to encourage investments in renewable energy generation and other “clean energy” technologies sited at buildings and other facilities (Section 48);
- A credit to incentivize the installation of EV charging stations (Section 30C); and
- A credit to incentivize energy-efficient new residential construction, including multifamily (Section 45L).

The Real Estate Roundtable (RER) has [encouraged Congress](#) for a [number of years](#) to make clean energy tax incentives more usable for building owners, managers, and financiers—and more impactful to help meet national GHG reduction goals. Below is our summary of key IRA provisions.

179D Tax Deduction For Energy Efficient Buildings²

Amount of Deduction

- The 179D deduction amount is on a “sliding scale.”
 - Amount increases with higher levels of building efficiency.
 - Minimum efficiency gain eligible for the deduction: 25%, pegged to a minimum deduction amount of 50 cents per building ft².

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179D Tax Deduction For Energy Efficient Buildings (Continued)

- Each percentage point increase in building efficiency correlates to a 2-cent increase in the deduction amount.

Efficiency Gain Over Baseline	Deduction Amount "Base Rate"	Labor Standards "Bonus Rate"
25% (minimum)	50 cents per ft ²	\$2.50 per ft ²
30%	60 cents per ft ²	\$3.00 per ft ²
35%	70 cents per ft ²	\$3.50 per ft ²
40%	80 cents per ft ²	\$4.00 per ft ²
50% (maximum)	\$1.00 per ft ²	\$5.00 per ft ²

- 179D deduction amount increases five times if the building project meets "labor standards" that: (1) pay "prevailing wages" to laborers that "install" equipment; and (2) satisfy "apprenticeship" hiring requirements.
 - IRA's general approach: Projects meeting labor standards are eligible for "Bonus" incentives that are five times more than "Base" incentives.
 - See prevailing wage and apprenticeship guidance ([published by the IRS](#) on Nov. 30, 2022)

Eligible Energy Efficient "Property"

- Projects to achieve efficiency gains through installations of:
 - Interior lighting (not "exterior")

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179D Tax Deduction For Energy Efficient Buildings (Continued)

- HVAC and hot water systems
- Envelope (roof, windows, insulation)

Timing

- IRA sliding scale amounts apply to energy efficient property “placed in service” after December 31, 2022.
- No sunset for this deduction. 179D became a permanent part of the tax code in December 2020.

Eligible Building Types

- Any building within the scope of the [ASHRAE 90.1 energy standard](#) for commercial and larger (not “low-rise”) multifamily buildings.

General 179D Baseline

- New construction must model at least 25% more efficient over the ASHRAE 90.1 baseline to qualify for an incentive on the sliding scale.
- The **2007** version of ASHRAE 90.1 provides 179D’s general baseline for equipment “placed in service” up to Dec. 31, 2026 (see [IRS guidance published on Dec. 23, 2020](#)).
- [The 2019 version of ASHRAE 90.1 will provide 179D’s general baseline for equipment “placed in service” on or after Jan. 1, 2027.](#)

Retrofits—Section 179D(f) “Alternative Deduction”

- Retrofit baseline: The building’s **own** specific level of pre-retrofit site energy usage intensity (EUI).
 - **Post**-retrofit site EUI reductions of at least 25% are measured against the **pre**-retrofit baseline to determine the “sliding scale” incentive amount.
- A building must be five years or older to qualify for 179D(f)’s retrofit 179D(f) path.

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179D Tax Deduction For Energy Efficient Buildings (Continued)

- Project must be set forth in a “qualified retrofit plan” certified by a professional engineer or registered architect.
 - No requirement that the government review or approve the qualified retrofit plan.
- Taxpayer must wait to claim the retrofit deduction for at least one year after the equipment is in service **and** the project results in anticipated site EUI reductions.
 - Taxpayer cannot claim the retrofit deduction in the year it buys or installs equipment.
 - Architect/engineer must make a “final certification” of site EUI one year after the retrofit plan is implemented to show the efficiency gain.
- 179D(f) retrofit deduction amount and cap
 - Uses the same sliding scale in the table above.
 - The greater the efficiency gains proved out in the retrofit plan’s “final certification,” the greater the deduction amount
 - The deduction amount is capped at the retrofit plan’s cost (i.e., “aggregate adjusted basis...of energy efficient building retrofit property placed in service”).

Deduction Reset

- The 179D deduction can apply to a specific building every three years (or every four years in the case of a building owned by a governmental or tribal body, or a non-profit organization).

REITs

- Includes earnings and profits (E&P) “conformity” accounting fix.
 - 179D deduction amount reduces E&P in the year that the energy efficiency components are installed (not ratably over a five-year period, as prior law required).

