The Real Estate Roundtable

October 30, 2023

Submitted via www.regulations.gov

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
Principal Deputy Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: **Proposed Rule, REG-100908-23, "Increased Credit or Deduction Amounts Satisfying Certain Prevailing Wage and Apprenticeship Requirements," 88 Fed. Reg. 60,018 (Aug. 30, 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 regarding Prevailing Wage/Registered Apprenticeship requirements ("PW/RA Requirements") for "bonus rate" clean energy tax incentives under the *Inflation Reduction Act* ("*IRA*").

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. An addendum to this letter provides more information on The Roundtable.[1]

The Roundtable has long advocated for meaningful and usable tax credits and deductions that leverage private sector investments in renewable energy and energy efficiency. Success in decarbonizing buildings depends on collaboration between policy makers; the unions and trade workers that install, construct and maintain clean energy building systems; the companies that own, develop, and finance real estate; and the tenants who consume energy to run their households and businesses in the structures that make our communities safe and vibrant – our homes, offices, stores, schools, warehouses, hotels, restaurants, gyms, data centers, labs, and places of healing and worship. Corporate policies of Roundtable members align with the Biden Administration's goals and investors' demands to reduce emissions, modernize the grid, create a skilled clean energy workforce, and show leadership on the world stage to combat the climate crisis.

[1] *Infra* p. 9.

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SUMMARY

- Treasury/IRS should develop "Recordkeeping Requirements" for PW/RA compliance that reflect the reality of how laborers, mechanics, and apprentices are employed on real estate projects, who is hired by whom, and who tracks hours worked.

- Real estate owners and developers that might claim *IRA* tax incentives are not the direct employers of electricians, plumbers, carpenters, HVAC technicians, drywallers, painters, glaziers, solar technicians, EV charging installers or any other subcontractors that construct or retrofit buildings. Asset owners do not hire, fire, pay, or train these trade workers. General contractors ("GCs") and subcontractors ("subs") directly employ manual laborers. The (sub)contractors on a project maintain records on the essential terms of their workers' employment or apprenticeships. Building owner and developer taxpayers do not.

- Without some sort of streamlined regulatory process that allows the direct employers of building trade workers to certify their PW/RA compliance "up" to the taxpayer, "bonus" incentives will not entice private sector commercial and multifamily owners to invest at scale in clean energy projects. The *IRA*'s objectives will be undermined if the costs of labor compliance far exceed the incentives offered by Congress to support retrofits and other projects to slash carbon emissions in the built environment.

- ***Suggested Regulatory Solution:*** Any final PW/RA Rule should allow a paperwork "safe harbor" for building owners/developers to rely on certifications provided by their GCs and/or subs. Real estate business taxpayers should rest assured in their claims to a bonus incentive if their contractors certify and declare in writing that all *IRA* wage and apprenticeship requirements are met. Such a certification should be the only paperwork that an owner/developer should be required to maintain to satisfy PW/RA Requirements and access 5x credits and deductions. NLRB's just-finalized "joint employer" rule[2] supports the labor compliance "self-certification" framework we suggest.

COMMENTS

1. ***"Base rate" incentives are minimal. "Bonus rates" are at a level that can attract private sector investments in clean energy building projects – but paying higher wages that swallow-up the "bonus" will demotivate real estate's interest in the IRA.***

- "Base rates" of *IRA* incentives are rather inconsequential to many private sector real estate owners and investors. The "base" levels are generally not valuable enough to induce businesses to shoulder the steep upfront expenses for costly clean energy building investments.

- For example, the deduction at section 179D is the tax code's primary provision to motivate high energy-efficiency projects in commercial and multifamily buildings. 179D's current "base rate" is now at levels significantly lower than what the deduction offered before the

[2] NLRB final rule, "Standard for Determining Joint Employer Status," 88 Fed. Reg. 73,946 (Oct. 27, 2023).

IRA's enactment. Pre-*IRA* 179D provided a deduction for whole-building efficiency improvements at ***$1.80*** per square foot. The new base rate is far less. The *IRA*'s amended version starts at ***50 cents*** per square foot and scales-up to only reach ***$1.00*** per square foot.

