# 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." The SEC's proposal is 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 that generated the most stakeholder responses ever to an SEC-proposed regulation.

When finalized, the rule will impose the first-ever federal requirements on companies, funds, and lenders registered with the SEC to report, measure, and quantify for investors "material" risks related to climate change in Form 10-K and other filings.

California, however, has somewhat beat the SEC to the punch. In September 2023, Governor Newsom signed into law corporate emissions and climate-risk disclosure requirements without waiting for the SEC to act. (See The Roundtable's separate fact sheet, "California's Climate Disclosure Package.") While more companies will be affected by the SEC's eventual requirements, California is now the first jurisdiction in the U.S. to impose climate-related public disclosures on businesses as a matter of law.

The final SEC rule 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 unclear.

The Roundtable will update this fact sheet whenever the SEC releases a final rule. Below is a summary of the 2022 proposed rule.

## 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."

- "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 emissions – as well as "upstream" emissions that are "embodied" in construction materials and other purchased goods/services.

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

- Likewise, if the tenant is a registrant subject to SEC rules, then their "upstream" emissions would include the owner's building-related Scope 1 and 2 emissions.
- "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 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.

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

- Scope 3 assurances would be optional.
- 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; claiming *IRA* clean energy tax incentives; 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

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

- 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

***NOTE: In all likelihood, the proposed rule's deadlines will change when a final rule is announced.***

**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

The Real Estate Roundtable (RER) does not intend this communication to be a solicitation related to any particular company, nor does it intend to provide investment, legal, or tax advice. Nothing herein should be construed to be an endorsement by RER of any specific company or products as an offer to sell or a solicitation to buy any security or other financial instrument or to participate in any trading strategy. RER expressly disclaims any liability for the accuracy, timeliness, or completeness of data in this publication.

# California's Climate Disclosure Package: Summary of SB 253 and SB 261

## Issue

In September 2023, the California Legislature passed two bills that will require certain businesses to disclose and report their greenhouse gas (GHG) emissions and climate-related financial impacts:

- SB 253: The Climate Corporate Accountability Act requires certain businesses to quantify, report, and disclose Scopes 1, 2, and 3 emissions.
- SB 261: Requires certain businesses to more generally report and disclose climate-related financial risks.

Governor Gavin Newsom will sign these measures into law. Upon their enactment, SB 253 and SB 261 will become the first laws in the U.S. to require companies to report, disclose, and publicly file specific reports regarding GHG emissions and climate risks. California's climate reporting package precedes a long-anticipated final rule on climate disclosures anticipated by the U.S. Securities and Exchange Commission. The new laws could also compel other states to adopt similar measures.

Below is The Real Estate Roundtable's topline summary of SB 253 and SB 261.

## California SB 253, "Climate Corporate Data Accountability Act"

WHAT: CORPORATE EMISSIONS DISCLOURES

- Requires annual corporate disclosures of Scopes 1, 2, and 3 emissions.
- Reporting in conformance with Greenhouse Gas (GHG) Protocol's standards, guidance, and "scopes" definitions.
- Scope 1: direct GHG emissions from sources a reporting entity owns or "directly controls," including but not limited to "fuel combustion activities."
- Scope 2: indirect GHG emissions from "consumed" electricity, steam, heating or cooling "purchased or acquired by a reporting entity."
- NOTE: There is no reference in the law regarding reporting of power purchase agreements (PPAs), renewable energy certificates (RECs), offsets, or other instruments regarding off-site purchases of clean energy.

