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The Real Estate Roundtable

June 30, 2023

The Honorable Lily Batchelder
Assistant Secretary of Tax Policy
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Mr. William M. Paul
Assistant Principal Deputy Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: **Notice of Proposed Rulemaking,**
Additional Guidance on Low-Income Communities Bonus Credit Program,
88 Fed. Reg. 35,791 (June 1, 2023)

Dear Assistant Secretary Batchelder and Deputy Chief Counsel Paul:

The Real Estate Roundtable (www.rer.org) ("The Roundtable") appreciates this opportunity to comment on the above-referenced proposed rule ("Proposal").

The Roundtable brings together the leaders of the nation's top publicly held and privately owned real estate ownership, development, lending, and management firms, together with the leaders of major real estate trade associations, to address jointly national policy issues relating to real estate and the overall economy.[1] Increasing the nation's supply of affordable housing and decarbonizing the nation's stock of buildings are policy priorities for The Roundtable.

The *Inflation Reduction Act (IRA)* addresses both our climate and housing crises through provisions such as Section 48(e). The section offers a competitive "bonus credit" for solar, wind, and storage facilities at a 10% rate in low-income communities and at a 20% rate for low-income housing. We support the Biden Administration's objectives to accelerate clean energy deployment in affordable housing while reducing greenhouse gas emissions in a manner that improves environmental justice.

Smart rules from the Treasury and IRS should provide more clarity and certainty for taxpayers to access Section 48(e) to help achieve the Administration's goals. Optimizing uptake of the bonus tax credits can help unleash private sector capital for renewable energy investments in underserved communities. Here is a summary of our key points to improve the Proposal:

[1] The attached addendum (at p. 6) provides more information on The Roundtable's membership.

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<u>"Single Project" Definition</u>

- Eligibility for Section 48(e)'s bonus credit depends on a project size limit. The *IRA* states that a "qualified wind and solar facility" must have a "maximum net [electrical] output of less than 5 megawatts."[2] The Proposal interprets this limitation by reference to IRS notices issued before the *IRA*'s enactment. These prior notices would apply a balancing test of eight (8) criteria to determine whether, under the facts and circumstances of any given case, the electrical output from separate energy properties must be aggregated to comprise a "single project" that meets or exceeds the 5-MW threshold.

- "Single project" status should not always depend on a complicated and subjective "facts and circumstances" test.

- Certain single factors should deem a project "single" with no further analysis. Renewable energy properties should be conclusively "single" if they are:
  - located at different non-contiguous addresses; **<u>or</u>**
  - require separate government permits; **<u>or</u>**
  - require distinct interconnection agreements with a utility.

- If none of these outcome determinative factors apply as a "safe harbor" in a particular situation, the 8-factor balancing test would be appropriate to define the reach of a "single project."

<u>"Financial Benefit" to Low-Income Housing Renters</u>

- Section 48(e) states that a solar or wind facility at low-income housing qualifies for a 20% bonus credit – as long as the "financial benefits" of the clean electricity "produced" on-site are "allocated equitably" among the building's tenants.[3]

- "Net metering" projects where multifamily owners generate excess solar or wind electricity – and sell it back to the grid for off-site consumption – yield a measurable "financial benefit" that may be allocated among low-income residents consistent with the *IRA*'s language.

- However, the Proposal misses the mark by interpreting financial "benefit" to mean the "value" of possible savings on tenants' utility bills that might arise from renewable energy produced on-site. Multifamily building owners cannot control occupants' behaviors regarding whether or not they use power efficiently in their leased spaces. Nor do multifamily owners generally have access to data from sub-meters in leased apartment units to measure any putative bill savings that might accrue directly to tenants.

- Moreover, building owners do not receive the financial benefit of tenants' energy bill savings to help underwrite the costs for building-wide clean energy investments. This "split incentive" problem is heightened in low-income housing, which already operates at slim financial margins with minimal extra capital available for owners to invest in on-site wind or solar generation.

