

November 4, 2022

Submitted via www.regulations.gov

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-48), Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Subject: Internal Revenue Service Notice 2022-48

To Whom It May Concern:

Thank you for the opportunity to submit comments with respect to Internal Revenue Service (“IRS”) Notice 2022-48. The following comments are submitted with respect to changes made to Section 179D, the energy efficient commercial building deduction, by the Inflation Reduction Act (“IRA”, P.L. 117-169).

The Coalition for Energy Efficient Jobs & Investment (“Coalition”) represents a broad spectrum of stakeholders, including real estate, manufacturing, architecture, contracting, engineering, building services, financing, labor, education, environmental and energy efficiency advocates. Coalition members have used Section 179D since the provision was established in 2005 and, consequently, have significant expertise with respect to its use. We have appreciated the opportunity to serve as a resource for the IRS and Department of the Treasury (“Treasury”) with respect to Section 179D over the years and look forward to working with the IRS and Treasury, as well as the Department of Energy (“DOE”) and National Renewable Energy Laboratory (“NREL”), in the coming months with respect to the recent changes made to Section 179D by the IRA and the Consolidated Appropriations Act, 2021 (“CAA”, P.L. 116-260). To the extent forthcoming guidance may also address changes made to Section 179D by the CAA, we urge the IRS to review our previously submitted comments from March 22, 2022 and June 2, 2021.

Question 1: Section 179D(d)(3)(A) provides that in the case of EECBP installed on or in property owned by a specified tax-exempt entity, the Secretary is to promulgate regulations or guidance to allow the allocation of the deduction “to the person primarily responsible for designing the property in lieu of the owner of such property.” What criteria should the Treasury Department and the IRS consider in providing rules to determine the person that is “primarily responsible for designing the property” under § 179D(3)(A)?

The amended Section 179D(d)(3)(A) expands the provision’s allocation provision, which was previously available only to governmental entities, to also include tax-exempt entities. The existing guidance and practice that applied in the context of a governmental entity allocation has worked well and we urge the IRS to build on this existing foundation for tax-exempt entities.

More specifically, we ask that AM-2018-005 is updated to reflect that tax-exempt entities are now eligible to allocate the Section 179D deduction. In this regard, the updated guidance would apply to both governmental and tax-exempt entities.

Question 2: Section 179D(f)(7)(A) provides that for purposes of § 179D(f), the term “energy use intensity” means the annualized, measured site energy use intensity determined in accordance with such regulations or other guidance as the Secretary provides and measured in British thermal units.

Question 2a: What criteria should the Treasury Department and the IRS consider in developing regulations or other guidance addressing this determination?

We encourage the IRS to use existing energy use intensity (EUI) criteria for the purposes of Section 179D(f). EUI is a defined term that is in widespread use under the Energy Star Portfolio Manager framework. Energy Star Portfolio Manager is currently used by five states and 42 municipalities to benchmark public and commercial buildings. While Energy Star Portfolio Manager requires additional information that is not needed to calculate the site EUI, we suggest the IRS work in conjunction with the Environmental Protection Agency to create a modified version of Energy Star Portfolio Manager that focuses solely on the information needed to calculate the site EUI – the total energy consumed by the building in one year and the total gross floor area of the building. We also suggest that the IRS allow taxpayers to do their own site EUI calculations based on this information. Finally, we recommend that no adjustments be made to the definition of EUI to avoid confusion in the marketplace.

Question 2b: How should the instruction in § 179D(h)(1) requiring that new technologies regarding renewable energy be taken into account in determining energy efficiency and savings be taken into account in determining energy use intensity?

The Coalition believes that new renewable energy technologies that produce energy savings should be included in the building’s modeling method as well as the EUI calculation and therefore reflected in the ability of the building to achieve 25% - 50% energy savings above the current ASHRAE 90.1 Reference Standard. However, only the costs with respect to increasing the energy efficiency of the building with respect to eligible property (lighting, HVAC, and envelope) should be utilized to determine the Section 179D deduction.