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179D Tax Deduction For Energy Efficient Buildings (Continued)

- REITs and their shareholders may thus receive a fuller and more immediate financial benefit by claiming the 179D deduction.

Section 48 Investment Tax Credit

Types Of Projects

- “Energy Property” covered by current law: solar to generate electricity for heating or cooling; fiber-optic solar to illuminate the inside of a structure; “small wind” and microturbines; geothermal used to produce electricity; geothermal heat pumps to heat or cool a structure; fuel cells; waste recovery; and combined heat and power.
- IRA adds: energy storage (including thermal energy storage); dynamic glass; microgrid controllers; biogas property; and linear generators.

Credit Amount

- 6% of the cost of the Energy Property (“Base Rate”).
- Can scale up to 30% of cost (“Bonus Rate”) if project pays prevailing wages and meets apprenticeship requirements for the duration of the project’s “construction.”
 - Except for microturbines: 2% “Base Rate” and 10% “Bonus Rate.”
- “Small solar” and other projects that generate less than one MW of electricity can qualify at the 30% “Bonus Rate” even if they do not meet wage and apprenticeship standards.
- Credit amount can be increased by 2%/10% if project meets “domestic content requirements” (i.e., materials are made in the USA).
- Credit amount can be increased by 2%/10% if project is located in an “energy community” (i.e., Brownfield site, census tract [or immediately adjacent tract] where a coal mine closed after Dec. 31, 1999, or coal-fired electric plant was retired after Dec. 31, 2009).

Timing And Switch To “Technology Neutral” Tax Credits

- Generally: Section 48 project construction must commence in 2023 or 2024.
 - Except for geothermal heat pumps: Construction must commence through 2034.

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Section 48 Investment Tax Credit (Continued)

- Tax credit starts to scale down for geothermal heat pumps constructed in 2033 and 2034.
- For Section 48 projects constructed **after** Jan 1, 2025:
 - Transition to the technology-neutral “Clean Electricity Production Credit” (Section 45Y) or the “Clean Electricity Investment Credit” (Section 48E).
 - Taxpayer to opt for either the 45Y PTC or the 48E ITC.
 - Credits start to phase out by 2032 or when the electric power sector emits 75% less carbon than 2022 levels (whichever comes later).
 - Section 45Y PTC or Section 48E ITC is available for any “zero carbon” electricity facility or technology.
 - 45Y PTC = tax credit per kWh of “zero carbon” electricity produced and sold in the 10-year period after the facility is placed in service.
 - Base Rate of .5 cents per kWh.
 - Bonus Rate of 2.5 cents per kWh (if prevailing wage/apprenticeship standards are met).
 - 48E ITC = tax credit based on same Base Rate and Bonus Rate structure discussed above.
 - Base Rate: 6% of the cost investment in the “zero carbon” facility.
 - Bonus Rate: 30% of the cost of investment in the facility (if prevailing wage/ apprenticeship standards are met).
 - 5-year depreciation for any qualifying “zero carbon” 45Y facility or 48E property.

Low Income Housing And Communities

- Any credit amounts under Sections 48, 48E, or 45Y do not reduce the basis of buildings supported by Section 42 LIHTCs.
- 20% credit boost for solar and wind projects, generating less than 5 MW, installed “on” low-income housing buildings (such as those supported by LIHTCs).
- 10% credit boost for solar and wind projects, generating less than 5 MW, located in census tracts eligible for New Markets Tax Credits (NMTCs).

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30C Tax Credit For EV Charging Stations

- Extended through 2032.
- Same Base Rate (6%) and Bonus Rate (30%) structure discussed above.
- Credit capped at \$100K for each charging station or refueling pump installed at a property.
- Third party “transferability” applies.
- Geographic limitations—charging station must be located in either:
 - A low-income or high-poverty Census tract under New Markets Tax Credit (NMTC) criteria ([see NMTC tracking tool](#)); or
 - Not an “urban area” as defined by the U.S. Census Bureau.

Section 45L “New Energy Efficient Home” Tax Credit

Duration and Building Eligibility

- Extended through 2032.
- Pertains to new construction which includes “substantial rehabilitation”.
- All residential buildings—single-family and multifamily—are eligible.
- “High-rise” multifamily and apartment buildings can also qualify for the Section 179D tax deduction discussed above (if they are in the scope of the ASHRAE 90.1 standard).
 - ASHRAE 90.1 (and hence, Section 179D application) covers multifamily buildings of four stories or more.

Primary Use of Building

- Must be “residential.”
- Mixed-use buildings: “Dwelling” units and common space (excluding parking garages) must exceed 50% of the building’s square footage.