- While the "base rate" is inadequate, the 5x "bonus rate" comes with significant regulatory strings attached: business taxpayers must generally satisfy new and onerous PW/RA Requirements as described in the proposed rule at issue to attain the "bonus."

- Section 179D's "bonus" deduction will be swallowed-up by the higher wages that must be paid to qualify at the 5x level. The *IRA*'s 179D "bonus rate" starts at $2.50 and tops-out at $5.00 per square foot – as long as prevailing wages are paid. However, a March 2020 report from U.C. Berkeley estimates that apartment building construction projects in California with prevailing wage requirements "cost an average of $30 ***more*** per square foot than those without wage requirements" (p. 14). A rational taxpayer will find not find reformed section 179D appealing when the deduction is offset more than five-times by wages that must be paid to "win" the incentive.

- Treasury/IRS must acknowledge that the costs of higher wages and fringe benefits paid to laborers and mechanics will generally ***exceed*** incentive amounts – thus rendering the *IRA*'s "bonus" illusory in many cases. Heightened labor costs de-value *IRA* credits and deductions by placing greater stress on a project's economic bottom line. In turn, dampened business interest in the tax incentives diminishes creation by private sector investors of new clean energy supplies and undermines the Biden Administration's climate goals.

- We encourage the Administration to undertake a nationwide study of the economic impact of PW/RA Requirements to assess whether (and by how much) increased labor costs counteract incentive levels set in the *IRA* – particularly in markets where the construction workforce is not unionized, and for non-government contract projects typically under no regulatory obligation to pay prevailing wages.

2. ***Extra administrative costs from PW/RA paperwork obligations will be significant – and deter private real estate companies' interest in the "bonus" for clean energy tax incentives.***

- Even assuming a taxpayer pays the higher wages and fringes to support a "bonus rate" award, a business will also factor the added costs simply to comply with PW/RA paperwork constraints to assess whether pursuing the bonus is worth the effort.

- Owners, GCs, and subs on ***private*** sector building projects that might seek a 5x *IRA* bonus must effectively adopt most standard practices that apply for ***government*** contract and ***public*** works projects – notably, the need to pay, and document payment of, prevailing wages to all laborers. As a result, the proposed rule is a boon for the market of prevailing wage consultants. Building project managers with no experience in public contracting or prevailing wage requirements will need retain the expertise of consultants that specialize in Davis-Bacon reporting and compliance. A web search for the terms, "Davis Bacon consultant" and " will be needed to document "bonus" rate qualification. The amount of these consultants' fees is another added regulatory cost to diminish the *IRA*'s "bang for the buck."

- The Roundtable asked one of our members with expertise in procuring green building tax incentives to request quotes from labor consultants for their fees to assist claims for the 179D deduction. As the table below reveals, the net financial impact of PW/RA compliance alone can exceed the net present value of the maximum available 179D "bonus" at $5 per square foot:

TABLE – Net Financial Impact from Proposed Recordkeeping Compliance Costs Associated with Claiming Maximum 179D Deductions ($5 per sf)

Construction Type	Building Size (sf)	Estimated Cost of Recordkeeping Range*	Max NPV Value of 179D ($5/sf)	Net 179D Impact After Proposed PW/RA Recordkeeping Requirements
Multifamily Rental	285,000	$144,000 - $374,400	$237,245	$(137,155)
Education Center	115,000	$126,000 - $327,600	$111,775	$(215,825)
Commercial Office Renovation	55,000	$102,000 - $265,200	$53,457	$(211,743)
Hotel	120,000	$144,000 - $374,400	$116,634	$(257,766)
Mixed Use Industrial	85,000	$80,000 - $156,000	$82,616	$(73,384)

- ➢ Our research shows that, assuming a 30% tax rate and a 7% discount rate, the cost of PW/RA recordkeeping ***alone*** would generally exceed the net present value of the ***maximum*** 179D deduction. Unfortunately, a builder/developer of a private sector project will be deterred from seeking a 179D "bonus" unless they have some independent reason for their (sub)contractors to pay prevailing wages, hire apprentices, and satisfy related document compliance

