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

Issue

On March 21, 2022, the U.S. Securities and Exchange Commission (SEC) released its proposed rule, "The Enhancement and Standardization of Climate-Related Disclosures for Investors." [Read the SEC's fact sheet.] The SEC's proposal has been called one of the Biden administration's key policies to combat the climate crisis.

The proposed rule has no immediate effect. It kicked off a public comment period in that generated the most stakeholder responses ever to an SEC-proposed regulation.

If finalized, the proposal would become the first-ever rule requiring all companies, funds, and lenders registered with the SEC to report, measure, and quantify material risks related to climate change in their periodic filings (such as Form 10-K).

A final rule from the SEC has been delayed for months. The delay is reportedly due to concerns that the proposal was too aggressive in its approach requiring disclosures of indirect Scope 3 emissions in a company's "value chain." Litigation against the SEC has also been widely reported as highly probable whenever the Commission releases a final rule. When—or even if—companies must comply with any SEC climate reporting rule thus remains shrouded in uncertainty.

Below is a summary of key takeaways that might be useful as Roundtable members—and their legal, accounting, and environmental experts and consultants—review the SEC's complex, 510—page proposal on climate risk reporting. The Roundtable will prepare a new fact sheet summarizing any SEC final rule whenever it is released.

Scope 1 & 2 GHG Emissions Disclosures

SEC registrants would be required to report and quantify Scope 1 and Scope 2 GHG emissions each year. Scope 1 and 2 reporting would require registrants to define and disclose how they determine their "organizational" and "operational" boundaries.

- Scope 1 and 2 emissions would need to be "disaggregated" and reported separately.
- "Organizational boundaries" for GHG emissions disclosure would track the same "scope of entities...and other holdings" based on the accounting principles that the registrant uses for its "consolidated financial statements."

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Scope 1 & 2 GHG Emissions Disclosures (Continued)

- "Operational boundaries" would require "identifying emissions sources within [the registrant's] plants, offices, and other facilities that fall within organizational boundaries;" and then "categorizing the emissions as either direct or indirect emissions." A registrant should explain its approach and describe its methodology for determining "operational boundaries."
- **The SEC does not specifically address how to bucket Scope 1 and 2 emissions in the building owner-tenant context. General principles on setting "organizational" and "operational" boundaries would need to be consulted in this regard.**
- A registrant would have the discretion to explain and disclose its emissions calculation approach. Examples: emissions per building floor area, kilowatt-hour (kWh) of electricity used, etc.

Scope 3 Reporting

SEC registrants would report Scope 3 emissions if the company has announced a Scope 3 reduction goal—or if investors would find the registrant's Scope 3 emissions "material."

- Scope 3 "indirect" emissions definitions follow the World Resources Institute's Greenhouse Gas Protocol "Scope 3" standard. The GHG Protocol is referenced heavily as a non-binding standard throughout the SEC's proposal. The SEC also repeatedly refers to the Task
- Force on Climate-Related Disclosures (TCFD) as another basis for its proposed emissions reporting framework.
- While the SEC does not propose a quantitative threshold for determining materiality, it "notes that some companies rely on a quantitative threshold, such as 40 percent, when assessing the materiality of Scope 3 emissions."
- If a registrant determines that its Scope 3 emissions are not "material," "it may be useful to investors" to explain why the registrant came to that conclusion.
- Under the GHG Protocol as cited in the SEC proposal, a building owner's "downstream" Scope 3 emissions would include tenant-based Scope 1 and 2 emissions.
- Likewise, if the tenant is a registrant subject to SEC rules, then their "upstream" emissions would include owner-based Scope 1 and 2 emissions.

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Scope 3 Reporting (Continued)

- "As more companies make their Scope 1 and 2 emissions publicly available, these data can serve as the input for other companies' Scope 3 calculations."
- Review the 15 categories of Scope 3 emissions (including employee commuting, business travel, purchased goods, etc.) discussed in the GHG Protocol's Scope 3 guidance.

Scope 3 "Safe Harbor"

With regard to Scope 3 disclosures only, the SEC proposes a "safe harbor" for certain liability under federal securities laws.