# California's Climate Disclosure Package: Summary of SB 253 and SB 261

- Scope 3: indirect upstream and downstream GHG emissions from sources that the reporting entity does not own or directly control, that "**may** include … purchased goods and services, business travel, employee commutes, and processing and use of sold products."
- Thus, embodied emissions in construction materials, and tenant-based leased space emissions, **may** be included in required disclosures
- **NOTES:**
  - The statutory text explicitly requires that that **"all"** of a reporting entity's Scope 1 and Scope 2 emissions must be disclosed.
    - Thus, the extent of Scope 1 and Scope 2 reporting appears to be regulated company's national and global emissions.
    - There is not a limitation to emissions from assets only located in California.
  - In contrast: The "all" qualifier is **not** included in the statutory text regarding Scope 3 emissions.
    - Because of the plain textual difference in the bill's language for Scope 3 reports compared to Scopes 1 and 2, there is arguably an interpretation that the California Legislature did not intend to mandate disclosures for all Scope 3 emissions (either in terms of all GHG Protocol Scope 3 categories or in terms of geographic reach).
    - The extent of Scope 3 reporting will likely be a controversial issue during the agency rulemaking stage that will develop regulations to implement the law.

**WHO: "REPORTING ENTITIES"**

- Any partnership, corporation, LLC or other business entity.
- Formed under any state law, or federal law.
- Does business in California.
- "Total annual revenues" greater than $1 billion dollars.
  - Not "profits."
  - "Total" revenue (i.e., global).

# California's Climate Disclosure Package: Summary of SB 253 and SB 261

  - Based on reporting entity's revenue for the prior fiscal year

**TO WHOM: "EMISSIONS REPORTING ORGANIZATION"**

- Annual disclosures submitted to a non-profit Emissions Reporting Organization to be contracted by the California Air Resources Board ("Board").
- Board to establish a "digital platform" where public disclosures are made available.

**HOW: THIRD-PARTY ASSURANCE**

- Reporting entity must retain a "third-party assurance provider" regarding all reported emissions.
  - Provider "shall have significant experience in measuring, analyzing, reporting, or attesting to" GHG emissions.
- A "complete assurance provider's report" must accompany the emissions disclosures.
- Scope 1 and Scope 2 engagement:
  - Performed at a "limited assurance level" starting in 2026.
  - "Reasonable assurance level" starting in 2030.
- Scope 3 engagement:
  - Law does not specify an assurance level through 2029, but the Board may establish one by regulation.
  - Starting in 2030, law specifies a "limited assurance level" for Scope 3 reports

**HOW MUCH: FEES AND FINES**

- Board to establish a "filing fee" at a level to cover its administration costs. To be deposited in a State Treasury climate disclosure fund.
- Board to establish "administrative penalties" for nonfiling, late filing, or "other failure to meet requirements."
  - Any penalties imposed on a non-compliant entity shall not exceed $500K in a reporting year.

# California's Climate Disclosure Package: Summary of SB 253 and SB 261

**WHEN: RULEMAKING AND COMPLIANCE DEADLINES**

- By January 1, 2025: Board to adopt implementing regulations.
- Starting in 2026: Scope 1 and Scope 2 disclosures required.
- Starting in 2027: Scope 3 disclosures required.
    - Scope 3 disclosures filed no later than 6 months after Scope 1 and Scope 2 disclosures.
- During 2029 and by January 1, 2030: Board "shall update as necessary" disclosure deadlines.
- After 2033: Board can stick with the GHG Protocol, or adopt an alternative standard following a stakeholder input process.

## California SB 261, Disclosures of Climate-Related Financial Risks

- Companies with annual "total" revenues > $500 million, d/b/i California, must biannually report and disclose:
    - climate-related financial risks; and
    - mitigation measures to reduced and adapt to such risks.
    - Entities regulated by the California Department of Insurance, or in the "business of insurance in any other state," are exempt and have no reporting responsibilities under this law.
    - There is no requirement that only "public companies" must file California law disclosures.
- Disclosures as aligned with the Task Force on Climate-Related Financial Disclosures (TCFD) standard satisfy the law.
- Publicly accessible reports satisfy the law where such reports are required by "any regulated exchange national government, or other government entity."
    - E.g.: Functionally equivalent reports for purposes of California law would be those submitted and filed pursuant to:

    - Any rule ultimately finalized by the US-SEC regarding disclosures for climate-related financial risks;  or
    - International Financial Reporting Standards Sustainability Disclosure Standards, as issued by the International Sustainability Standards Board.
- The climate-related financial risk report does not need to include Scopes 1, 2, or 3 disclosures. But if they are included, they should be third-party verified.
- SB 261 reports must be filed by January 1, 2026 – and posted on the company's own website.
- Fees will be imposed on companies for the CA government to administer the program. Penalties may be imposed for non-filings or insufficient reports.

