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The Real Estate Roundtable

November 4, 2022

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: Internal Revenue Service Notices 2022-48, 2022-49, 2022-50,
and 2022-52 Concerning the Inflation Reduction Act**

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 Notices issued by the Internal Revenue Service (“IRS”) regarding the clean energy tax incentives in 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 jointly address national policy issues relating to real estate and the overall economy. An addendum to our detailed comments attached to this letter provides more information on The Roundtable.¹

The Roundtable’s comments aim to accelerate clean energy deployment, reduce greenhouse gas emissions, and lower energy consumption by providing more clarity and certainty for taxpayers to access the *IRA*’s incentives. Our key points are:

**I. [Notice 2022-48](#)
Incentives for Improving Commercial and
Residential Building Energy Efficiency**

- Section 179D has failed to meaningfully leverage private sector investments in high performance (and costly) energy efficient building systems since its 2005 enactment. The *IRA* provides an opportunity to significantly increase taxpayers’ interest in 179D and lower the carbon footprint of U.S. buildings in a transformative way – but that will depend on how the IRS implements key provisions on matters such as:

¹ See p. 19 of attached comments.

- Regarding the “traditional” path of Section 179D compliance that measures efficiency improvements over the “model” ASHRAE 90.1 building:
 - Treasury recently affirmed in May that the **2007** version of ASHRAE 90.1 is Section 179D’s current “Reference Standard.” The IRS should clarify that, under the *IRA*, the May affirmation sets the **2007** iteration as the standard for equipment “placed in service” for four years following Treasury’s **next** affirmation. Such a clarification will resonate in the marketplace as the real estate sector absorbs 179D’s overhaul.
 - Treasury’s next “Reference Standard” affirmation should be pegged to ASHRAE 90.1 **2016**. Forty-five states have their codes at the 2016 iteration or earlier (and some have no statewide building energy requirements at all). The Secretary should not affirm future “Reference Standards” at a pace that is too aggressive pace and out of sync with codes adopted in the overwhelming majority of states. The Roundtable thus recommends the 2016 version of ASHRAE 90.1 as the next step.
 - Treasury should establish a regular cycle to affirm future “Reference Standards” to give taxpayers predictability. The affirmation cycle should also enshrine updated 179D’s standards at a quicker pace than what has occurred to date to help drive higher levels of building efficiency.

- Regarding the new 179D subsection (f) “alternative” path for building retrofits:
 - The retrofit path’s success will depend heavily on guidance that instructs how to measure site energy usage intensity (“site EUI”).
 - ✓ Pre-retrofit “baseline” site EUI should not penalize retrofits that require a building to use more energy to bring it “up to code.” For example, an older, poorly ventilated building will require improved indoor air quality measures to address COVID-19. The pre-retrofit “baseline” should be adjusted as if the older building consumed the energy it would have needed to meet health and other code mandates prior to a rehab project.
 - ✓ “Final” certified site EUI measured **after** a retrofit project must take into account how a building operation’s may have dramatically changed since measuring the **before** retrofit “baseline.”
 - ✓ Variables such as changes in occupancy, square footage, hours of operation, tenant composition, and number of computers will be particularly impacted by a building’s conversion from one use to another (for example, from office to multifamily). Accounting for these factors is necessary to ensure an “apples to apples” comparison when calculating pre- and post-retrofit site EUI.

- ✓ [EPA's ENERGY STAR commercial buildings program](#) has deep expertise in providing technical guidance on how to “normalize” for building operational characteristics in EUI calculations. The Roundtable and our members look forward to continuing our longstanding collaboration with ENERGY STAR to inform and expeditiously develop Section 179D(f) “normalization guidance.”
- The IRS should define the dates when retrofit property is “placed in service,” and when a retrofit plan is “established,” to allow projects currently in the planning, design and construction phases to qualify for Section 179D(f)’s exacting standards.
 - ✓ “Placed in service” occurs after “installation.” Building systems in a “qualified retrofit plan” should be deemed “placed in service” when the last component starts to perform – e.g., the date the last window is installed, the last HVAC pipe is wrapped with insulation, or when the last interior light starts to illuminate.
 - ✓ A “qualified retrofit plan” requires three certifications: (1) pre-retrofit “baseline” site EUI; (2) “status” that describes the plan’s “retrofit property”; and (3) post-retrofit “final” site EUI. The last certification to occur in this chronology is “final” site EUI – and that date should accordingly provide the plan’s “establishment” date.
- The *IRA* allows a single building to claim all of the credits and deductions for which it qualifies. Stacking multiple incentives must be encouraged for the real estate industry to strive towards “net zero emissions.”
 - Section 48 clean energy generation properties like solar PV and combined heat and power (CHP) systems can help lower site EUI. Building property within Section 179D’s scope – interior lighting, HVAC and hot water, envelope, and associated insulation and controls – must function together to at least meet the deduction’s minimum requisite to improve efficiency by 25%. Beyond the 25% minimum, incremental percent reductions in site EUI attributable to Section 48 properties should allow for greater deduction amounts on 179D’s “sliding scale” that correlate to higher levels of efficiency.
 - Certain dwellings are eligible for both the Section 45L credit for residential new construction and rehabilitation, as well as the Section 179D deduction for energy efficient buildings. The IRS should clarify the overlap between 45L and 179D to optimize investments that can make America’s housing stock more affordable, energy efficient, and resilient to climate change.

II. [Notice 2022-49](#)

Certain Energy Generation Incentives

- Section 48(a)(3)(A)’s “energy property” definitions include solar equipment to heat or cool a “structure,” or to illuminate the inside of a “structure.” There is no requirement that PV panels must be placed on the very same building to be heated, cooled, or illuminated.

- The IRS should clarify that Section 48 solar equipment can be installed on parking lots, garages, carports, canopies, platforms, racks, mounts, etc., and does not need to be on or attached to the same “structure” that uses the clean energy generation for electricity.

III. [Notice 2022-51](#)

Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the *Inflation Reduction Act of 2022*

- A “single project” under Section 48, that generates less than one megawatt (MW) of electricity, qualifies for “bonus rate” amounts regardless of prevailing wage or apprenticeship provisions. Taxpayers need clear guidance to define “single project.”
 - Existing [Notice 2018-59](#) regarding Section 48’s “Beginning of Construction Date” is analogous. It offers a “facts and circumstances” balancing test to determine when multiple energy properties “are operated as part of single project.”²
 - The Roundtable requests the IRS to provide more certainty than Notice 2018-59 currently provides, to ascertain whether a “single project” puts out less than 1-MW. In lieu of Notice 2018-59’s subjective multi-criteria balancing, certain more objective criteria should **alone** determine whether a project is “single” without further analysis.
 - Factors beyond a taxpayer’s ability to control should definitively determine “single project” status. For example: Section 48 properties at non-contiguous, different addresses created by local governments; mandating different construction permits from a regulatory body; or subject to different interconnection agreements with a utility, should all conclusively deem a “single project.”
 - Outside of these recommended lone factor determinants, a “facts and circumstances” like the one articulated in Notice 2018-59 would be appropriate to determine whether properties might be disaggregated and come under the 1-MW ceiling.
- New Market Tax Credit (NMTC) census tracts define qualification for the *IRA*’s Section 48(e) credit enhancement for solar and wind facilities in “low-income communities,” and Section 30C’s credit for EV charging stations.
 - Taxpayers entering into contracts to construct Section 30C and 48(e) projects in the coming months should receive “safe harbor” assurance that protects their current eligibility from future changes to NMTC tract status caused by updated Census data.
- Section 48(e) offers a 20% credit enhancement for certain solar and wind facilities “part of” a low-income residential building supported by **federal** housing programs. Buildings supported by **state and local** programs identified by non-federal agencies should also be eligible.