Question 3: Section 179D(f)(2) provides detail on a “qualified retrofit plan.” Is guidance providing additional definitions or other guidance regarding qualified retrofit plans needed?

One of the most important facets of a “qualified retrofit plan” is the certified EUI reduction. The Coalition requests that the IRS consider allowing any submission regarding a project that highlights the certified EUI reduction to be sufficient for a building to qualify as a retrofit project. Should the IRS determine that more specific guidance is needed, the Coalition asks that the IRS consider engaging in a separate request for information/notice and comment period.

Question 4: Section 179D(f)(7)(B) provides that the term “qualified professional” means an individual who is a licensed architect or a licensed engineer and meets such other requirements as the Secretary provides. Is any guidance providing other requirements that licensed architects or licensed engineers must satisfy needed?

The Coalition asks with respect to the definition of a “qualified professional” that the IRS does not include language requiring the qualified professional to be “in the jurisdiction in which the building is located.” Importantly, this language is not included in the IRA. However, it is found in Notice 2006-52 with respect to a “qualified individual” that is required to certify a building in order to claim the Section 179D deduction. The Coalition asks that any forthcoming guidance remove the “in the jurisdiction in which the building is located” language from Notice 2006-52 with respect to a “qualified individual.” In both scenarios, the project designer (architect or engineer) is likely licensed in the state, therefore their designs will account for state and local code requirements and conditions. With respect to the qualified professional and qualified individual, we believe it is most important that their main area of expertise be in evaluating a project with respect to the ASHRAE 90.1 Reference Standard, which is universal.

The Coalition also asks the IRS to consider expanding the list of qualified individual designations to include: USGBC’s LEED AP, AEE’s CEM, AEE’s CMVP, AEE’s CEA, AEE’s EEP, AEE’s CBPC, ASHRAE’s BEMP, ASHRAE’s CHD, ASHRAE’s HBDP, ASHRAE’s BCxP, and ASHRAE’s BEAP.

Question 5: Please provide comments on any other topics relating to the § 179D deduction that may require guidance.

Please find below the Coalition’s comments on additional topics with respect to implementation of the IRA (as well as the CAA) for your consideration.

ASHRAE Reference Standard Update Cadence

In order to provide clarity as designers and builders look ahead to upcoming projects that may qualify for Section 179D, we urge the IRS to adopt guidance that streamlines and creates certainty with respect to the ASHRAE 90.1 Standard update cadence. As we discussed in our March 2022 and June 2021 letters, the CAA requires that the new ASHRAE 90.1 Standard be affirmed by the Secretary of Treasury, after consultation with the Secretary of Energy. We construe the word “affirmed” to mean the IRS will publish the applicable standard for tax purposes as ASHRAE publishes updated standards. Additionally, as Treasury and IRS consider the cadence of the ASHRAE 90.1 Standard update, we would like to suggest that any adjustments to the applicable ASHRAE 90.1 Standard occur with respect to the start of the calendar year, rather than in October of the year the Standard is certified. This will help provide certainty and allow sufficient time for implementation, which is important as Section 179D projects may take multiple years to design and multiple years to construct and place in service.

The Coalition applauds Congress for continuing to challenge building owners to invest in the latest technologies to harness energy efficiency gains. It is important to note that the minimum threshold of 25% above the affirmed ASHRAE standard is challenging to meet, particularly with the elimination of the partial deduction. The necessary steps to implement the most recent

ASHRAE standard must be taken and the technology to achieve those energy efficiency gains must be available. Making these targets too challenging would have a counterproductive effect away from the objective of the policy; if buildings are unable to meet energy efficiency targets, projects would not move forward, leaving potential energy efficiency gains on the table.