*The Real Estate Roundtable (RER) does not intend this communication to be a solicitation related to any particular company, nor does it intend to provide investment, legal, or tax advice. Nothing herein should be construed to be an endorsement by RER of any specific company or products as an offer to sell or a solicitation to buy any security or other financial instrument or to participate in any trading strategy. RER expressly disclaims any liability for the accuracy, timeliness, or completeness of data in this publication.*

Energy and Climate

# 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 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, storage, 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[9]

**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

| 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 "efficiency gain" performance standard along the sliding scale in the table above.
- 179D is **not** a tax "credit" and does not reduce a company's tax liability dollar-for-dollar.

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

**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—which covers commercial buildings and larger multifamily buildings with four floors or more (not "low-rise" multifamily).

**General 179D Baseline for New Construction**

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

**Retrofits—Section 179D(f) "Alternative Deduction"**

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

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

- 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 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 requisite level of efficiency gain.
- 179D(f) retrofit deduction amount and cap
  - Uses the same sliding scale in the table on page 1.
  - 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 3 years (or every 4 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

**REITs**

- Includes earnings and profits (E&P) "conformity" accounting fix.
  - 179D deduction amount fully reduces E&P in the year that the energy efficiency components are installed or, in the case of a retrofit, in the year that site EUI reductions are proven and "certified" (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.

**Relationship to Low-Income Housing Tax Credits (LIHTCs)**

- 179D Deduction amounts **do** reduce basis in LIHTC properties.
  - Note different treatment for Section 48 tax credit that **does not** reduce LIHTC basis.
  - Bipartisan LIHTC reform legislation pending in Congress **would not** reduce LIHTC basis under 179D (section 309 of S. 1557/H.R. 3238).

## 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.

**Base and Bonus Rate ITC Credit Amount (see also separate RER chart on "Base and Bonus Rate Amounts")**

- 6% of the cost of the Energy Property ("Base Rate").

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

- Can scale up to 30% of cost (“Bonus Rate”) if project pays prevailing wages and meets apprenticeship requirements for the duration of the project’s “construction.”
    - Except for microturbines: 2% “Base Rate” and 10% “Bonus Rate.”
- “Small solar” and other projects that generate less than one MW of electricity can qualify at the 30% “Bonus Rate” even if they do not meet wage and apprenticeship standards.
- Credit amount increased by 2% if project meets “domestic content requirements” (i.e., iron, steel, manufactured products are made in the USA). See also IRS Notice 2023-38 (May 12, 2023)
    - 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). See also IRS Notice 2023-29
    - Boost to 10% if prevailing wage/apprenticeship standards are met.

**Low-Income Housing and Communities– See also IRS Notice 2023-17 (Feb. 13, 2023)**

- 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).
- Section 48 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.

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

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

## 30C Tax Credit for EV Charging Stations

- Extended through 2032.
- Same Base Rate (6%) and Bonus Rate (30%, if labor standards are met) structure discussed above.

- Credit capped at $100K for each charging station or refueling pump installed at a property.
- Third-party "transferability" applies.
- Geographic limitations—charging station must be located in either:
  - A low-income or high-poverty Census tract under New Markets Tax Credit (NMTC) criteria (see NMTC tracking tool); or
  - Not an "urban area" as defined by the U.S. Census Bureau. Guidance ideally forthcoming here.

## Section 45L "New Energy Efficient Home" Tax Credit

**Duration and Building Eligibility**

- Extended through 2032.
- Pertains to new construction and "substantial rehabilitation".
- All residential buildings—single-family and multifamily—are eligible.
- Multifamily and apartment buildings that are 4 floors or more can also qualify for the Section 179D tax deduction discussed above (as they are in the scope of ASHRAE 90.1 standard).

**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

**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" certain IRA credits to another taxpaying entity that can use them.