² Section 7.01(2)-(4) of Notice 2018-59 (at pp. 21-24) discusses when multiple energy properties are treated as a “single project” “solely” to determine the “start of construction” for Section 48 purposes.

- Determining the level of prevailing wages for “bonus rates” is more art than science. The Labor and Treasury Secretaries should issue guidance that specifies all of the job profiles of “laborers and mechanics” that warrant *IRA* prevailing wages, as well as the process to determine the geographically correct wages for those occupations.
- Taxpayers should be able to rely on certifications of compliance with prevailing wage and apprenticeship requirements by contractors. Moreover, proper application of prevailing wage determination guidance should provide a “safe harbor” to taxpayers, as well as their contractors and subcontractors who directly hire laborers, from the *IRA*’s wage under-payment and penalty provisions.

IV. Notice 2022-50

Elective Payment of Applicable Credits and Transfer of Certain Credits

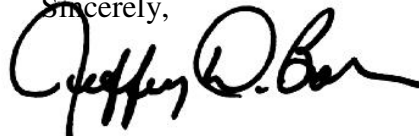
Commercial real estate is typically owned and managed through a partnership or REIT, and these entities frequently include both taxable and tax-exempt investors. Ensuring that the credit refundability and transferability rules work seamlessly with business entities that bring together a variety of different owners and investors, as well as industry expertise, is critical to the new regime’s success in spurring broad-based capital formation for climate-saving investments.

Treasury guidance should clarify that a partnership can elect both the direct pay option under section 6417 for its tax-exempt partners and the transferability option under section 6418 for its taxable partners, including REITs, provided the elections and allocations of credits respect each partner’s appropriate, distributive share of the tax incentives. In addition, guidance should ensure that the potential risk of tax credit recapture remains with the party exercising control over the qualifying property.

* * *

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



**COMMENTS OF THE REAL ESTATE ROUNDTABLE
IN REPOSE TO THE INTERNAL REVENUE SERVICE’S NOTICES
REGARDING THE *INFLATION REDUCTION ACT***

NOVEMBER 4, 2022

I.

[Notice 2022-48](#)

**Comments on Incentive Provisions for Improving the
Energy Efficiency of Residential and Commercial Buildings**

1. *The Treasury Secretary should “affirm” the ASHRAE 90.1 standard, after consultation with the Energy Secretary, on a predictable basis that cycles-up to more recent iterations.*

- Relevant Statutory Provision: 26 U.S.C. § 179D(c)(2)

Proposed schedule:

TREASURY AFFIRMATION DATE	ASHRAE 90.1 YEAR VERSION	“PLACED IN SERVICE” DATE
N/A	2007	Up to 12/31/2026
1/1/2023	2016	1/1/2027 – 12/31/2029
1/1/2026	2019	Starting on 1/1/2030

The *IRA*’s revisions to Section 179D provide a “sliding scale” that increases the deduction’s amount with higher levels of building efficiency. 179D eligibility under the new law starts at 25% improvement beyond ASHRAE 90.1 at a “base rate” of \$0.50 per ft². Incremental increases cap-out at \$1.00 per ft² for a building modeled to perform 50% “over ASHRAE.”¹

Guidance should give real estate stakeholders sufficient time to absorb the substantial changes in 179D’s “sliding scale” approach. The Roundtable thus proposes a schedule for Section 179D “Reference Standard” affirmations, correlated to equipment “placed in service” dates, as depicted in the table above.

¹ 26 U.S.C. § 179D(b)(2). For each percentage increase in efficiency over 25%, the new deduction amount increases by \$0.02 per ft². 179D’s new “base rate” amounts are less than the prior law’s “whole building” incentive amount, which was \$1.80 per ft² for a 50% improvement. Under the *IRA*, a 5x “bonus rate” is offered if prevailing wage and apprenticeship requirements are satisfied. *Id.* § 179D(b)(3).



- The *IRA* defines “Reference Standard” as either the **2007** version – or the most recent version “affirmed” by the Treasury Secretary (with a positive “determination” by the Energy Secretary) four years prior to the building equipment being “placed in service.”² Just last May, the IRS “affirmed” that the **2007** version of ASHRAE 90.1 is the relevant 179D standard.³ Accordingly, whenever the Treasury Secretary next affirms a more recent version of 90.1, the IRS should clarify that the **2007** version will continue to apply to equipment “placed in service” for four years following such affirmation.
- The Roundtable encourages subsequent Treasury affirmations starting with ASHRAE 90.1 **2016**. Currently, only four states have adopted commercial building energy codes that meet or exceed the **2019** version.⁴ Thus, the vast majority of states are at the **2016** version or earlier (while some have no energy code at all.) The 179D deduction will continue to be vastly underutilized if it ramps-up too aggressively with a “Reference Standard” that is widely out of sync with the pace of state code adoptions – particularly because the new “base rate” is significantly less than the incentive’s amount under prior law.⁵ To prove 179D’s viability in the private sector, it will be critical to progress to updated “Reference Standards” – but not in a manner that continues to make the incentive too lofty and unreachable in the marketplace.
- The Roundtable believes that Treasury can strike a fair balance by starting with a post-*IRA* “Reference Standard” affirmation pegged to ASHRAE 90.1 **2016**. Such an affirmation would adjust real estate stakeholders to more recent versions of ASHRAE 90.1 at a quicker pace than Section 179D has fostered to date.⁶ It would also encourage swifter implementation of higher, costlier energy standards for more efficient buildings. A 25% efficiency improvement beyond ASHRAE 90.1 **2016** – the minimum level to obtain the lowest deduction on 179D’s sliding scale – would account for an approximate 20% improvement over and above the **2019** version.⁷

² *Id.* § 179D(c)(2).

³ See IRS, LB&I Process Unit, [IRC 179D Energy Efficient Commercial Buildings Deduction](#) (revised 05/26/22) at p. 9. This affirmation of the **2007** version applies to equipment “placed in service” up until December 31, 2020. The Treasury Secretary has yet to affirm a standard for equipment “placed in service” during 2021 and 2022.

