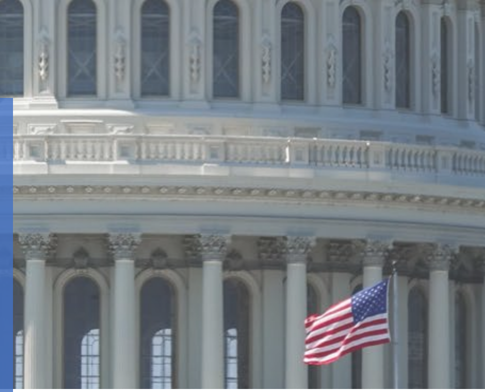


The Real Estate Roundtable

Inflation Reduction Act Fact Sheet — IRS Guidance On Clean Energy Tax Incentives

April 6, 2023

Please read in conjunction with The Real Estate Roundtable's separate fact sheet, "Clean Energy Tax Incentives Relevant to U.S. Real Estate" (April 6, 2023)

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

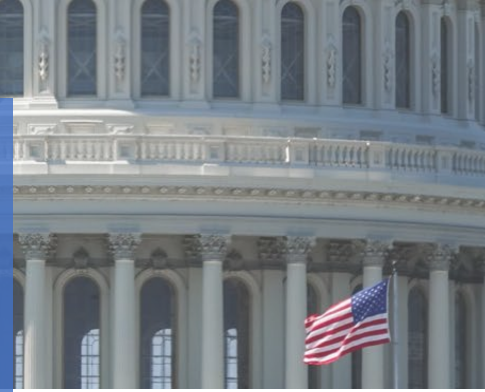
IRS Notice 2022-61 (87 Fed. Reg. 73,580 [November 30, 2022])
U.S. Department of Labor slide deck

- 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.

  - 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%

  - 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.



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"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***).
- 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."
        - 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
        - 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)
- 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 intil IRS issues regulations.