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

- REITs, etc., can transfer the full or partial amount of a credit.
  - Transferability allowed for credits under Sections 30C, 45Y, 48, and 48E.
  - Transferability is ***not*** allowed for the Section 45L credit.
  - Transferability of 179D (called an "allocation") is only allowed by government, tribal, and non-profit building owners. They can allocate the deduction to architects and designers responsible for the building project. 179D transfer is ***not*** allowed by private sector, for-profit building owners.
- The recipient of the credit (the "transferee taxpayer") must pay for the credit "in cash."
  - Joint Committee on Taxation report (JCX-5-23) at p. 98): Transferee taxpayer bears "recapture risk."
  - That is, the buyer of tax credits is responsible to payback any credit amounts if the property ceases to be used to generate solar, wind, used for storage, EV charging, etc.
  - To create a robust market for IRA credits, transferee buyers will likely require contractual indemnities and other protections from building owner taxpayers upon the sale of credits.
- 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.

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

**Who Can Buy and Sell IRA Tax Credits -- Summary**

| IRA Tax Incentive | Direct Pay from U.S. Government | Optional Transfer of Incentive |
|---|---|---|
| • **179D Tax Deduction for Energy Efficient Commercial and Larger Multifamily Buildings** | Not allowed | *Who can transfer:*<br>• Only specified "tax-exempt entities" that own buildings can "allocate" 179D amounts.<br>• This includes federal/state/local government, tribal, and non-profit building owners.<br>• Private sector building owners ***cannot*** transfer 179D amounts.<br><br>*Who can receive:*<br>• Only the "person primarily responsible for designing" the energy-efficient property can receive allocated 179D amounts.<br>• E.g., Architects, engineers, efficiency contractors/consultants<br><br>*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, rural electric coops., and non-profits. | *Who can transfer:*<br>• All business taxpayers that are not eligible for "direct pay." |

| | | |
|---|---|---|
| • **Section 48E Clean Electricity Investment Tax Credit (projects constructed in 2025 or later)**<br>• **Section 45Y Clean Electricity Production Tax Credit (projects constructed in 2025 or later)** | | • E.g., REITs, partnerships, corporations<br><br>***Who can receive:***<br>• 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 |

The Real Estate Roundtable (RER) does not intend this communication to be a solicitation related to any particular company, nor does it intend to provide investment, legal, or tax advice. Nothing herein should be construed to be an endorsement by RER of any specific company or products as an offer to sell or a solicitation to buy any security or other financial instrument or to participate in any trading strategy. RER expressly disclaims any liability for the accuracy, timeliness, or completeness of data in this publication.

# IRA Section 48 Investment Tax Credit— “Base” and “Bonus” Rate Amounts

| | Section 48 Project Type | Base Credit Amount | Meets Wage, Apprenticeship | Bonus Credit Amount | Relevant Statutory Section/ Regulation/Guidance |
|---|---|---|---|---|---|
| | **Various “energy property”**[10] | 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)<br>• 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 bonuses re: solar, wind, associated storage < 5 MW; “domestic content”; and Brownfields. | • 26 U.S.C. §§ 48(a) (9)(A), (B)(i)<br>• Guidance expected to define “single” energy project |
| | **Interconnection property for projects ≤ 5 MW (measured in AC)** | 6% of project costs | 30% of project costs | See below, “domestic content”; and Brownfields. | • 26 U.S.C. § 48(a)(8)<br>• IRS Notice 2022-61 (87 Fed. Reg. 73,580 [Nov. 30, 2022]) for labor guidance |
| | **Microturbines**[11] | 2% | 10% | See below, “domestic content”; and Brownfields. | • 26 U.S.C. §§ 48(a)(2)(a)(ii), 3(a)((iv) |
| **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.[12] Must apply to DOE/IRS for allocation. | • 26 U.S.C. §§ 48(e)(1)(A)(i), (2)(A)(iii)(I)<br>• IRS Notice 2023-17 (Feb. 13, 2023) |
| **Only solar, wind + storage projects with max net output < 5 MW (measured in AC).** | **On low-income housing (e.g., supported by LIHTCs or Section 8 vouchers)** | N/A | N/A | Add 20%. Annual capacity limit.[13] Must apply to DOE/IRS for an allocation. | • 26 U.S.C. §§ 48(e)(1)(A)(ii), (2)(A)(iii)(II), (2)(B)<br>• IRS Notice 2023-17 (Feb. 13, 2023) |
| **Only solar, wind + storage projects with max net output < 5 MW (measured in AC).** | **“Low-income economic benefit” (high poverty, low income census tract)** | N/A | | Add 20%. Annual capacity limit.[14] Must apply to DOE/IRS for allocation. | • 26 U.S.C. §§ 48(e)(1)(A)(ii), (2)(A)(iii)(II), (2)(C)<br>• IRS Notice 2023-17 (Feb. 13, 2023) |
| | **Any “energy property” that meets domestic content requirements (“Buy American”)**[15] | N/A | • Add 10% if project meets wage, apprenticeship | • Add 10% if project generates < 1MW (labor standards N/A)<br>• Add 2% if project ≥1 MW and does not meet wage, apprenticeship. | • 26 U.S.C. §§ 45(b)(9)(B); 48(a)(12)<br>• 49 C.F.R. § 661.5 (*IRA* incorporates “Buy America” regs from the Federal Transit Administration)<br>• IRS Notice 2023-38 (May 12, 2023) |