⁴ CA, MA, OR, VT, WA. See <https://www.energycodes.gov/status/commercial>.

⁵ *Supra* note 1. Moreover, the “bonus rate” could prove illusory and not much of a motivator for energy efficiency projects, because the 5x deduction amounts will generally be more than offset by the higher prevailing wages that taxpayers and their contractors must pay to laborers installing 179D projects. That is, the higher wages will “swallow” the bonus rate.

⁶ The **2001** version of ASHRAE 90.1 provided the 179D standard for **10.5** years, for energy efficient commercial building property (“EECB”) placed in service from August 8, 2005 -December 31, 2015. See *supra* note 3. The **2007** version would govern for a total of **10** years (from 2016-2026) under the schedule we propose. Thereafter, the **2016** version would apply to equipment “placed in service” for three years.

⁷ The 2019 version of ASHRAE 90.1 is itself 37.6% more “site” energy efficient than the 2007 version.

- 2019 version: 4.7% percent more site energy efficient than 2016 version. ([DOE July 28, 2021 determination](#)).
- 2016 version: 6.8% more site energy efficient than the 2013 version. ([DOE Oct. 2017 determination](#).)
- 2013 version: 7.6% more site energy efficient than 2010 version. ([DOE Aug. 2014 determination](#).)
- 2010 version: 18.5% more site energy efficient than 2007 version. ([DOE Oct. 2011 determination](#)).



- Software developers must certify that their software meets all of the “procedures and detailed methods” necessitated by each successive iteration of ASHRAE 90.1.⁸ Existing 179D guidance provides a long list of technical criteria entailed in software certification.⁹ After the software developer’s certification, the Energy Secretary must then determine that the latest available software is “qualified” for purposes of 179D calculations under the newer, governing ASHRAE 90.1 version.¹⁰ This software certification and qualification process takes time. The schedule we propose will give sufficient runway to software developers to adapt their modeling technologies to each updated ASHRAE 90.1 standard – and to the Energy Secretary to qualify compliant software.

2. Regarding the Section 179D(f) “alternative” path for retrofit projects, IRS guidance should clarify that:

- a. A “qualified retrofit plan” can include projects currently in the design, planning, and construction phases, as long as – (1) any individual retrofit component is “placed in service,” and (2) such a plan is “established” – after December 31, 2022.**

- Relevant Statutory Provisions: 26 U.S.C. § 179D(f)(2)(A),(C); IRA §13303(d)(2)

Building retrofits presently in the design, planning, and construction phases prior to the IRA’s effective date should be encouraged to strive for Section 179D(f)’s “alternative” path. Owners and their design consultants might expand upon underway projects to attain the higher efficiency levels that can result in a deduction award – *i.e.*, at least 25% improvements over “baseline” site energy usage intensity (“site EUI”). Likewise, if a currently planned retrofit on the cusp of installation is expected to result in 25% site EUI reductions, there is no valid reason to bar that project from Section 179D(f)’s incentive.

Section 179D(f)’s “Effective Date” provision applies to retrofit property “**placed in service** after December 31, 2022,” pursuant to a “qualified retrofit plan **established** after such date.” Both “established” and “placed in service” warrant clarification:

- The definition of “qualified retrofit plan” requires a “qualified professional” to certify: (1) **pre**-retrofit “baseline” site EUI; (2) the “status” of “installed” retrofit property; and (3) **post**-retrofit site EUI on any date more than one year after the retrofit property’s installation. The latest of these events in the plan’s chronology is certification of post-retrofit “final” site EUI. The IRS should clarify that the date of “final” site EUI certification is also the retrofit plan’s date of “establishment” because it is the last statutory prerequisite to occur to produce a “qualified” plan.

⁸ 26 U.S.C. § 179D(d)(2)(B)(i).

⁹ IRS [Bulletin 2008-14, Notice 2008-40](#), § 3.02 (April 7, 2008).

¹⁰ US-DOE website, [Qualified Software for Calculating Commercial Building Tax Deductions](#).



- Guidance should also clarify that “**placed in service**” occurs at a point in time after “**installation.**” For example, lights might be installed in December – but not switched on and “placed in service” to illuminate interior space until January. Similarly, a heat pump or chiller might be installed in December – but not function to heat or cool a building until such equipment is “placed in service” in January.

These clarifications for “placed in service” and qualified retrofit plan “establishment” dates will allow rehab projects in the midst of design and construction to access Section 179D(f).

- b. *For plans that take multiple years to complete, a “qualified professional” may use the **last date that any individual plan component is “placed in service” as the appropriate date for determining both pre-retrofit “baseline” site EUI and post-retrofit site EUI “final” certification.***

- Relevant Statutory Provisions: 26 U.S.C. § 179D(f)(2)(A),(C); § 179D(f)(7)(A)

Award of Section 179D(f)’s “alternative” deduction depends on a minimum 25% reduction in site EUI. Whether a retrofit achieves that reduction is determined by comparing the building’s energy consumption per square foot before the retrofit, to energy consumption after the retrofit. The relevant “before” metric is certified “baseline EUI,” measured on “any date during the 1-year period ending on the date” that retrofit property is “**placed in service.**” The relevant “after” metric is a “qualifying final certification” of site EUI on “any date that is more than 1 year after” retrofit property is “**placed in service.**” Thus, the “placed in service” date is critical to determine both pre-retrofit “baseline” and post-retrofit “final” site EUI.

As noted above, the “placed in service” date is not the same as the “installation” date. Guidance should clarify that “placed in service” happens **after** retrofit property is installed. “Placed in service” occurs on the date retrofit property is “turned on” and functions to heat, cool, light, insulate, or otherwise condition the building.

Guidance should further clarify the “placed in service” date when retrofit property has multiple components, or a retrofit plan involves multiple building systems. If the plan aims to achieve site EUI reductions through new windows or lights, then the key date should occur when the last individual window or light is “placed in service.” If the plan includes an HVAC retrofit, then “placed in service” should occur when mechanical insulation wraps the last pipe. If the plan will achieve site EUI reductions through a combination of retrofitted HVAC and a new roof, then the key date should occur when the last of these systems is “placed in service”– because all of the equipment in a “qualified retrofit plan” is designed to work together to attain whole-building reductions by at least 25%.

- c. *Guidance is needed to clarify how existing buildings that are vacant with zero or negligible “baseline” site EUI, or that were not code compliant before a retrofit, can pursue 179D(f)’s path.*



- Relevant Statutory Provisions: 26 U.S.C. §§ 179D(f)(4), (5), (6)

The *IRA* provides that site EUI is an “annualized” measurement and that the pre-retrofit “baseline” is “adjusted to take into account weather.” Other than that, the statute leaves it to the Treasury Secretary to define site EUI through further guidance.