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[2] 26 U.S.C. § 48(e)(2)(A)(ii).
[3] 26 U.S.C. § 48(e)(2)(B)(ii).

- Accordingly, Treasury/IRS should drop the interpretation that "financial benefit" equates with the "value" of tenants' energy savings.

"Other Affordable Housing Programs"

- Section 48(e) restricts the 20% low-income residential bonus to renewable facilities that are part of rental buildings supported financially by federal "covered housing programs" – or "other affordable housing programs as the [Treasury] Secretary may provide."[4]

- Buildings supported by non-federal programs administered by local public housing authorities ("PHAs") and state housing finance agencies ("HFAs") should be eligible for Section 48(e)'s bonus. The Treasury Secretary should "provide" accordingly.

"Ownership"

- Congress indicated no intent in the *IRA* to prefer applications for low-income bonus credits based on who owns a project.

- However, the agencies propose priority treatment in the application process for tax-exempt owners to receive bonus credits over other businesses. Non-profits already get a major benefit under the *IRA* in the form of direct payment for tax credits – in short, grants – from the federal government under Section 6417.

- The Proposal's bias for non-profits to receive bonus credits, nowhere evidenced in the law itself, subverts the main goal of Section 48(e): to spur solar and wind deployment in underserved communities and low-income housing as much as possible – ***regardless of ownership***.

- If the agencies intend to convert the bonus credit program into a grant program for tax-exempts they should plainly state that is their goal. As proposed, the agencies would essentially relegate most qualified business taxpayers to an arbitrary lottery where they might be awarded whatever bonus credits are left over, after they are granted outright to non-profits.

- The Roundtable recommends that the better approach would be to award low-income bonus credits to qualified applicants on a first-come, first-served basis. If ***the project*** meets the requirements set forth in the statute, there should be no additional arbitrary preference based on ownership status. Our recommendations would best further the law's primary intent and accelerate progress toward the Biden Administration's ambitious goal for a net zero economy by 2050.

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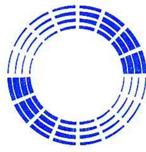
[4] 26 U.S.C. § 48(e)(2)(B)(i).

* * *

More detailed analysis is provided below. Please contact Duane J. Desiderio, Senior Vice President and Counsel (energy) (ddesiderio@rer.org) and Ryan P. McCormick, Senior Vice President and Counsel (tax) (rmccormick@rer.org), for questions regarding these comments.

Sincerely,

Jeffrey D. DeBoer
President and Chief Executive Officer



COMMENTS OF THE REAL ESTATE ROUNDTABLE
TO THE PROPOSED RULEMAKING,
"Additional Guidance on Low-Income Communities Bonus Credit Program"
88 Fed. Reg. 35,791 (June 1, 2023)

1. "Single Project" Definition

- ***"Single project" status should not always depend on a complicated "facts and circumstances" test. Certain single factors should deem a project "single" with no further analysis – such as where projects are located at different non-contiguous addresses, covered by separate government permits, or require distinct interconnection agreements.***

Solar, wind, and associated energy storage properties may qualify for the low-income communities bonus if they comprise a "single project" generating AC electrical output under five (5) megawatts.[5] The Proposal cautions, "some applicants may attempt to circumvent" the *IRA*'s statutory size threshold by artificially "dividing larger projects" into fractions that add up to 5 MW or more.[6] To prevent project disaggregation, the agencies propose to define "single project" with reference to pre-*IRA* notices ("Existing Notices") that interpret Section 48.[7] Unfortunately, these Existing Notices set forth an ambiguous "facts and circumstances" test. They require taxpayers to balance eight factors to determine whether individual energy properties should be combined into a "single project."[8]

Treasury/IRS should afford more clarity to the "single project" definition. Taxpayers applying for bonus credits will, in practice, retain lawyers and accountants for counsel on whether a project with multiple components falls under the 5-MW limit. Delivery of clean power to low-income communities and housing will be delayed while companies endeavor to insulate themselves with advisory letters and opinions regarding whether any given project is "single."