- ➢ Moreover, the table above only addresses regulatory costs of paperwork obligations for the proposed PW/RA recordkeeping rule at the maximum incentive amounts. In the eyes of a business taxpayer, 179D's value is even further reduced when factoring:
  - ✓ Lesser "bonus" levels available for projects that do not reach the top end level of 50% energy savings (*i.e.,* 25% - 49% energy savings on the *IRA*'s sliding incentive scale);
  - ✓ Fees for other third-party consultants and qualified professionals to conduct energy analyses, certify retrofit plans, and certify final levels of attained energy savings after the retrofit plan is operational for at least a year (all required by the *IRA*'s text);
  - ✓ Tax preparation and filing fees;
  - ✓ And, of course, the added costs to invest in high efficiency equipment and systems that must operate to reach the performance standard for 179D qualification.

- The Roundtable wholly encourages Treasury/IRS to conduct its own thorough cost-benefit accounting of the proposed PW/RA Requirements. Policy makers, climate advocates, unions

– and the real estate owners, developers and contractors who bear the underwriting and regulatory burdens of 179D compliance – should all gain an accurate understanding grounded in financial metrics of how the PW/RA proposal would likely dis-incentivize business taxpayers' fervor to pursue *IRA* bonuses.

3. ***<u>Recommended Regulatory Solution:</u> To spur more clean energy projects in buildings, a regulatory solution is needed to ease the IRA's paperwork burdens. The final PW/RA recordkeeping rule should allow an owner-taxpayer to rely on written "certification" from general and/or sub-contractors that they have met all labor-related requirements.***

- Any final PW/RA rule should minimize administrative costs on businesses to stockpile labor-related paperwork. Treasury/IRS should develop "Recordkeeping Requirements" that reflect the reality of how laborers, mechanics, and apprentices are employed on real estate projects, who is hired by whom, and who tracks hours worked.

- A company that owns or develops a commercial building is the likely taxpayer to seek an *IRA* benefit because it bears the project's financial risk. Yet, the owner/developer does not possess the information or keep the files needed to meet the proposed rule's "Recordkeeping Requirements" regarding number of laborers on a project, wages and "corrective payments" paid to mechanics, total labor hours worked, and apprentices on the job.[3] The building owner/developer does not hire, fire, pay, or train such laborers; there is no direct employee-employer relationship between them. Simply put, it is not industry practice for building owners to collect or maintain the reams of documents and data sought by Treasury/IRS on the details of trade laborers' employment terms.

- If any businesses keep documents responsive to PW/RA "Recordkeeping Requirements," they would be the subs (hired by GCs) that directly employ the skilled and manual workers on building projects. Subcontractors collect information on the number of hours worked by, and wages and fringes paid to, electricians, HVAC technicians, plumbers, drywallers, EV charging installers, solar workers, etc.

- ***<u>The Roundtable's recommended regulatory solution is as follows:</u>*** Any final PW/RA Rule should allow a paperwork "safe harbor" for building owner/developer taxpayers to rely on written certifications from their GC and/or subs. Such written certifications should be the only paperwork an owner/developer taxpayer must maintain to support "bonus" claim on a tax return. The labor compliance certifications should state the (sub)contractors have met all *IRA* wage and apprenticeship requirements needed to support the taxpayer's claim to a 5x incentive. An exception to the "safe harbor" could apply if the property owner taxpayer knew or had reason to know that the (sub)contractor's certification was false.

- Our recommendation – to allow a building owner to rely on certifications provided by (sub)contractors regarding wages and apprentices – is supported by Biden Administration policy defining the parameters of the employer-employee relationship.