Any building that is five years or older qualifies for Section 179D(f)’s alternative approach. Consider an abandoned warehouse built years ago. The lights and heating have not been turned on, or simply do not work, because the building has been unoccupied for quite some time. How would that empty warehouse pursue a retrofit deduction if its baseline site EUI is “zero” or negligible? Even if the highest performing lights and heat pumps are installed as part of a “qualified retrofit plan,” energy consumption will only **increase** once the building starts to function again as workable or habitable space. Such an **increase** in energy use under a baseline “vacant building” scenario should not penalize a plan that must **decrease** EUI for purposes of a 179D(f) award.

Similarly, a major rehab might be planned for a building that does not comply with code requirements – but the retrofit will bring it “up to code.” For example, buildings that have been unventilated or under-ventilated should not be punished for increasing ventilation rates to mandatory levels for the health and safety of building occupants – particularly in light of new air exchange requirements implemented to minimize the spread of COVID-19 and other pathogens. Pre-retrofit “baseline” calculations must be calibrated for indoor air quality standards and related energy usage increases needed to improve the building’s health and safety.

Guidance should explain how structures at least five years old, to be re-positioned and re-purposed in the marketplace with a major rehabilitation project, can claim a Section 179D(f) deduction if they have no or minimal pre-retrofit site EUI “baseline,” or if the “baseline” does not reflect a building that complies with ventilation or other code requirements.

- d. *Further technical guidance is critical for “qualified professionals” to certify “final” site EUI in a manner that adjusts for a building’s operational variables that may have changed since the pre-retrofit “baseline” – such as changes in occupancy, square footage, tenant uses, and hours of operation.***

- Relevant Statutory Provisions: 26 U.S.C. §§ 179D(f)(5), (6), (7)(a)

The IRS should clarify that retrofit project calculations must “normalize” for key variables when measuring “final” site EUI. This is necessary to compare “apples to apples,” so that post-project energy performance correlates to the building’s operations at the snapshot in time of pre-retrofit “baseline” measurement. Upon “final” certification, a number of factors relevant to a building’s operations may have changed since the pre-retrofit baseline. The project may result in expanded square footage. The project may be a building’s conversion to a different use to meet local market needs – for example, a change from underutilized office or retail to



residential or warehouse space in high demand. Such an expansion or conversion would likely necessitate changes in the building’s occupancy, density, tenants, number of computers, and hours of operations – which can have a dramatic effect on “before” and “after” site EUI. It is critical for guidance to explain to building owners, engineers, and contractors how to adjust for these factors in the context of Section 179D(f)’s “final qualifying certification.”

[EPA’s ENERGY STAR for Commercial Buildings](#) program is expert in developing technical guidance that deals with variable “normalization” in the building EUI context.¹¹ The Roundtable appreciates our longstanding and productive relationship with the ENERGY STAR team. We welcome the opportunity to continue our interactions to help develop “real world” guidance specifically geared to normalize factors for building operations in the context of Section 179D(f).

3. *Current 179D guidance on “Method of Computation” should be revised to reflect the “alternative” retrofit path.*

- Relevant Current 179D Guidance: IRS Notice 2006-54, § 3 (June 26, 2006)

Notice 2006-54 provides existing guidance for “traditional” Section 179D. Section 3 of the Notice requires updating to reflect “site EUI” calculations under the law’s new “alternative” path to address matters such as:

- EPA ENERGY STAR’s industry standard, online building energy benchmarking tool – [Portfolio Manager](#) – should be favored as the tool for professionals to use to measure pre- and post-retrofit site EUI;
- Unlike the “traditional” path, there is no “Reference Building” relevant for purposes of “alternative” 179D calculations. Rather, the “retrofit” path calls for site EUI improvements against a building’s **own** pre-retrofit baseline (not against some model ASHRAE 90.1 building). Notice 2006-54 should be adapted accordingly.
- The “Method of Computation” under the current Notice establishes a fraction that uses the same energy efficient commercial building property (“EECBP”) components to compare “ASHRAE reference building” performance over “proposed building” performance. Two changes should clarify computations for the “alternative” path:

¹¹ E.g., [EPA Recommended Metrics and Normalization Methods for Use in State and Local Building Performance Standards](#) (updated Sept. 27, 2022); EPA ENERGY STAR Portfolio Manager, [Technical Reference: Climate and Weather](#) (Aug. 2022); EPA ENERGY STAR Portfolio Manager, [Technical Reference: ENERGY STAR Score](#) (April 2021 2021) (discussing building operations normalization in “source EUI” context).



- First, the components in the “retrofit” numerator and denominator must be the same energy efficient commercial retrofit property (“EECRP”) components as certified in the “qualified retrofit plan.”
- Second, the 179D(f) numerator is the pre-retrofit “baseline” EUI, and the 179D(f) denominator is the “final” site EUI.

4. “Certification” standards and other matters in current 179D guidance should largely stay the same, but some modifications are needed to reflect the IRA’s changes.

- Relevant Current 179D Guidance: IRS Notice 2006-54, § 4 (June 26, 2006); IRS Notice 2008-40 (April 7, 2018)

Notice 2006-54 and its amplifying Notice 2008-40 both address “Certification” requirements for “traditional” 179D. These Notices require modifications in light of the *IRA*.

- Both Notices address issues relating to the former “partial” 179D deduction for individual systems (at \$0.60 per ft²) such as under the now-defunct “interim lighting rule.” These sections of the 2006 and 2008 Notices should be withdrawn because the *IRA* no longer allows such partial deductions.
- Notice 2008-40 provides the most recent guidance on the standards and procedures for software developers to certify, and for the Energy Secretary to qualify, “approved software programs” for calculations under 179D’s “traditional” path. These should be re-affirmed.
- Notice 2008-40 provides guidance on how government building owners may “allocate” the 179D deduction to building designers. These provisions should largely remain the same, but be adapted to cover non-profits and tribes that may now also allocate.
- Notice 2006-54, Section 4, provides guidance on “certification” required by “qualified individuals” for compliance with 179D’s “traditional” path. These provisions should largely remain the same – but adapt to incorporate the new certifications required for “qualified retrofit plans,” “baseline” site EUI, and post-retrofit “final” site EUI. As Notice 2006-54 currently provides for “traditional” 179D, the IRS should:
 - Not require taxpayers to attach 179D(f) retrofit certifications to their tax returns;
 - Direct taxpayers to retain certification paperwork “sufficient to establish” its claim for a 179D(f) retrofit deduction, as generally required by § 1.6001-1(a) of the Income Tax Regulations;
 - Require information to establish the identity of “qualified individuals” making 179D(f) certifications; and



- Require a declaration by “qualified individuals” that they make relevant Section 179D(f) retrofit certifications “under penalties of perjury.”