- Under specific provisions of the proposed rule, "safe harbor" indicates that "disclosure of Scope 3 emissions [by a] registrant would be deemed not to be fraudulent statement" unless it was made "without a reasonable basis or was disclosed other than in good faith."
- The "safe harbor" extends to "any statement regarding Scope 3 emissions" in a document filed with the SEC under Reg S-K.
- The SEC recognizes the data collection, verification, and other difficulties in estimating emissions up and down a registrant's supply chain. It thus proposes a "targeted safe harbor for Scope 3 emissions data in light of the unique challenges associated with this information."

Third-Party Assurances

Scopes 1 and 2 disclosures would require independent third-party assurances.

- As part of the proposed requirements, registrants need to file an "attestation report" for Scopes 1 and 2 disclosures.
- "Limited assurance" is required in the first two years of compliance and scales up to "reasonable assurance" thereafter.
- "Reasonable assurance" is equivalent to the level of assurance provided in an audit of the financial statements included in a 10-K.
- Scope 3 assurances would be optional.

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Third-Party Assurances (Continued)

- Assurances would only be required from "large accelerated filers" and "accelerated filers" (See "compliance" summary below).
- "Attestation report" would need to be prepared and signed by a third-party "attestation provider" who has "significant experience" in GHG measurement and reporting. The provision is modeled after the SEC's existing rules to ensure that auditors reviewing financial statements are independent from their clients.

Reporting on "Transition Risks"

Registrants would need to report on "transition risks" such as regulatory compliance costs with federal, state, and local climate laws.

- While not specifically mentioned by the SEC, "transition risks" would likely encompass the costs and burdens of real estate stakeholders to comply with so-called energy"benchmarking," "building performance standards," and similar laws imposed by state and local governments.
- Other similar risks associated with the potential transition to a cleaner economy would include reduced market demand for carbon-intensive "products," devaluation or abandonment of assets, climate-related litigation risks and fines, and changes in "consumer behavior."
- Transition risk disclosure can also include optional reporting on "climate-related opportunities" such as capital expenditures, costs savings, and "new markets" that arise from energy- and water-efficiency investments; increased uses of renewable energy; and purchase of renewable energy certificates ("RECs").

Reporting on "Physical Risks"

In addition to GHG emissions, registrants would also need to report on material "physical risks" to buildings and other assets posed by climate change. Examples of material "physical risks" mentioned in the SEC's proposal include:

- Percentage of buildings located in flood hazard areas
- Potential diminution in value of coastal properties subject to rising sea levels

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Reporting on "Physical Risks" (Continued)

- Amount of assets (e.g., book value and as a percentage of total assets) in regions of "high" or "extremely high" water stress and scarcity
- Ability of construction laborers to work safely outdoors during heat waves which could delay operations and reduce earnings

Compliance Timeline

Compliance would start in 2024 for the biggest registrants and phase-in for other companies.

- Registrants with a global value of $700 million or more—"large accelerated filers"—would need to comply first.
  - Compliance for Scope 1 and 2 disclosures for filings in 2024 (covering FY 2023 emissions)
  - Compliance for Scope 3 disclosures for filings in 2025 (covering FY 2024 emissions)
- Registrants with a global value of $75 million or more up to $750 million—"accelerated filers"—would need to comply next.
  - Compliance for Scope 1 and 2 disclosures for filings in 2025 (covering FY 2024 emissions)
  - Compliance for Scope 3 disclosures for filings in 2026 (covering FY 2025 emissions)
- Smaller reporting companies have the most time to comply.
  - Compliance with Scope 1 and 2 disclosures for filings in 2026 (covering FY 2025 emissions)
  - Exempt from Scope 3 reporting

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IRA Clean Energy Tax Incentives Relevant to U.S. Real Estate: 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 Buildings[8]

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

IRA Clean Energy Tax Incentives Relevant to U.S. Real Estate: Fact Sheet

179D Tax Deduction for Energy Efficient Buildings (Continued)

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)

179D is a "deduction" – not a "credit."

- 179D effectively works as a form of "accelerated depreciation" for energy-efficient building "property"—as long as the property achieves the performance standard along the "sliding scale." explained above.

IRA Clean Energy Tax Incentives Relevant to U.S. Real Estate: Fact Sheet

179D Tax Deduction for Energy Efficient Buildings (Continued)

Eligible Energy Efficient "Property"

- Projects to achieve whole-building efficiency gains through installations of any combination of:
  - Interior lighting (not "exterior")
  - 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).