[3] PW/RA Proposed Rule, 88 Fed. Reg. at 60,035, columns 2-3

- Under the expansive reasoning of a National Labor Relations Board ("NLRB") final rule published last Friday,[4] the owner/developer of a building could be deemed a "joint employer" of laborers and mechanics on a project – along with any GC and subcontractors as fellow "joint employers." To be clear, The Roundtable strenuously objects to the NLRB's unworkable and unfair rule.[5] Businesses should not be considered employers of workers they do not hire. They should not be liable under some limitless theory of potential "authority to control" essential terms and conditions of employment that apply to another entity's hired employees.

- But if the final "joint employer" is the Biden Administration's position on labor policy, then it should apply to support its climate policy – and back the PW/RA Paperwork "safe harbor" we recommend here. For the *IRA*'s purposes, one putative "joint" employer – *i.e.*, the building owner – should be able to rely on certifications that ***another*** putative "joint" employer – *i.e.*, the GC or subs – has satisfied all of the wage and apprenticeship matters within their direct control.[6] The "joint employer" rule should operate to indemnify taxpayers seeking *IRA* bonus incentives who rely on certifications provided by GCs or subs that immediately and directly control "essential employment terms" regarding wages, hours worked, and apprenticeship hiring.[7]

4. ***The need for streamlined PW/RA rules is critical given that the very text of the IRA itself fails to fully encourage building clean energy projects.***

- The Roundtable's best case scenario would be to amend the *IRA*'s statutory text to remove the PW/RA Requirements and thereby unleash significant sums in the capital markets for cost-effective building electrification and energy-efficiency projects. But we are realistic as to those chances. We are not sanguine as to the prospects for ***any*** *IRA* legislative amendments any time soon. That is why it is crucial for IRS/Treasury to get the rulemaking process right – so implementing *IRA* regulations function to maximize clean energy deployment across all real estate asset classes. Progress toward this goal can be achieved with a Treasury/IRS rule that streamlines paperwork burdens by allowing a "safe harbor" for contractors' wage and apprenticeship "certifications" as we suggest.

- In any event, The Roundtable takes this opportunity to suggest further targeted reforms to the tax code that will help scale real estate's transformation toward zero emissions. At a

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[4] NLRB final rule, "Standard for Determining Joint Employer Status," 88 Fed. Reg. 73,946 (Oct. 27, 2023).
[5] The Roundtable aligns with the comments on the proposed "joint employer" rule submitted by the Associated Builders and Contractors, the Associated General Contractors of America (AGC),and the Coalition for a Democratic Workplace (CDW).
[6] Proposed rule relies on NLRB's own decisions stating that a business may be deemed an indirect "joint employer" upon "reserved, unexercised control" of workplace matters, even though an "intermediary" entity is directly responsible for "essential terms and conditions of employment" regarding "wages, benefits, and other compensation; hours of work and scheduling; firing and discharge … and work rules and directions governing the manner, means or methods of work performance." 88 Fed. Reg. at 73,946, column 3; at 73,966, column 1.
[7] New 29 C.F.R. § 103.40(d).

minimum, the Biden Administration should signal desired *IRA* statutory changes when it develops its "green book" for FY'2024

- ***Section 48: Include building electrification technologies.*** Nothing in the *IRA* specifically encourages commercial building electrification. Air-source heat pumps, induction cooktops, and other electrification equipment for building heating, hot water, and kitchen functions should be added to the list of technologies supported by the section 48 Investment Tax Credit ("ITC"). Section 48 covers geothermal heat pumps – so why not air source heat pumps, too?

- ***Sections 45L and 179D: Allow private owner transfers to unrelated third parties.*** The new "transfer" provision at section 6418 can go along way to help monetize certain tax credits and open up new markets for companies without tax liability to underwrite more clean energy projects. Yet, the statute's text precludes private building owners from "allocating" section 179D to third-party building designers and architects. Similarly, section 45L is not among the credits eligible for transfer listed in section 6418. As a result, 179D and 45L are thus largely unusable by REITs and other institutional owners of real estate in the private sector. These entities ***themselves*** cannot benefit from tax incentives due to their corporate structure, yet the *IRA* provides them no opportunity to transfer 179D and 45L to unrelated third parties who might benefit from these incentives. Congress gave authorization for private owners to transfer eleven (11) clean energy tax credits – including the section 48 ITC and the section 30C credit for EV charging stations. Sections 45L and 179D get the same treatment and they should be eligible for "transfer" and "allocation," respectively.