[10] 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.
[11] Nameplate capacity < 2,000 KW and electricity-only generating efficiency ≥ 26%. 26 U.S.C. § 48(c)(2).
[12] 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.”
[13] 200 MW. See *id.* Cannot be combined with extra credits for “low-income community” or “low-income economic benefit.”
[14] 700 MW. See *id.* Cannot be combined with extra credits for low-income housing or “low-income community.”
[15] Steel, iron, and certain percentages of “manufactured products” that are components of “energy property” and certified by taxpayer 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

| Brownfield site (or area economically dependent on fossil fuel industry)[16] | N/A | • Add 10% if project meets wage, apprenticeship | • Add 2% if project does not meet wage, apprenticeship.if project also meets labor standards. | • 26 U.S.C. §§ 45(b)(11)(B)(i); 48(a)(14)<br>• IRS Notice 2023-29 (Apr. 4, 2023) |
|---|---|---|---|---|

The Real Estate Roundtable (RER) does not intend this communication to be a solicitation related to any particular company, nor does it intend to provide investment, legal, or tax advice. Nothing herein should be construed to be an endorsement by RER of any specific company or products as an offer to sell or a solicitation to buy any security or other financial instrument or to participate in any trading strategy. RER expressly disclaims any liability for the accuracy, timeliness, or completeness of data in this publication.

[16] Additive and *can* be combined with various credits for low-income "communities," "housing" and "domestic content." No capacity limits or IRS/DOE application required

# New Federal Definition for "Zero Emissions Buildings" ("ZEB")

## Issue

The Biden Administration plans to propose a standardized definition for the term, "Zero Emissions Building" ("ZEB"). The U.S. Department of Energy (US-DOE) will take public comments on the definition. It is expected to release a final version as early as the end of this year.

Certainly, Congress has not granted any authority to ***mandate*** that private sector buildings must be "zero emissions." DOE's definition, however, can establish a guideline and aspiration. The Roundtable has long advocated for a uniform, realistic – and ***voluntary*** – federal definition to clarify how the U.S government defines real estate with low or no carbon footprint.

Key CRE audiences all have different and varying conceptions of what "net zero," "zero emissions," and "low carbon" mean. A unifying federal "ZEB" definition can potentially bring much-needed consistency to help owners, developers, and financiers navigate the diverse patchwork of climate-related programs such as:

- Building "labels" and financial incentives administered by various federal agencies;
- Consistent disclosures for the SEC's imminent climate reporting rule and similar reporting required at the state level [See RER's US-SEC and California law climate disclosures facts sheets];
- Compliance with state and local building performance mandates;
- Criteria for financial institutions, pensions, SWFs, insurance providers, and other institutional investors and asset managers of real estate;
- Federal leasing clauses for U.S. government tenants in private sector buildings;
- "Points" across myriad building certification programs; and
- NGO protocols and standards that have international reach for companies to establish emissions targets. [See RER's Science-Based Targets Initiative (SBTi) fact sheet.]