5. *Current 179D guidance should drop the “in the jurisdiction” language for Professional Engineers in the “Qualified Professional” definition.*

- Relevant Current 179D Guidance: IRS Notice 2006-54, § 5.05(2) (June 26, 2006)

Notice 2006-54, Section 5.05, sets the criteria for “qualified individuals” that must make Section 179D-related “certifications.” The qualified individual must: (1) not be related to the taxpayer; (2) be a “properly licensed” professional engineer or contractor; and (3) represent in writing that they are qualified to provide requisite “certifications.” These criteria for “qualified individuals” should continue to apply for the 179D “traditional” path and further pertain to the new “retrofit” path.

However – for Professional Engineers (“PEs”) **only** – The Roundtable urges the IRS to drop the requirement in Notice 2006-54 § 5.05(2) for licensing “**in the jurisdiction** in which the building is located.” The [National Council of Examiners for Engineering and Surveying \(“NCEES”\)](#) sets a consistent national threshold for PE qualification.¹² As long as an NCEES-qualified PE makes required certifications under “penalties of perjury,” that should sufficiently establish Section 179D’s level of professional rigor.

6. *Incidental energy efficiency gains, attributable to renewable generation properties “placed in service” at a building, should factor into Section 179D calculations.*

- Relevant Statutory Provision: 26 U.S.C. § 179D(h)(1)

Section 179D(h)(1) gives the Treasury Secretary authority to promulgate regulations “as necessary” to account for new technologies regarding “renewable energy for purposes of determining energy efficiency and savings.”

The Roundtable encourages guidance that allows building owners to include incremental efficiency gains attributable to renewables when calculating the percentage of efficiency improvements on 179D’s “sliding scale.” In the ambitious effort to drive our nation toward net zero energy consumption and GHG emissions, Congress intended taxpayers to layer multiple *IRA* incentives on the same project. The same commercial building should be encouraged to install solar panels, combined heat and power systems, etc. and connect them to the grid (eligible for Section 48 tax credits) – while also installing EV charging stations (eligible for 30C credits) – while also installing high performance HVAC or roofs (eligible for the 179D deduction).

¹² Unlike PEs, “contractors” should be licensed in the State of the building’s location because there is no national standard for “contractor” qualification.



Energy efficient commercial “building” or “retrofit” property must, by itself, achieve the minimum 25% site EUI reduction needed to qualify for 179D. If solar panels, CHP, microturbines or other Section 48 energy properties complement a Section 179D(f) “qualified retrofit plan,” for example, and drive incremental gains in energy savings, then the building owner should be eligible for a greater deduction on the 179D “sliding scale” that correlates to a higher percentage of efficiency improvements.

7. Regarding the Section 45L credit for new and significantly modified energy efficient homes, guidance is needed to clarify that:

a. Some residential buildings are eligible to “stack” both the Section 45L credit and the Section 179D deduction – but the overlap is different depending on whether the residential building pursues 179D’s “traditional” or “alternative” path.

- Relevant Statutory Provisions: 26 U.S.C. § 179D(f)(4); 26 U.S.C. §§ 45L(b)(3), (c)(3)

Buildings that qualify for 179D’s “traditional” path are those covered by the ASHRAE 90.1 standard. This includes “high rise” multifamily buildings of **four** stories or more.¹³ The Section 45L tax credit also applies to four-story assets, as long as they meet EPA ENERGY STAR program requirements.¹⁴ Accordingly, IRS guidance should clarify that multifamily “new construction” of four stories or more is eligible for both the 45L credit and the “traditional” 179D deduction – assuming that the building satisfies the qualifying criteria of each incentive.

In comparison, “any” building that is at least five years old is eligible for Section 179D(f)’s “alternative” path. There is no 179D(f) limitation on a building’s height, or whether the building is “residential” or “commercial” – there is only an age limitation because this incentive pertains to “retrofits.” Section 45L, meanwhile, allows the residential efficiency credit for “substantial reconstruction and rehabilitation”¹⁵ – with no age limitation. Accordingly, IRS guidance should clarify that **retrofit** projects are eligible for **both** the 45L credit and the 179D “alternative” deduction regarding:

- **any** multifamily building at least five years old; and
- single-family homes, townhomes, or manufactured homes at least five years old, as long as these homes are used to generate rental income and are **not** covered by

¹³ See https://www.hud.gov/program_offices/comm_planning/environment_energy/energy_codes.

¹⁴ Section 45L(c)(3) provides a tax credit to “dwelling units” that meet EPA’s ENERGY STAR certification program for Multifamily New Construction. EPA’s [“Multifamily New Construction Building Eligibility” flowchart](#) indicates its program covers all “multifamily” under EPA’s definition – which includes residential sized four floors or more.

¹⁵ See https://www.energystar.gov/partner_resources/residential_new/program_reqs/mfhr/building, footnote 1 (“New construction” for EPA’s purposes “can include significant gut rehabilitations when defined as a change of use, reconstruction of a vacant structure, or when construction work requires that the building be out of service for at least 30 consecutive days”).



the “home owner” tax credit at Section 25C – which pertains to HVAC, windows, etc. installed on a “dwelling unit” (including a manufactured home)¹⁶ “used as a residence by the taxpayer.”¹⁷

b. *New Section 45L compliance states that residential buildings must “meet” EPA ENERGY STAR requirements – but that does not mean formal “certification” (as the pre-IRA credit stated).*

- Relevant Statutory Provisions: 26 U.S.C. §§ 45L(c)(1), (d)

Section 45L in effect before the *IRA* plainly stated that a dwelling unit needed to be “**certified**” to meet previous energy savings requirements.¹⁸ The *IRA* changes 45L’s residential energy savings standard – and further **drops** the “certification” language. The new version of Section 45L requires “dwelling units to “**meet**” EPA ENERGY STAR “[Single-Family New Construction](#)” and “[Multifamily New Construction](#)” program elements. The new version of Section 45L does not state it requires ENERGY STAR “certification.”

The only “certification” explicitly required under new Section 45L concerns increased credit amounts for residences that go beyond the EPA’s minimum. Congress stated that “certification” **is** required for “zero energy ready homes” certified **by the Energy Department.**¹⁹

Formal EPA “certification” would certainly provide a “safe harbor” for a Section 45 claimant. In any event, a taxpayer seeking the Section 45L incentive must retain documents “sufficient to establish” its claim, as [§ 1.6001-1\(a\) of the Income Tax Regulations](#) generally requires for records that support reported income, credits and deductions. “Meeting” ENERGY STAR standards can be documented through means other than full-blown “certification,” and the Treasury Secretary should consult with the EPA Administrator to provide guidance here.

II.

[Notice 2022-49](#)

Comments on Certain Energy Generation Incentives

IRS guidance should clarify that:

- 8. *The term “structure” does not require installation of solar “energy property” on the very building which uses the electricity for heating, cooling, hot water, or fiber-optic interior illumination.***

¹⁶ 26 U.S.C. § 25C(c)(4).

¹⁷ 26 U.S.C. § 25C(d)(1)(A).