IRA Clean Energy Tax Incentives Relevant to U.S. Real Estate: Fact Sheet

179D Tax Deduction for Energy Efficient Buildings (Continued)

  - **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 path.
- 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 of at least 25%.
  - Taxpayer cannot claim the retrofit deduction in the year it buys or installs equipment.
  - Architect/engineer must make a "final certification" of site EUI at least 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 on page 55.
  - The deduction amount increases with greater efficiency gains proved out in the retrofit plan's "final certification."
  - 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).

IRA Clean Energy Tax Incentives Relevant to U.S. Real Estate: Fact Sheet

179D Tax Deduction for Energy Efficient Buildings (Continued)

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).
    - 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 prior 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; linear generators; and “interconnection property” to the electric grid.

Credit Amount (see also separate RER chart on “Base and Bonus Rate Amounts”)

- 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.

IRA Clean Energy Tax Incentives Relevant to U.S. Real Estate: Fact Sheet

Section 48 Investment Tax Credit (Continued)

- Credit amount increased by 2% if project meets "domestic content requirements" (i.e., materials are made in the USA).
    - Boost to 10% if prevailing wage/apprenticeship standards are met.
- Credit amount increased by 2% 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).
    - Boost to 10% if prevailing wage/apprenticeship standards are met.

Increased Credit Amounts for 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).
- Credit increases for low-income housing and communities are competitive. They are capped at annual capacity limits, require an application to US-DOE, and approval by Treasury/IRS.

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.
    - 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).

IRA Clean Energy Tax Incentives Relevant to U.S. Real Estate: Fact Sheet

Section 48 Investment Tax Credit (Continued)

        - 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.

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:

IRA Clean Energy Tax Incentives Relevant to U.S. Real Estate: Fact Sheet

30C Tax Credit for EV Charging Stations (Continued)

- 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, including "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.

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).

IRA Clean Energy Tax Incentives Relevant to U.S. Real Estate: Fact Sheet

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

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, 179D deductions do reduce the basis of LIHTC buildings.

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.

IRA Clean Energy Tax Incentives Relevant to U.S. Real Estate: Fact Sheet

Credit Transfers Allowed to Third Parties (Continued)

    - 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).
    - Transferability is **not** allowed for the section 45L credit.
- 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.
- See summary chart on the next page

IRA Clean Energy Tax Incentives Relevant to U.S. Real Estate: Fact Sheet

Summary of "Direct Pay" and "Transfer" Options
for *IRA* Tax Incentives

IRA Tax Incentive	Direct Pay from US Government	Optional Transfer of Incentive
• 179D Tax Deduction for Energy Efficient Commercial and Larger Multifamily Buildings	Not allowed	***Who can transfer:*** • 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 ***cannot*** transfer 179D amounts. ***Who can receive:*** • Only the "person primarily responsible for designing" the energy-efficient property can receive allocated 179D amounts. • E.g., Architects, efficiency contractors/consultants ***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.
• Section 48 Investment Tax Credit (projects constructed in 2023 or 2024)	Direct pay eligibility limited to state/local governments, tribes,	***Who can transfer:*** • All business taxpayers that are not eligible for "direct pay."

• **Section 48E Clean Electricity Investment Tax Credit (projects constructed in 2025 or later)** • **Section 45Y Clean Electricity Production Tax Credit (projects constructed in 2025 or later)**	rural electric coops., and non-profits.	• E.g., REITs, partnerships, corporations ***Who can receive:*** • Any unrelated third-party that pays taxes (the "transferee taxpayer"), and that buys the credit amount "in cash."
• **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.
• **45L Tax Credit for New Energy Efficient Homes (Single- and Multifamily eligibility)**	Not allowed	Not allowed

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IRS Guidance on Clean Energy Tax Incentives: Fact Sheet

Issue

Congress passed the *Inflation Reduction Act (IRA)* on August 16, 2022. The *IRA* overhauled the U.S. tax code's credits and deductions to incentivize clean power generation and investment.

The U.S. Treasury Department and Internal Revenue Service (IRS) have responsibilities to coordinate with the Energy Department, the Environmental Protection Agency, and other federal agencies to develop guidance to implement the law. RER submitted comments to Treasury/IRS on November 4, 2022 and December 2, 2022 to shape the agencies' guidance on key matters.