The inquiry should not ***always*** require taxpayers and their consultants to apply an opaque and subjective 8-factor test. The Roundtable recommends a final rule that supports clearer outcomes to deem a project "single." A Section 48 project should be "single" where energy properties:

- are located at separate, non-contiguous addresses assigned by local government, **or**
- require distinct interconnection agreements with a utility, **or**
- require different construction or installation permits from a regulatory body.[9]

[5] 26 U.S.C. § 48(e)(2)(A)(ii).
[6] 88 Fed. Reg. at 35,793/2.
[7] *Id.* The Proposal cross-references section 7.01(2)(a) of Notice 2018-59 and section 4.04(2) of Notice 2013-29.
[8] The eight criteria set forth in the Existing Notices "may" include, but "are not limited to," whether the energy properties: (1) are owned by a single legal entity; (2) are constructed on contiguous pieces of land; (3) are described in a common power purchase agreement(s); (4) have a common intertie; (5) share a common substation; (6) are described in one or more common environmental or other regulatory permits; (7) constructed pursuant to a master construction contract; or (8) are financed pursuant to the same construction loan agreement.
[9] The same issue also arises elsewhere in the *IRA*, as "single projects" generating AC electrical output under one MW are eligible for the Section 48 ITC at the 30% rate (regardless of prevailing wage and apprenticeship requirements). 26 U.S.C. § 48(a)(9)(B)(i). We

The Administration's environmental justice goals – to bring clean electricity quickly and efficiently to low-income communities – should not be weighed-down with unnecessary regulatory ballast. The Roundtable recommends that Treasury/IRS issue a final rule that supports streamlined determinations of "single project" status in appropriate cases.

2. "Financial Benefit" to Low-Income Housing Renters

- ***Where multifamily owners deploy "net metering" to generate excess electricity sold back to the grid for off-site consumption, the project yields a measurable "financial benefit" that may be allocated among low-income tenants to comply with the IRA's text.***

- ***However, Treasury/IRS should not interpret financial "benefit" to mean the "value" of possible savings on tenants' utility bills that might arise from renewable energy produced on-site. Multifamily owners cannot usually control or measure utility bill savings that accrue directly to tenants. Nor do owners receive possible financial savings from lower utility bills in leased spaces to help underwrite the costs they incur for building-wide clean energy investments.***

The *IRA* offers a competitive 20% bonus credit for solar, wind, and storage facilities that are "part of" low-income residential buildings. To qualify for this Section 48 bonus, the statute directs that taxpayers must "allocate[] equitably" the "financial benefits" from renewable electricity "produced" at the building among its tenants.[10] For example, when a multifamily owner invests in a "net metering" project that generates solar power and sells some of it back to the grid for profit,[11] the sold portion could be measured, quantified, and equitably shared with tenants for the purpose of satisfying the *IRA*'s express terms. The price for excess solar energy exported for off-site consumption – in the form of a utility credit above and beyond what is needed to power on-site common areas and individual apartments – may be a "financial benefit" within the statute's text.

The Proposal, however, conflates financial ***"benefit"*** with financial ***value.*** IRS/Treasury would enact a rule that improperly substitutes the statutory term "financial ***benefit*** of the electricity produced" with a definition of "financial ***value*** of net energy savings."[12] This proposed approach would dampen significantly taxpayers' interest in shouldering the costs for solar and wind facilities that serve low-income housing. With respect, this aspect of the Proposal is flawed for at least three reasons.

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likewise advocated in the 1-MW context that the same outcome determinative factors offered here should conclude the "single project" analysis without resort to the 8-factor balancing test. See The Roundtable's Nov. 4, 2022 comments, pp. 12-13 (available on regulations.gov).

[10] 26 U.S.C. § 48(e)(2)(B)(ii).

[11] See Solar Energy Industries Association, "Net Metering" ("Net metering is a billing mechanism that credits solar energy system owners for the electricity they add to the grid. For example, if a residential customer has a PV system on their roof, it may generate more electricity than the home uses during daylight hours").