¹⁸ See *prior* 26 U.S.C. § 45L(c)(1). Further, *prior* § 45L(d) specified the “Method” and “Form” for *certifications* required for the now defunct version of the credit.

¹⁹ 26 U.S.C. § 45L(c)(1)(B), § 45L(d)(1).



- Relevant Statutory Provision: 26 U.S.C. § 48(a)(3)(A)(i),(ii)

Section 48’s definition of “energy property” covers two types of solar “equipment.” The first uses solar energy to “generate electricity to heat or cool (or provide hot water for use in) **a structure**.” The second uses solar energy “to illuminate the inside of **a structure** using fiber-optic distributed sunlight.”

Nothing in the “energy property” definition requires that PV panels or other “equipment” must be installed **on** the same “structure” that uses the solar energy for heating, cooling, or fiber-optic interior illumination. Thus, “equipment” may be installed on a parking lot, garage, carport, platform, rack, or mounting system and provide solar-generated power to a nearby building. IRS clarification on this point would be helpful.

9. *The IRS should clarify whether fiber-optic solar equipment and electrochromic glass will continue to qualify for tax credits when the Section 48E “Electricity Investment Credit” takes effect in 2025.*

- Relevant Statutory Provisions: 26 U.S.C. § 48(a)(3)(A)(ii); 26 U.S.C. § 48E(b)(3)(A)(i),(ii)

Section 48(a)(3)(A)(ii) includes equipment that uses solar energy to “illuminate the inside of a structure using fiber-optic distributed sunlight.” That same subparagraph now also encompasses “electrochromic glass which uses electricity to change its light transmittance properties in order to heat or cool a structure.” These Section 48 definitions apply “only with respect to property” constructed before January 1, 2025.

The IRA’s new technology neutral “Clean Electricity Investment Credit,” at Section 48E, becomes effective starting in 2025 after the Section 48 credit expires. The Section 48E credit will apply to “any **qualified facility**” and “any energy storage technology.” In turn, “qualified facility” is “used for the **generation** of electricity” and has a “zero” GHG emissions rate.

Solar used for interior fiber-optic illumination, and electrochromic glass, emit no GHGs. Indeed, they help a building use less carbon-based fuels and lower the built environment’s carbon footprint. However, while these Section 48(a)(3)(A)(ii) properties “use” electricity, they do not “generate” it. Thus, it is not clear whether the Section 48E tax credit will cover these technologies.

The Roundtable asks the IRS to clarify whether Section 48(a)(3)(A)(ii) properties are eligible for the tech neutral investment credit effective starting in 2025 – or whether it believes Congress must act to capture fiber-optic solar and electrochromic glass within Section 48E.



III.

[Notice 2022-51](#)

Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Under the Act Commonly Known as the *Inflation Reduction Act of 2022*

IRS guidance should clarify that:

10. Projects located at different addresses, requiring separate permits, and demanding distinct interconnection agreements are determinative factors that should require no further analysis to resolve that a project is “single” for purposes of increased credit amounts.

- Relevant Statutory Provisions: 26 U.S.C. §§ 48(a)(9)(A)(ii), (B) and (10)

An “energy project” qualifies for increased Section 48 amounts – without needing to satisfy prevailing wage and apprenticeship requirements – if its “maximum net output” of electricity or thermal energy is less than one megawatt (“MW”). To determine if this 1-MW output threshold is exceeded in any given case, the *IRA* directs taxpayers to consider that a “single project” can consist of “one or more [Section 48(a)(3)] energy properties.”

Guidance should give taxpayers clarity on the term “single project” so they know when aggregation of multiple “energy properties” is necessary for the 1-MW threshold. Existing [Notice 2018-59](#) concerning Section 48’s “Beginning of Construction Date” is analogous. It states that whether “multiple energy properties are operated as part of a single project will depend on the relevant facts and circumstances” – a test that balances eight criteria.²⁰

The Roundtable believes, and respectfully requests, that the IRS can provide more clarity than Notice 2018-59 currently offers to ascertain “single project” status for purposes of the 1-MW threshold. A subjective “facts and circumstances” test may sometimes be appropriate for this inquiry. However, in lieu of always requiring multi-factor balancing, certain single criteria stand-out on Notice 2018-59’s list that should **alone** determine whether a project is “single” without further analysis.

We discern that such “lone determinant” factors should depend on regulatory matters beyond a taxpayer’s ability to control. If energy properties are constructed at separate, non-contiguous addresses created by local government, then they should be “single projects.” Likewise, energy properties that require distinct “interconnection agreements” with a utility, or different construction permits from a regulatory body, should conclusively deem a project “single.”

²⁰ Section 7.01(2) of Notice 2018-59 (at pp. 21-22) These eight criteria “may” include 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.



The Roundtable accordingly urges the IRS to consider that certain definitive criteria may deem a project “single” without requiring a test that balances multiple factors.

11. *Census tracts that qualify for New Market Tax Credits (NMTCs) on the date a taxpayer signs a binding contract for solar, wind, and EV charging facilities should get a “safe harbor” if those tracts later lose eligibility based on updated economic data.*

- Relevant Statutory Provisions: 26 U.S.C. § 42(e)(2)(A)(iii)(I); § 30C(c)(3)(B)(i)(I)

Eligibility for the Section 30C tax credit for EV charging stations depends (in part) on whether the property is located in an NMTC-qualifying census tract. Similarly, under Section 48, certain solar and wind facilities get a 10% credit enhancement if they are located in a “low-income community” also defined by reference to NMTC census tracts.

Qualifying NMTC tracts are periodically updated based on 5-year poverty and income data provided by the [American Community Survey \(ACS\)](#). Currently, NMTC tracts are determined under [2011-2015](#) ACS data. A more recent vintage of 5-year ACS data, covering 2016-2020, was [just released this past March](#). As The Roundtable can best ascertain, NMTC census tracts have not yet been updated to reflect the most recent 5-year ACS dataset from 2016-2020.

Taxpayers planning Section 30C and Section 48 projects now need assurance that, if their properties are currently located in NMTC tracts, their eligibility will not change because of ACS data updates. They should get a “safe harbor” that tract eligibility is protected as of the date they sign binding contracts to deliver solar, wind, or EV charging facilities. Or, the IRS should allow a transition period for currently qualifying NMTC tracts under 2011-2015 data to remain effective at least for several years after 2016-2020 data establishes new tract qualifications.

12. *Mapping guidance should allow taxpayers to locate “energy communities” that qualify for a Section 48 credit increase.*

- Relevant Statutory Provisions: 26 U.S.C. §§ 45(b)(11)(B); 48(a)(14)(A);

Projects in “energy communities” can receive a Section 48 credit increase. These communities are defined as brownfields sites; high unemployment metropolitan statistical areas (MSAs) and non-MSAs that have been heavily dependent on the fossil fuel sector for employment or tax revenues; and census tracts where coal mines have been closed.