Treasury/IRS have released several key guidance documents since Congress passed the law. More is forthcoming, particularly on the *IRA*'s sections regarding:

- new authorities for taxpayers to sell certain credits (Section 6418)
- the deduction for commercial and multifamily owners to "retrofit" buildings and make them more energy efficient (Section 179D, subsection (f))
- non-urban locations where projects are eligible for the EV charging station tax credit (Section 30C, subsection (c)(3))

Treasury is expected to release proposed regulations in the months ahead that will be consistent with the recent IRS notices and announcements while also addressing stakeholder comments and providing additional details to help taxpayers comply.

This fact sheet summarizes IRS notices and other announcements released to date that provide more information on how owners and developers may benefit from the clean energy tax incentives relevant to U.S. real estate. The Roundtable will update this fact sheet as new guidance becomes available.

Prevailing Wage and Apprenticeship Guidance

IRS Notice 2022-61 **(87 Fed. Reg. 73,580 [November 30, 2022])**

U.S. Department of Labor slide deck

- Amount of certain incentives (e.g., Section 30C and 48 credits, Section 179D deduction) increase five times (5x) if project meets both wage and apprenticeship requirements.
    - Only prevailing wage is necessary for 5x boost for 45L credit (new single- or multi-family residential construction). No apprenticeship requirements for 45L credit.

IRS Guidance on Clean Energy Tax Incentives: Fact Sheet

Prevailing Wage and Apprenticeship Guidance (Continued)

  - No need to satisfy wage, apprenticeship for "small scale" wind, solar, etc. projects to get increased Section 48 credit amounts.
    - Projects generating under 1 MW (measured in AC) qualify for the 30% Section 48 credit. No compliance with labor requirements is necessary.
- The 5x wage and apprenticeship boost is required for projects that "begin construction" on or after January 29, 2023. (See next heading)
- Laborers and mechanics must be paid hourly prevailing wage (and fringe benefits) applicable to the market where the building is located.
  - E.g.: Electricians, iron workers, equipment operators, carpenters.
  - Not foremen or superintendents.
- Consult the Labor Department's www.sam.gov website to ascertain geographically appropriate wages for pertinent classifications of construction and repair jobs.
  - See also guide to navigate sam.gov.
- Use the most recent wage determination.
- Must pay prevailing wages throughout construction and for five years after the project is "placed in service."
- "Qualified apprentices" must perform an applicable percentage of "total labor hours" of the construction, alteration, or repair work.

When Construction Begins	% of Apprentice-Required Labor Hours
Before Jan 1, 2023	10%
During 2023	12.5%
After 2023	15%

IRS Guidance on Clean Energy Tax Incentives: Fact Sheet

Prevailing Wage and Apprenticeship Guidance (Continued)

- Consult registered apprenticeship programs approved by U.S. Labor Department or state labor agency: see www.apprenticeship.gov and DOL fact sheet.
- Good faith exception: Make a request for “qualified apprentices” from a registered apprenticeship program. If the request is denied, or no response in five business days, exception is satisfied.

- Keep records sufficient to support any claim for the 5x credit boost—such as documents to identify the applicable wage determination, the laborers and mechanics who performed construction/repair work, classifications of work performed, hours worked in each classification, and wage rates paid.

“Beginning of Construction” Guidance

IRS Notice 2022-61 **(87 Fed. Reg. 73,580 [November 30, 2022])**

- The date construction “begins” can be important to determine eligibility for IRA “base rate” and “bonus rate” incentive amounts.
- Construction “begins” under either of the following:
  - **“Physical Work Test:”** Construction begins when the taxpayer “maintains a continuous program of construction” “under a binding written contract”—that does not include “preliminary work” such as planning, designing, securing financing, researching, obtaining permits, engineering studies, or site clearing.
  - **“5% Safe Harbor:”** Construction begins when the taxpayer spends 5% or more of the total costs to construct a facility, and thereafter makes “continuous efforts” to complete the project.

Section 179D “Reference Standard” for New Construction

IRS Announcement 2023-1 **(Jan 17, 2023)**

- Establishes the “Reference Standard” for the ***traditional*** 179D deduction generally applicable to ***new construction*** (as noted above, IRS guidance still expected on ***“retrofit” 179D(f)*** deduction for ***existing buildings***).