[12] See, e.g., 88 Fed. Reg. at 35,794/1-2: "The Treasury Department and the IRS propose that financial benefit can be demonstrated through net energy savings." In turn, where the solar facility and the low-income building have the same owner, Treasury/IRS regulation would define "the financial value of net energy savings" to mean "the greater of (1) 25% of the gross financial value of the annual energy produced or (2) the gross financial value of the annual energy produced minus the annual costs to operate the facility."

First, residential building owners usually lack physical access to read electricity meters installed in leased spaces outside of common areas. Tenants that occupy separately-metered spaces have no obligation generally to report how much they pay for electricity to their landlords. Furthermore, to safeguard customer privacy, utilities usually have no legal obligation to provide data to residential building owners on the amount of electricity consumed in any leased space by a particular tenant that pays their monthly bills directly to a power company. Because building owners typically lack visibility into leased space energy use and utility payments, it is exceedingly difficult (if not impossible) for multifamily landlords to measure and allocate a putative "financial benefit" that might accrue from tenant-consumed energy (generated by solar, wind, or otherwise). Indeed, the Proposal itself acknowledges:

- ✓ "[I]t is often administratively infeasible in certain sub-metered buildings" to distribute "financial benefits" of electricity produced on-site to tenants.[13]
- ✓ Further, in some jurisdictions it may not be "legally possible to apply utility bill savings on residents' electricity bills."[14]

If utility protocols and leasing arrangements constrain building owners' ability to measure leased space energy use, how can owners be expected to "allocate[] equitably" potential "financial benefits" that ***go directly to tenants*** from on-site solar production? A key *IRA* goal – to incentivize clean energy facilities as "part of" low-income housing – will be undermined if Treasury/IRS follow the Proposal's route. The Roundtable urges the agencies to ***not*** equate "financial benefit" with some tenant-level "value" of solar energy that asset owners can neither measure nor track.

Second, any putative "financial benefit" that may accrue to tenants from energy savings depends on ***their*** behaviors. Landlords do not set thermostats, turn off lights, charge phones, operate computers, or plug-in appliances in leased units of housing. The Proposal misses the mark by placing the burden on landlords to "allocate[ ] equitably" among tenants any benefits from lower utility bills, when tenants control how much they pay – or save – based on choices they make regarding leased space power consumption.

Third, the Proposal fails to address the well-documented "split incentives" conundrum.[15] Simply put, when a ***tenant*** pays their own utility bill, any financial benefit from energy savings accrues to ***them*** – not to the building owner. Yet, tenants do not pay the price tag for the equipment, the labor to install it, permitting costs to construct the project, or ongoing expenses to maintain the facility. Because building owners do not typically receive utility bill savings in multi-tenant assets, they do not receive financial benefits to help recoup their returns on clean energy investments. Moreover, split incentives are exacerbated in the context of low-income housing where rents are already charged at below-market rates, margins are slim, and it is even more challenging for solar projects to "pencil-out."

Accordingly, The Roundtable recommends that Treasury/IRS issue a final rule that does ***not*** define "financial benefit" with reference to the putative "financial value" received by specific tenants through savings on their utility bills. Potential "value" that ***tenants*** may enjoy is the wrong metric for financial "benefits" to incentivize ***landlords*** to bear the financial and regulatory costs for clean electricity projects in low-income housing.

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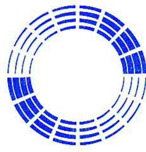
[13] *Id.* at 35,794/3.
[14] *Id.*
[15] See Urban Land Institute, *Addressing the Landlord/Tenant Split Incentive to Drive Building Decarbonization* (March 15, 2022) ("Building owners and tenants are often characterized by a 'split incentive' which hinders joint efforts towards energy-efficient buildings. Why should one party pay for an improvement when the other stands to benefit?").

 The Real Estate Roundtable

3. “Other Affordable Housing Programs”

- ***Buildings supported by state and local affordable housing programs should be eligible for the 20% low-income residential bonus credit.***

Section 48(e) incorporates by reference separate federal statutes[16] that provide financial assistance to “residential rental buildings” eligible for the 20% bonus credit. The provision includes multifamily assets supported by low-income housing tax credits and Section 8 housing choice vouchers. Buildings covered by “such other affordable housing programs” as the Treasury Secretary “may provide” can also be eligible for Section 48(e)’s credit boost.