IRA Clean Energy Tax Incentives: Fact Sheet

Section 45L “New Energy Efficient Home” Tax Credit (Continued)

For Multifamily Homes

- Credit applies to "dwelling units" in a "building" [eligible for EPA’s ENERGY STAR “Multifamily New Construction Program.”](#)
- “Dwelling unit” must meet both:
 - EPA’s most recent [National Program Requirements](#); and
 - Any applicable EPA [regional program requirements](#) (e.g., [California](#)).

Credit Amounts

- Credits are “per unit” in a qualifying multifamily building.
 - Increased amount if the unit meets [U.S.-DOE’s Zero Energy Ready Home Multifamily Program](#) (in development).
 - For single family: Increased credit amount if the home is [certified by U.S.-DOE](#) as a “Zero Energy Ready Home.”
- 5x “Bonus Rate” if prevailing wage requirements are met.
 - No apprenticeship hiring requirement for multifamily “Bonus Rate.”
 - No prevailing wage “Bonus Rate” for single family.

	Base	Base Zero Energy	Bonus	Bonus Zero Energy
Multifamily	\$500	\$1,000	\$2,500	\$5,000
Single-Family	\$2,500	\$5,000	n/a	n/a

Low Income Housing

- 45L credit amounts do not reduce the basis of buildings supported by Section 42 LIHTCs.
- However, the IRA does *not* provide for similar basis reduction under Section 179D—*i.e.*, any 179D deductions *do* reduce the basis of LIHTC buildings.

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Credit Transfers Allowed To Third Parties

- Companies with little or no tax liability that cannot typically benefit from tax credits—like REITs—have the option to “transfer” credits to another taxpaying entity that can use them.
- Transferability can be for the full or partial amount of a credit.
 - Transferability allowed for credits under Section 30C, 45Y, 48, and 48E.
- Transferability is **not** allowed for the Section 179D deduction (except state/local governments, tribes, and non-profit organizations can transfer 179D deduction amounts to architects and designers responsible for the building project).
- The recipient of the credit (the “transferee taxpayer”) must pay for the credit “in cash.”
- The “transferee taxpayer” must be unrelated to the company making the transfer.
- Transferred credit amounts are not “income” to the company making the transfer.
- Transferred credit amounts are not deductible by the “transferee taxpayer.”
- REITs can transfer the full amount of the credit.
 - REIT transfers are not subject to outdated “retained income” restrictions that would otherwise limit the value of credits eligible for transfer.

Summary of “Direct Pay” and “Transfer” Options
for the IRA’s Clean Energy Tax Incentives

IRA Tax Incentive	Direct Pay from US Government	Optional Transfer of Incentive
<ul style="list-style-type: none"> 179D Tax Deduction for Energy Efficient Commercial and Larger Multifamily Buildings 	<p>Not allowed</p>	<p><i>Who can transfer:</i></p> <ul style="list-style-type: none"> Only specified “tax-exempt entities” that own buildings can “allocate” 179D amounts. This includes federal/state/local government, tribal, and non-profit building owners. Private sector building owners <i>cannot</i> transfer 179D amounts. <p><i>Who can receive:</i></p> <ul style="list-style-type: none"> Only the “person primarily responsible for designing” the energy-efficient property can receive allocated 179D amounts. E.g., Architects, efficiency contractors/consultants <p>NOTE: Earnings and profits “conformity” for REITs—i.e., full amount of 179D deduction reduces E&P in the same year that the REIT claims the deduction.</p>
<ul style="list-style-type: none"> Section 48 Investment Tax Credit (projects constructed in 2023 or 2024) Section 48E Clean Electricity Investment Tax Credit (projects constructed in 2025 or later) 	<p>Direct pay eligibility limited to state/local governments, tribes, rural electric coops., and non-profits.</p>	<p><i>Who can transfer:</i></p> <ul style="list-style-type: none"> All business taxpayers that are not eligible for “direct pay.” E.g., REITs, partnerships, corporations

<ul style="list-style-type: none"> Section 45Y Clean Electricity Production Tax Credit (projects constructed in 2025 or later) 		<p><i>Who can receive:</i></p> <ul style="list-style-type: none"> Any unrelated third-party that pays taxes (the “transferee taxpayer”), and that buys the credit amount “in cash.”
<ul style="list-style-type: none"> Section 30C EV Charging Station Tax Credit 	Same as immediately above for Section 48 ITC, etc.	Same as immediately above for Section 48 ITC, etc.
<ul style="list-style-type: none"> 45L Tax Credit for New Energy Efficient Homes (Single- and Multifamily eligibility) 	Not allowed	Not allowed

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State and Local Carbon Mandates on Buildings

Issue

States, cities, and other localities are increasingly passing laws and ordinances that impose regulatory mandates on buildings to reduce greenhouse gas (GHG) emissions, energy consumption, or both. These laws are known as Building Performance Standards (BPS).