IRS Guidance on Clean Energy Tax Incentives: Fact Sheet

Section 179D "Reference Standard" for New Construction (Continued)

- Baseline for measuring efficiency improvements is the ASHRAE 90.1 energy standard for commercial and high-rise multifamily buildings (4 floors or more).
  - Assuming construction "begins" after December 31, 2022, the applicable year-version of the ASHRAE 90.1 baseline depends on when the building is "placed in service":
  - **2007** version of ASHRAE 90.1: applies to a building "placed in service" up to December 31, 2026.
  - **2019** version of ASHRAE 90.1: applies to a building "placed in service" on or after January 1, 2027.

Low-Income Communities: Section 48 Bonus Credit for Solar, Wind Projects

IRS Notice 2023-17 **(Feb. 13, 2023)**

- Bonus credits for Low-Income Communities are "competitive." They require an application to the Department of Energy and an award from Treasury/IRS.
  - Underlying Section 48 "base rate" credits (6% of project costs, or 30% if labor standards satisfied) are non-competitive and require no application.
  - Increased Bonus Amounts
    - Extra 10% credit boost if the project is in a New Market Tax Credit census tract.
  - Extra 10% boost if the project is on "Indian land."
  - Extra 20% credit boost if the project is "on" low-income housing (such as apartments supported by Low-Income Housing Tax Credits (LIHTCs) or Section 8 vouchers).
  - Extra 20% credit boost is part of a "low-income economic benefit project."

IRS Guidance on Clean Energy Tax Incentives: Fact Sheet

Low-Income Communities: Section 48 Bonus Credit for Solar, Wind Projects (Continued)

        - At least 50% of the financial benefits of the electricity produced by the facility are provided to households that meet high-poverty and low-income criteria.

- Technology and Output Limitations
    - Low-Income bonus not available for all Section 48 technologies. Only for:
        - Solar property.
        - Wind property.
        - Energy storage installed in connection with such property.
        - Maximum net output < 5 MW.
- Annual Program Cap on Availability
    - 1.8 gigawatts—statutory cap for calendar years 2023 and 2024.
    - Any unused capacity based of 2023 bonus credit awards will carry over to 2024.

Bonus Rate Location	When to Apply	Annual Capacity Limit
Low-Income Community (NMTC tract)	Starting Q4 2023	700 megawatts
Indian Land	Starting Q4 2023	200 megawatts
Low-Income Residential (e.g. LIHTC, Section 8)	Starting Q3 2023	200 megawatts
Low-Income Economic Benefit	Starting Q3 2023	700 megawatts

- Application Process and Lottery
    - Only the owner of a facility may apply for a bonus credit allocation.
    - Only one bonus allocation per facility.
    - If applications for bonus credits exceed limitations in a given category, then DOE may conduct a lottery to allocate awards.
    - Agency roles

IRS Guidance on Clean Energy Tax Incentives: Fact Sheet

Low-Income Communities: Section 48 Bonus Credit for Solar, Wind Projects (Continued)

        - US-DOE reviews applications to determine project eligibility, makes recommendations to IRS to allocate bonus credits to specific applicants, conducts lottery if capacity is over-subscribed.
        - IRS makes final decision whether to accept or reject application and notifies applicant of its decision.
- Placed in Service Deadline
    - Property must be placed in service within 4 years after the applicant receives notice from Treasury/IRS of the bonus award.
    - "Placed in service" is the earlier of the taxable years when:
        - Depreciation begins, or
        - The property is "placed in a state of condition of readiness" to perform its functions.
        - No bonus credit allowed for a facility placed in service prior to an allocation award.

Brownfields: Section 48 Bonus Credit for "Energy Communities"

IRS Notice 2023-29 **(April 4, 2023)**

- Extra 2% bonus credit for Section 48 projects "placed in service" "within" a Brownfield.
    - Extra 10% bonus if Section 48 project also meets prevailing wage, apprenticeship requirements.
- "Brownfield" defined by prior statute.
    - See 42 U.S.C. § 9601(39)

IRS Guidance on Clean Energy Tax Incentives: Fact Sheet

Brownfields: Section 48 Bonus Credit for "Energy Communities" (Continued)

- Similar bonus credits provided for Section 48 projects in areas heavily dependent on coal mining and other fossil fuel industries for tax revenue and employment; and in census tracts where retired coal mines were located.
- Applies to taxable years ending after April 4, 2023.
- Notice 2023-29 governs until IRS issues regulations.