- ***Section 179D: Repeal rule that reduces a property's basis by the amount of the claimed deduction.*** Under section 179D(e), the depreciable basis of energy efficient commercial building property is reduced by the amount of any section 179D deduction allowed. The effect of basis reduction is to reduce the depreciation deductions allowable over the economic life of the property. The purpose of depreciation deductions is to recognize and compensate owners for the gradual decline in the value of their investment due to normal wear and tear and technological obsolescence. The basis reduction in section 179D(e) has no impact on governmental and nonprofit property owners because of their tax-exempt status. In the case of taxable property owners, however, basis reduction effectively eliminates any net tax savings from claiming the 179D deduction beyond an acceleration of deductions the taxpayer would otherwise claim in the future (timing benefit). Moreover, if the taxpayer has tax losses, which is often the case until a property is sold, even the timing benefit associated with the accelerated deductions may have little or no economic value. Lastly, because the 179D deductions are ultimately recaptured as ordinary income, taxpayers actually may be worse off financially.

  There are many instances in which the tax law "turns off" basis reduction in order to achieved desired policy objectives. For example, the basis of qualifying renewable energy property is reduced by only 50% of the allowable investment tax credit. The renewable energy investment tax credit does not reduce the basis of property eligible for the low-income housing credit at all. Federally funded grants generally reduce the basis of a property for LIHTC purposes, but not if the grant enables a property to be rented to low-income tenants.

In the base case of an individual property owner taxed at a rate of 40.8%, section 179D can be viewed as equivalent to a $1.02/sq.ft. tax credit and analogous to other credits that do not reduce basis. In order to provide a meaningful 179D tax incentive for energy efficient commercial building improvements by taxable property owners, policymakers should repeal section 179D(e) and allow taxpayers to claim a deduction under section 179D without reducing the basis of the property

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For more information, please contact at The Real Estate Roundtable (www.rer.org):

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- **Ryan P. McCormick, Senior Vice President and Counsel (tax) rmccormick@rer.org**

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Thank you for the opportunity to submit comments. For more information, 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).

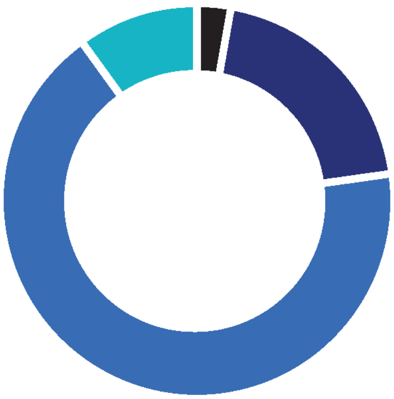
Sincerely,

Jeffrey D. DeBoer
President and Chief Executive Officer

About The Real Estate Roundtable

www.rer.org

Who We Are



Asset Managers

3%

Financial Services

20%

58% Banks (Commercial & Investment)

16% Mortgage Bankers

26% Insurers

Owners

67%

55% Private

44% Public

46% Mixed

14% Office

12% Retail

12% Hotel

11% Housing

4% Industrial

2% Other

Real Estate Trade Organizations

10%

American Hotel & Lodging Association (AHLA)

American Resort Development Association (ARDA)

Association of Foreign Investors in Real Estate (AFIRE)

Building Owners and Managers Association Int'l. (BOMA)

CRE Finance Council (CREFC)

CREW Network (CREW)

International Council of Shopping Centers (ICSC)

Mortgage Bankers Association (MBA)

NAIOP, the Commercial Real Estate Development Association (NAIOP)

National Apartment Association (NAA)

National Association of Home Builders (NAHB)

National Association of Real Estate Investment Managers (NAREIM)

Nareit (NAREIT)

National Association of Realtors® (NAR)

National Multifamily Housing Council (NMHC)

Pension Real Estate Association (PREA)

Real Estate Executive Council (REEC)

Urban Land Institute (ULI)