"ZEB" should best construed to mean, "zero over time." It is likely not a standard for an asset to reach immediately or in the short-term. However, with the right definition, an asset may strive for zero emissions by 2040 or later. For example, at or near the end of the useful life of a gas-fired building boiler, cap ex planning now may support replacement with a heat pump in 10-15 years.

# New Federal Definition for "Zero Emissions Buildings" ("ZEB")

New construction might be able to reach "ZEB" even quicker, if planned at the start of development and construction compared to retrofitting a decades-old asset.

The U.S. Environmental Protection Agency (EPA) is pursuing complementary policy. Its ENERGY STAR program plans to issue final criteria for its "NextGen" label for low-carbon buildings by Q1-2024. NextGen should be viewed as a "point in transition" along the path to ultimately achieve zero emissions. Both DOE's definition of "ZEB" and EPA's NextGen "label" criteria can – and must – work together.

## The Roundtable's Position

The Roundtable's comments to US-DOE will explain that a federal "ZEB" definition should – and should not – include the following:

- **Efficiency First:** Emissions must be reduced first and foremost by making the asset as cost-effectively efficient as possible.

- **Focus on "The Building":** The "zero" emissions aspiration should focus on emissions attributable to energy consumed within the asset's physical parameters. This means the eventual removal of Scope 1, Scope 2, and tenant-based Scope 3 emissions.

- **Not Embodied Carbon:** The real estate market, product manufacturers – and government guidance – are not ready now to get to "zero emissions" embodied in construction materials and other purchased goods and services.
  - EPA's holistic embodied emissions strategy may help real estate owners ***eventually*** make strides in tackling embodied carbon. But EPA's collaboration with manufacturers is nowhere near complete and needs time to gain traction.

- **Not Scope 3 Generally:** Similar to excluding embodied carbon, other Scope 3 categories (such as employee travel or commuting) should not be encompassed in a "ZEB" definition.
  - As noted above, from the perspective of "The **Building**," a "Zero Emissions **Building**" should strive over time to eliminate emissions from downstream tenant-based energy consumption.
  - Such leased space emissions should be ***the only*** Scope 3 category within the purview of a federal "ZE**B.**"

# New Federal Definition for "Zero Emissions Buildings" ("ZEB")

- **100% Renewables – Either On-Site of Off-Site:**
  - "Zero emissions" should mean that all energy consumed on-site is renewably sourced.
  - However, not all buildings can deploy or install on-site solar panels, tap into geothermal heat, etc.
  - Thus, off-site renewable energy purchases (e.g., RECs) must be allowed.
    - We need a standardized system to track REC purchases to assure they are valid, independently verified, and to avoid double-counting.
    - ENERGY STAR Portfolio Manager should be enhanced to incorporate REC tracking functions.
  - Because climate change is an international problem, there should be no geographic restriction as to where RECs may be purchased. RECs should "count" as long as they are third-party verified and meet quality control criteria – regardless of where the corresponding zero-emissions energy is sourced.
    - For example: Don't limit REC purchases to the "grid region" where the building is located.
    - Electric utilities may not even make RECs available in U.S. markets where they operate as monopolies (e.g., non-ISO regions).
    - Even if RECs are made theoretically available in certain markets, utilities might purchase them all to meet their own "renewable portfolio standards" imposed by state law – leaving nothing left over for nearby building owners to purchase at scale.

The Real Estate Roundtable (RER) does not intend this communication to be a solicitation related to any particular company, nor does it intend to provide investment, legal, or tax advice. Nothing herein should be construed to be an endorsement by RER of any specific company or products as an offer to sell or a solicitation to buy any security or other financial instrument or to participate in any trading strategy. RER expressly disclaims any liability for the accuracy, timeliness, or completeness of data in this publication.

# "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

**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

- 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.