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IRA Section 48 Investment Tax Credit— "Base" and "Bonus" Rate Amounts

Section 48 Project Type	Base Credit Amount	Meets Wage, Apprencticeship	Bonus Credit Amount	Relevant Statutory Section/ Regulatory Guidance
Various "energy property"[9]	6% of project costs	30% of project costs	See below for bonus re: solar, wind, associated storage < 5 MW; and "domestic content"; and Brownfields.	• 26 U.S.C. §§ 48(a)(2)(a)(i), (9), (10) • IRS Notice 2022-61 (87 Fed. Reg. 73,580 [Nov. 30, 2022]) for labor guidance
Any "energy project" with max net output < 1 MW (measured in AC)	30% of project costs	N/A	See below for bonus re: solar, wind, associated storage < 5 MW; and "domestic content"; and Borwnfields.	• 26 U.S.C. §§ 48(a) (9)(A), (B)(i) • Guidance expected to define "single" energy project
Interconnection property for projects ≤ 5 MW (measured in AC)	6% of project costs	30% of project costs	Below, "domestic content"; and Brownfields.	• 26 U.S.C. § 48(a)(8) • IRS Notice 2022-61 (87 Fed. Reg. 73,580 [Nov. 30, 2022]) for labor guidance
Microturbines[10]	2%	10%	Below, "domestic content"; and Brownfields.	• 26 U.S.C. §§ 48(a)(2)(a)(ii), 3(a)((iv)

[9] Consult relevant definitions for each "energy property" type at 26 U.S.C. § 48(c): fuel cells; solar electricity for heating/cooling/hot water; fiber-optic solar for interior illumination; electrochromic (dynamic) glass; "small wind" property (turbine capacity ≤ 100 KW); waste energy recovery (capacity ≤ 50 MW); electricity and hydrogen storage (nameplate capacity ≥ 5 KWH); thermal energy storage; biogas; combined heat and power; geothermal heat pumps; microgrid controllers.
[10] Nameplate capacity < 2,000 KW and electricity-only generating efficiency ≥ 26%. 26 U.S.C. § 48(c)(2).

Only solar, wind + storage projects with max net output < 5 MW (measured in AC).	In an NMTC census tract ("low-income community")	N/A	N/A	Add 10%. Annual capacity limit.[11] Must apply to DOE/IRS for allocation.	• 26 U.S.C. §§ 48(e)(1)(A)(i), (2)(A)(iii)(I) • [IRS Notice 2023-17](https://www.irs.gov) (Feb. 13, 2023)
	On low-income housing (e.g., supported by LIHTCs or Section 8 vouchers)	N/A	N/A	Add 20%. Annual capacity limit.[12] Must apply to DOE/IRS for an allocation.	• 26 U.S.C. §§ 48(e)(1)(A)(ii), (2)(A)(iii)(II), (2)(B) • IRS Notice 2023-17 (Feb. 13, 2023)
	"Low-income economic benefit" (high poverty, low income census tract)	N/A		Add 20%. Annual capacity limit.[13] Must apply to DOE/IRS for allocation.	• 26 U.S.C. §§ 48(e)(1)(A)(ii), (2)(A)(iii)(II), (2)(C) • IRS Notice 2023-17 (Feb. 13, 2023)
	Any "energy property" that meets domestic content requirements ("Buy American")[14]	N/A	N/A	• Add 10% if projects meets labor OR generates < 1MW. • Add 2% if project does not meet labor standards.	• 26 U.S.C. §§ 45(b)(9)(B); 48(a)(12) • 49 C.F.R. § 661.5 (*IRA* incorporates "Buy America" regs from the Federal Transit Administration)
	Brownfield site (or area economically dependent on fossil fuel industry)	N/A	N/A	• Add 2% • Add 10% if project also meets labor standards.	• 26 U.S.C. §§ 45(b)(11)(B)(i); 48(a)(14) • IRS Notice 2023-29 (Apr. 4, 2023)