The Treasury Secretary should consult with the HUD Secretary to “provide” for state and local affordable housing programs for purposes of Section 48’s low-income bonus. State and local agencies are suited to determine the unique housing needs in their jurisdictions. HUD already maintains online databases of local public housing agencies (PHAs)[17] and state housing finance agencies (HFAs).[18] These non-federal entities should identify their own affordability programs to support buildings eligible for Section 48’s “qualified solar and wind facility” extra credit.

4. “Ownership”

- ***There is no basis in the IRA for the Proposal’s bias that non-profit or similar entities should receive bonus credits, in the form of direct pay grants, over other business taxpayers. Rather, qualified applicants should receive bonus awards on a first-come, first-served basis. Allocating limited incentives regardless of ownership status will better serve both the law’s intent and the Biden Administration’s goal for accelerated, economy-wide clean energy transformation.***

Congress indicated no intent in the *IRA* to prefer applications for low-income bonus credits based on project ownership. However, the agencies propose priority treatment in the application process for tax-exempt entities to receive bonus credits over other businesses. Non-profits already get a major benefit under the *IRA* in the form of direct payment for tax credits – in short, grants -- from the federal government under Section 6417.

The Proposal’s bias for non-profits to receive bonus credits, nowhere evidenced in the law itself, subverts the main goal of Section 48(e): to spur solar and wind deployment in underserved communities and low-income housing as much as possible – ***regardless of ownership***. If the agencies intend to convert the Section 48(e) bonus credit program into a grant program for tax-exempts, they should plainly state that is their goal.

The agencies’ Proposal would essentially relegate most qualified business taxpayers to a random lottery system where they might be awarded whatever bonus credits are left over, after they are granted outright to non-profits. The business community needs more certainty that they have fair opportunities to seek a low-income bonus if their solar or wind facilities qualify under the statute’s very terms. Otherwise, companies interested in

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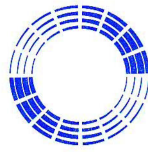
[16] 26 U.S.C. § 48(e)(2)(B)(i), referencing the Violence Against Women Act of 1994, 34 U.S.C. § 12491(a)(3) (definition of “covered housing program”), and rural housing programs administered by the Department of Agriculture under the Housing Act of 1949.
[17] See https://www.hud.gov/program_offices/public_indian_housing/pha/contacts.
[18] See https://www.hudexchange.info/programs/housing-counseling/.

underwriting solar, wind, and storage facilities in low-income communities – including companies that develop and own low-income housing – will be heavily dissuaded from applying for clean energy credits in the first place. That is not a good message for the Treasury and IRS to send to U.S. businesses.

The Roundtable recommends that the better approach would be to award low-income bonus credits to qualified applicants on a first-come, first-served basis. If ***the project*** meets the requirements set forth in the statute, there should be no additional arbitrary preference based on ownership status. Our recommendations would best further the law's primary intent and accelerate progress toward the Biden Administration's ambitious goal for a net zero economy by 2050.

* * *

Please contact Duane J. Desiderio, Senior Vice President and Counsel (energy) (ddesiderio@rer.org) and Ryan P. McCormick, Senior Vice President and Counsel (tax) (rmccormick@rer.org), for questions regarding these comments.



The Real Estate Roundtable

ADDENDUM

About The Real Estate Roundtable

https://www.rer.org/about-us/mission

The Roundtable's membership represents over 3 million people working in real estate; some 12 billion square feet of office, retail, and industrial space; over 4 million apartments; and more than 5 million hotel rooms. It also includes the owners, managers, developers, and financiers of senior, student, and manufactured housing as well as medical offices, life science campuses, data centers, cell towers, and self-storage properties. The collective value of assets held by Roundtable members exceeds $4 trillion.