EPA and states already provide locator tools to identify brownfields sites. Similarly, Treasury has mapping tools for NMTC-qualified tracts. However, we are not familiar with online resources that will allow taxpayers to easily identify the MSAs, non-MSAs, or census tracts of retired coal plants eligible for the “energy communities” credit boost. The Roundtable encourages the IRS to work with other agencies so taxpayers can readily identify these areas with tools similar to NMTC tract maps.



13. Buildings supported by state and local affordable housing programs should be eligible for Section 48(e)'s low-income residential project enhancement.

- Relevant Statutory Provision: 26 U.S.C. § 48(e)(2)(B)(i)

The *IRA* incorporates by reference separate **federal** statutes²¹ that provide financial assistance to “residential rental buildings” eligible for a 20% increase for certain wind and solar projects in low-income communities. This includes financial assistance from federal Low-Income Housing Tax Credits (“LIHTCs”) and other programs. Buildings covered by “such other affordable housing programs” as the Treasury Secretary “may provide” can also be eligible for Section 48’s low-income 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 enhancement. State and local agencies are best suited to determine the unique housing needs in their jurisdictions. HUD already maintains online databases of [local public housing agencies \(PHAs\)](#) and [state housing finance agencies \(HFAs\)](#). 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.

14. The Labor Secretary should issue guidance that identifies the suite of “laborers and mechanics” involved in IRA projects that warrant prevailing wages – and the process to determine the geographically correct rate for those jobs. Such guidance should allow taxpayers to rely on a contractor’s certification of compliance with relevant prevailing wage and apprenticeship requirements.

- Relevant Statutory Provisions: E.g., 26 U.S.C. § 45(b)(7)(B); § 48(a)(10)(B); § 179D(b)(4)(B); § 30C(g)(2)(B)

The *IRA* establishes a “bonus rate” for its various incentives that multiply “base rate” credit amounts by five. Taxpayers can qualify for the “bonus rate” if their clean energy projects generally satisfy prevailing wage and apprenticeship requirements. If a taxpayer claims the “bonus rate” but wages are paid below the prevailing rate in the jurisdiction of the project’s location, the taxpayer must pay the correct wages with interest on the under-payment – along with a penalty to the U.S. Treasury. The *IRA* places responsibility on the taxpayer for any incorrect wage payment, even if the taxpayer does not hire “laborers and mechanics” who are rather the direct employees of contractors and subcontractors that employ those workers and pay their wages.

²¹ E.g., Section 41411(a) of 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*.



The Labor Secretary should develop guidance to give taxpayers, employers, and workers clarity on prevailing wage matters relevant for *IRA* “bonus rates.” What types of “laborers and mechanics” are “employed in the construction” of EV charging stations (Section 30C)²² or multifamily residences (Section 45L)²³? What categories of “laborers and mechanics” “employed in the installation of” energy efficient building equipment are relevant for Section 179D?²⁴ Regarding Section 48, what “laborers and mechanics” are employed in the “construction of” various “energy properties”?²⁵ And, what is the geographically correct wage rate for all relevant construction or installation jobs?

The U.S. Bureau of Labor Statistics (BLS) “produces employment and wage estimates annually for [nearly 800 occupations](#)” at the national, state, and local levels. Those 800 job-types are then categorized into [23 separate “Major Groups” of “Occupation Profiles”](#) based on the latest BLS data.²⁶ It would seem that *IRA*-related jobs would fall primarily under [Major Group 47-000](#) (“Construction and Extraction Occupations”) and [Major Group 49-000](#) (“Installation, Maintenance, and Repair Occupations”). Should employers consult other “Major Group(s)” in BLS’s job classification scheme? Among the dozens of particular “profiles” listed separately under “Major Groups” for “Construction,”²⁷ “Installation,”²⁸ and others, which ones are relevant to *IRA*-related clean energy jobs? The Labor Secretary should clarify.

Likewise, the Foreign Labor Data Certification Service hosts an [“Online Wage Library”](#) that uploads “the newest prevailing wage data” generated by BLS. Should employers consult this online resource? Is this wage library complete for purposes of ascertaining all jobs for *IRA* “bonus rates”? A recent search revealed no prevailing wage information for laborers and mechanics specifically involved in construction or installation of EV refueling stations relevant to the Section 30C credit. How should taxpayers and employers treat those jobs?

Moreover, in the vast majority of cases, the direct employer of the laborers, mechanics, and apprentices constructing or installing property that qualifies for the energy tax incentives will not be the property owner taxpayer claiming the credit or deduction. Other than a contractual relationship with the firm performing the work, the property owner will have no direct oversight

²² 26 U.S.C. § 30C(g)(2)(A).

²³ 26 U.S.D. § 45L(g)(2)(A).

²⁴ 26 U.S.C. § 179D(b)(4)(A).

²⁵ 26 U.S.C. § 48(a)(10)(A).

²⁶ Released on March 31, 2022 (for May 2021).

²⁷ Sixty specific “job profiles” are listed under [Major Group 47-000](#). These include: “Electricians” ([Profile 47-2111](#)); “Insulation Workers-Mechanical” ([Profile 47-2132](#)); “Construction Laborers” ([Profile 47-2061](#)); “Solar Photovoltaic Installers” ([Profile 47-2231](#)); and “Miscellaneous Construction and Related Workers” ([Profile 47-4090](#)).

²⁸ Fifty-one specific “job profiles” are listed under [Major Group 49-000](#). These include: “Heating, Air Conditioning, and Refrigeration Mechanics and Installers” ([Profile 49-9021](#)); “Wind Turbine Service Technicians” ([Profile 49-9081](#)); “Electrical and Electronics Repairers, Commercial and Industrial Equipment” ([Profile 49-2094](#)); “Control and Valve Installers and Repairers, Except Mechanical Door” ([Profile 49-9012](#)); “Electrical Power Line Installers and Repairers” ([Profile 49-9051](#)); and a “Miscellaneous” category for “Installation, Maintenance, and Repair Workers, All Other” ([Profile 49-9099](#)).



or immediate control over the contractor’s employment practices, wages, overtime pay, or other workplace matters. The contracted firm will be in a better position to evaluate the specific roles and duties of its employees and determine the appropriate prevailing wage classification for purposes of the actual project. With this in mind, Treasury guidance should allow property owners to rely on a certification by a contractor, under penalty of perjury, that laborers and mechanics employed by the contractor (or by the contractor’s subcontractors) are paid prevailing wages for the project and that the contractor complies with the *IRA*’s apprenticeship requirements. An exception to the safe harbor could apply if the property owner knew or had reason to know that the contractor’s certification was false.