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[11] 700 MW as per IRS Notice 2023-17 (Feb. 13, 2023). Cannot be combined with extra credits for low-income housing or "low-income economic benefit."
[12] 200 MW. See *id.* Cannot be combined with extra credits for "low-income community" or "low-income economic benefit."
[13] 700 MW. See *id.* Cannot be combined with extra credits for low-income housing or "low-income community."
[14] Steel, iron, and certain percentages of "manufactured products" that are components of "energy property" and certified as produced in the U.S.A. Additive and ***can*** be combined with various low-income extra credits for "communities," "housing" and "economic benefit." No capacity limits or IRS/DOE application required

"NextGen" EPA Label for Low-Carbon Buildings

Issue

On January 31, 2023, the U.S. Environmental Protection Agency (EPA) proposed a low-carbon voluntary building recognition label called ENERGY STAR NextGen™. EPA designed the new program to reflect U.S. real estate's role to support the Biden administration's goal of economy-wide net-zero emissions by 2050.

The NextGen building label would expand upon the agency's successful ENERGY STAR program for assets that attain high levels of energy efficiency. The new label would allow companies to highlight buildings that further reduce Scopes 1 and 2 GHG emissions, deploy renewable energy technologies on-site, and encourage clean power purchases that increase off-site renewable energy supplies.

The Roundtable encouraged EPA to create a label for low-carbon buildings, along the lines of NextGen, to create uniform, voluntary, and easy-to-implement federal guidelines that help simplify the confusing patchwork of city and state climate-related building mandates.

EPA intends to make its NextGen label available in late 2023-early 2024. The Roundtable submitted comments on March 2, 2023. Our comments urge the agency to conduct a pilot program that tests the low-carbon label before any final NextGen criteria are released to the CRE marketplace. RER's comments also recommend that EPA refine its proposed NextGen criteria, as follows:

The Roundtable's Position

Efficiency

- Significant and **demonstrated reductions in a building's energy use** should be eligible for the NextGen label (as an alternate, additional criterion to EPA's proposal that only ENERGY STAR-certified buildings could qualify).
- Buildings that have the most room to improve performance (but are not yet "top of class") should be afforded NextGen label opportunities. These are exactly the kinds of real estate assets that need incentives to also increase renewable energy use and lower emissions.

"NextGen" EPA Label for Low-Carbon Buildings

The Roundtable's Position (Continued)

Renewable Energy

- The NextGen proposal would require that 30% of a building's energy use must derive from renewables. This level should start at 20% and adjust over time **to reflect the changing status of the electric grid as it decarbonizes** through increased reliance on solar, wind, and other clean power sources.
- **Battery storage** should be included in the percent requirement for renewable energy use.
- The requisite percentage of renewable energy use should also encompass **geothermal and other technologies** that harness clean energy sources for heating, cooling, hot water, cooking, and other building functions.
- NextGen should move toward recognizing **"peak demand" mitigation measures.** EPA's federal standard energy benchmarking tool, Portfolio Manager, should evolve so a building owner can track progress to use less electricity at times of peak demand.

GHG Reductions

- The Roundtable commends the EPA's proposal to **normalize a GHG "intensity target"** that correlates to a building's asset type and unique weather conditions based on a metric known as Heating Degree Days (HDD).

Renewable Energy Certificates (RECs)

- Voluntary NextGen recognition can provide **much-needed guidance on corporate accounting for REC purchases** and enhance credible claims on the environmental benefits from offsite clean power procurement.
- For purposes of the proposed label, an organization should promote its renewable energy consumption through RECs by showing it:
    - Has exclusive, contractual rights to the environmental attributes of the RECs it purchases;
    - Retains those rights and does not sell them;
    - Limits claims to match the scope of its REC purchases (here, for the tailored purpose of mitigating emissions from electricity consumed by a specific building(s) seeking NextGen recognition);

"NextGen" EPA Label for Low-Carbon Buildings

The Roundtable's Position (Continued)

- Retires RECs associated with a green power purchase to prevent "double counting";
- Certifies and verifies qualifying RECs by an independent third party; and
- Maintains the paperwork needed to substantiate its ownership of the energy attributes of verified RECs.

Application Process

- EPA should optimize NextGen procedures by allowing owners to **apply concurrently for both ENERGY STAR and NextGen certifications with the same application**.
- The Roundtable recommends a **three-year cadence for NextGen certification renewals** because many companies with nationwide portfolios choose to pursue updates to their asset certifications in cycles and not annually due to the heavy compliance lift.