Taken together, we strongly support efforts to affirm the latest ASHRAE standard on a regular cadence. It is important that such approvals be done in concert with DOE and NREL to ensure technologies exist in the marketplace to meet these thresholds and modeling is available to continue to allow Section 179D to drive energy efficient upgrades. In this regard, the alternate calculation available for retrofit projects will be helpful in enabling projects where energy efficiency gains are possible in older buildings. Similar to new construction projects, we urge DOE and NREL to monitor the delta between the available technologies in the marketplace and the energy efficiency standards that must be met to ensure projects are able to move forward.

Based on our understanding of the language in the CAA, we understand the ASHRAE 90.1 Standard update cadence (reflecting four years prior to a building being placed in service) to be the following:

- Project Placed in Service 2021 - ASHRAE 2007
- Project Placed in Service 2022 - ASHRAE 2007
- Project Placed in Service 2023 - ASHRAE 2007
- Project Placed in Service 2024 - ASHRAE 2007
- Project Placed in Service 2025 - ASHRAE 2007
- Project Placed in Service 2026 - ASHRAE 2007
- Project Placed in Service 2027 - ASHRAE 2019

The Coalition views this as a top priority for guidance to ensure there is clarity on what ASHRAE 90.1 Standard should be used for projects in a given year. We also strongly encourage the IRS to publish the cadence in any forthcoming guidance.

Use of Reference Equipment in Retrofit Buildings

In a retrofit project, it can sometimes be challenging to model lighting, HVAC and, especially, envelope. The Coalition requests that guidance continue to allow the use of reference equipment in retrofit projects or that NREL develop an alternative modeling technique that takes into account potential difficulties with obtaining data on all three properties. This would allow a project to hold the envelope, for example, at a reference standard in the event data cannot be collected and model the actual lighting and HVAC usage of the building.

With respect to retrofit projects generally, the Coalition asks the IRS to issue guidance on such projects promptly. Additionally, the Coalition asks the IRS to include language in the guidance accounting for the possibility of projects taking longer than one year to install with respect to calculating the EUI. For example, if a project takes more than one year to install and the building is shut down for a portion of the year in which the EUI is calculated due to that construction, the EUI may be significantly different than what it would be during a year when the building was in use. We would appreciate any flexibility the IRS may be able to provide with respect to the EUI calculation timing. Finally, the IRA requires that a building recalculate its EUI one year after the project components are placed in service to demonstrate the change in

energy efficiency. Since it will take one year to obtain this information, it may create an issue for the taxpayer with respect to the timing of being able to take the Section 179D deduction. We encourage the IRS to take this into account when considering the filing timelines with respect to commercial building projects.

Unconditioned New Construction Buildings

We are concerned that unconditioned new construction buildings, such as parking garages, may fall outside of the scope of an approved building under the IRA because an energy evaluation cannot be done if the building cannot be modeled. A similar issue arose with respect to implementation of Section 179D shortly after the deduction was created and was addressed through a regulatory fix included in IRS Notice 2008-40. We ask the IRS, NREL and DOE to incorporate a method to model unconditioned new construction buildings in forthcoming guidance to ensure they remain eligible for the Section 179D deduction. It is our understanding that retrofit unconditioned building projects can use the EUI technique to qualify for the deduction.

Building Modeling Under ASHRAE Standards 90.1-2016 and 90.1-2019

The Coalition looks forward to NREL issuing guidance with respect to updating the methodology for modeling buildings. In particular, the Coalition notes that the modeling requirements under ASHRAE Standards 90.1-2016 and 90.1-2019 are different than under 90.1-2007. While the updated modeling will not be needed for several years, we would appreciate NREL issuing guidance as soon as possible on how to implement the different modeling requirements under 90.1-2016 and 90.1-2019. The Coalition would be happy to serve as a resource to NREL on such guidance.

Conclusion

The Coalition is happy to serve as a resource to the IRS, Treasury, DOE, and NREL as you work on updating guidance with respect to Section 179D. Please contact Karishma Page, Partner, K&L Gates, if you have any questions or would like to discuss these comments (Karishma.Page@klgates.com).

Thank you for your consideration.

Sincerely,
The Coalition for Energy Efficient Jobs & Investment