The *IRA*’s overriding goal – to rapidly deploy clean energy projects “so the climate and economic benefits of this historic legislation can be felt as quickly as possible”²⁹ – will be served by minimizing ambiguities over “correct” prevailing wage rates and reducing opportunities for disputes between workers and employers. Accordingly, the Labor Secretary should issue guidance that articulates the process, standards, and resources for employers to identify “bonus rate” prevailing wages. That guidance should include a means to allow contractors to provide a certification that they have followed the process to meet wage and apprenticeship requirements upon which a taxpayer can rely when claiming “bonus rates.”

15. Under Section 48, prevailing wage requirements apply to laborers and mechanics employed in “the construction of” an “energy project.” In contrast, under Section 179D, prevailing wage requirements apply to laborers and mechanics employed in “the installation of” energy efficient building property. Guidance should explain the difference between these provisions.

- Relevant Statutory Provisions: 26 U.S.C. § 48(a)(10)(A)(i); 26 U.S.C. § 179D(b)(4)(A).

Comparing the prevailing wage provisions in Section 48 (and 45L and 30C, for that matter), to Section 179D, reveals key textual differences. Prevailing wages apply to workers involved in the “**construction**” of Section 48 “energy projects.” In contrast, prevailing wages apply to workers involved in the “**installation**” of Section 179D energy efficient building property. Moreover, the statute states that 179D “installation” workers are paid at prevailing rates – not for “installation” – but for “construction, alteration, or repair.”

Guidance should help taxpayers and their contractors navigate the differences on prevailing wage requirements under these incentives.

²⁹ Biden Administration [Fact Sheet](#); Treasury, *IRS Open Public Comment Period on Implementing the Inflation Reduction Act’s Clean Energy Tax Incentives* (released Oct. 5, 2022).



Notice 2022-50

Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits

The ability of the new and expanded energy tax incentives to spur widespread, transformational investment in renewable energy, greater energy efficiency in buildings, and the build-out of electric vehicle charging infrastructure heavily depends on the successful creation of a tax and legal framework that works seamlessly across business entity types. Commercial real estate is typically owned and managed through a partnership, and real estate partnerships represent half of the nation's four million partnerships. The *IRA* includes special rules designed to facilitate the use of the tax credits by partnerships, S corporations, and REITs. Many REITs hold their properties through subsidiary partnerships. Additional guidance on the application of the credits to partnerships is needed to ensure businesses and investors are not unintentionally discouraged or dissuaded from undertaking climate-saving investments.

Real estate partnerships frequently bring together both taxable and tax-exempt investors (partners). These include large, widely held partnerships as well as closely held joint ventures. The partnerships may focus on a single project or invest in multiple properties over many years. Tax-exempt investors in these partnerships can include pension funds, educational endowments, private foundations and public charities. Under the statute, the direct pay and credit transfer elections are made at the partnership level. Tax-exempt partners are eligible for direct payment of the credits and taxable partners, including REITs, are generally able to transfer credits for cash to unrelated parties. There is some uncertainty as to how partnership elections will work when a partnership involves both taxable and tax-exempt partners. Ensuring that the *IRA*'s credit refundability and transferability rules in sections 6417 and 6418 work across the full spectrum of real estate partnerships that involve differently situated owners and investors is critically important to the Act's overall objective to stimulate the adoption of zero-emission technologies and efficiency improvements.

Specifically, Treasury guidance should clarify that a partnership can elect both the direct pay option under section 6417 for its tax-exempt partners and the transferability option under section 6418 for its taxable partners, provided the elections and allocation of credits respect each partner's appropriate, distributive share of the tax incentives. For additional comments on this issue, The Real Estate Roundtable encourages Treasury and IRS staff to consider the letter submitted by nine real estate organizations, including The Roundtable, on October 28, 2022.³⁰

Certain other guidance related to the transferability of the credits would further drive energy-saving investment. This includes clarity that an eligible taxpayer may divide its credit and sell portions of the credit to multiple, separate transferees, provided the sum of the transfers does not exceed the eligible credit amount. In addition, Treasury guidance on the reasonable cause exception to the 20 percent penalty for an excessive credit transfer should provide clarity that reasonable cause for this purpose means reasonable cause as that term is defined in Treas. Reg. § 1.6664-4, and therefore, includes good faith efforts by the taxpayer to determine the

³⁰ [Comment from National Multifamily Housing Council and other real estate trade associations](#) (Oct. 28, 2022).



appropriate credit amount, such as the commissioning of a cost segregation study by an unrelated party, or appropriate attestations obtained by the transferee from the transferor. The latter could be similar to current rules relieving persons of withholding tax obligations if they receive specific information from the taxpayer under the penalty of perjury. The IRS could specify the required information and develop the necessary forms for transferor-to-transferee reporting that would offer reasonable cause protection to the transferee (provided the transferee did not have reason to know that the information was false).

In certain rare cases, acts may occur after a credit is transferred that require credit recapture. For example, three years after putting qualifying solar panels on a building, a property owner unrelated to the transferee could decide to demolish the building altogether and put the property to a new use. It is unclear whether the recapture provision applies to the transferor or the transferee of the credit.³¹ Liability for recapture of previously claimed credits should rest with the party that: (1) exercises control over the qualifying property, (2) is responsible for the actions leading to the credit's recapture, and (3) enjoyed the principal, net economic benefit of the tax credit, including its transactional value. Under all three factors, this will be the transferor and not the transferee.³² If necessary, the private sector may develop insurance products and contractual arrangements that attempt to shift the economic risk of recapture from the transferee to the transferor. However, such mechanisms will create additional costs and unnecessary friction that undermine the efficiency of the tax incentives, reduce the credits' marketability, and undercut the climate-saving objectives of the *IRA*.³³ Treasury should use its broad regulatory authority to clarify that the liability for recaptured credits rests with the appropriate, responsible party (*i.e.*, the transferor).

* * *

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

- **Duane J. Desiderio, Senior Vice President and Counsel (energy) ddesiderio@rer.org**
- **Ryan P. McCormick, Senior Vice President and Counsel (tax) rmccormick@rer.org**

³¹ Under I.R.C. § 50(a) "If, during any taxable year, investment credit property is disposed of, or otherwise ceases to be investment credit property with respect to the taxpayer, before the close of the recapture period, then the tax under this chapter for such taxable year shall be increased by the recapture percentage..." However, no provision in the Code indicates who is responsible for paying this tax. Prior to the enactment of Code § 6418, such a provision was not needed as the party that owned the property was the party that claimed the credit, so it was clear that party would be responsible. However, with the enactment of Code § 6418, the party that disposes of the investment credit property and the party that takes the tax credit may be different, and it is not clear which party is responsible for the tax.

³² In addition, the transferor, as property owner, bears the tax consequences of the basis reduction that occurs in conjunction with claiming the credit (and basis increase in the event of recapture).

³³ Moreover, it would seem easier for the IRS to audit the transferor in connection with recapture. If the IRS were to audit the transferee, the IRS would not be able to obtain any information about whether there was a recapture event.



About The Real Estate Roundtable

www.rer.org

Who We Are