The Biden Administration has enlisted more than 35 jurisdictions to form the [National BPS Coalition](#), committed to enact and implement local BPS laws by Earth Day in 2024. Some of these laws have already been proposed or adopted, for example in [Boston](#), [Maryland](#), [Montgomery County \(MD\)](#), [New York City](#), [St. Louis](#), [Washington State](#), and [Washington, D.C.](#)

The effect of BPS laws, and the energy consumption and emissions “targets” they would impose on buildings, can require asset owners to pay for energy efficiency “retrofits,” electrification projects, and install solar panels or other clean energy technologies. If an owner does not take such steps to reduce emissions or energy use, they could pay fines or penalties.

The U.S. Environmental Protection Agency (EPA) has issued helpful guidance recommending “metrics” that states and localities should consider if they enact BPS laws. Members of The Roundtable’s Sustainability Policy Advisory Committee (SPAC) participated in EPA’s multi-year, multi-stakeholder task force in developing these recommendations for states and localities.

Talking Points

- **Workable, federal-level, voluntary guidelines are needed to help standardize a potential “hodge-podge” of divergent local laws that can vary in how they regulate buildings.** Owners, managers, and financiers of nationwide real estate portfolios are looking to EPA for guidance to help unify local-level regulatory requirements and avoid conflicting mandates. EPA’s guidance for states and localities is on the right track because it recommends reductions that are within a building owner’s ability to manage and control. Specifically, EPA’s guidance recommends lowering on-site energy consumption (a.k.a. “normalized site energy usage intensity”) as an appropriate metric for BPS analysis and development.
- **Congress does not need to enact federal-level BPS mandates.** EPA has already issue federal-level guidance developed with months of input from environmental advocates, state and local leaders, and real estate stakeholders. Congress does not need to develop new legislation in this arena because EPA has already done the work.

State and Local Carbon Mandates on Buildings

Talking Points (Continued)

- **No BPS law should saddle building owners with responsibilities to “clean” offsite energy infrastructure like the electric grid or district-wide heating or cooling systems.** Regulators must avoid mandates that effectively make building owners responsible to de-carbonize the grid or district steam infrastructure. Such offsite infrastructure is not within the bounds of what building owners can control. Owners do not control whether the grid in their localities is fueled by wind, or nuclear, or natural gas, or hydropower, for example.
- **No BPS law should impose mandates on building owners to reduce emissions from or energy consumed by their tenants.** Any jurisdiction considering a BPS mandate must distinguish between emissions caused by an owner, and emissions caused by tenants. Building owners do not control operations in separate spaces leased by tenants—particularly in cases of “triple net leases” where a tenant directly pays electricity and other energy bills to a utility.
- **States and localities should not develop their own “carbon coefficients” if they consider BPS laws. They should look to well-established federal EPA standards.** Should a jurisdiction decide to impose GHG reduction “targets” on buildings, it should not create its own factors to convert various fuel sources and electricity to carbon emissions. Rather, it should rely upon the well-established emissions factors developed and published by EPA in its online [Emissions Factors Hub](#) and localized sub-regional electricity factors in its Emissions Generation and Resources Integrated Database ([eGRID](#)).
- **Any BPS law should allow the purchase of Renewable Energy Certificates (RECs) and Power Purchase Agreements (PPAs) as compliance mechanisms.** Until the point that states, localities, utilities, and grid operators are able to deliver de-carbonized electricity to commercial customers, any BPS laws should provide an opportunity for owners to mitigate emissions from purchased electricity attributable to their tenants and central building systems. Renewable Energy Certificates (RECs) and associated Power Purchase Agreements (PPAs) allow building owners to support off-site clean power sources. Owners should be able to claim the environmental attributes of clean power generated elsewhere through appropriately structured REC and PPA programs in the context of any building performance mandates.

State and Local Carbon Mandates on Buildings

Resources

- [Map](#) and [matrix](#) of BPS laws across the U.S. prepared by the Institute for Market Transformation (IMT)
- U.S. EPA ENERGY STAR's BPS [resource page](#) and [policy toolkit](#)
- U.S. EPA ENERGY STAR's [guidance to states and localities](#) recommending BPS metrics (May 2022)
- ["Zero Emission Building Ordinances" webpage](#) prepared by the [Building Decarbonization Coalition](#)
- [Comments from The Real Estate Roundtable](#) on IMT's "model" BPS ordinance (April 6, 2021)

