



November 3, 2022

The Honorable Secretary Janet Yellen
U.S. Department of Treasury
Internal Revenue Service, CC:PA:LPD:PR (Notice 2022-48)
Room 5203, P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

RE: Response to IRS Notice 2022-48, Request for Comments on Incentive Provisions for Improving the Energy Efficiency of Residential and Commercial Buildings

Dear Secretary Yellen,

The American Institute of Architects (AIA) is committed to safeguarding the health, safety, and welfare of the public. Since 1857, this concern has been central to all that we do. As the world's largest design organization representing over 94,000 design professionals, we take seriously the responsibility to decarbonize the building sector. Energy efficiency incentives are a necessary step to protect both human and ecological health.

As you know, the building sector currently contributes roughly 40 % of greenhouse gas emissions. Through the AIA 2030 Commitment, AIA has been working for most of the last two decades to transform the practice of architecture to produce net zero energy buildings in all new construction and major renovations by 2030. In recent years, AIA has taken that a step further to call for net zero *carbon* in new buildings by 2030 and all buildings by 2040. However, we cannot do it alone. Tax incentives, like the Energy Efficient Commercial Buildings Tax Deduction (179D), are an indispensable tool to advance building decarbonization.

AIA has long been a supporter of the 179D tax deduction and testified in support of this impactful deduction in 2007.¹ We continue to support the tax incentive and applaud Congress for enhancing the deduction in a meaningful way in the Inflation Reduction Act (IRA). This includes increasing the base deduction for qualifying projects (subject to wage and apprenticeship requirements), establishing a new compliance pathway for retrofit projects, and expanding eligibility to non-profit entities.

As the Treasury Department (Treasury) and the IRS seek to implement the changes to the deduction, AIA appreciates this opportunity to provide comments on the questions included in IRS Notice 2022-48.

- **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)?**

Treasury and the IRS should reaffirm existing guidance from 2008 to define the person “primarily responsible for designing the property.” Notice 2008-40 defined the “primary designer” as:

“a person that creates the technical specifications for installation of energy efficient commercial building property (or partially qualifying commercial building property for which

a deduction is allowed under 179D). A designer may include, for example, an architect, engineer, contractor, environmental consultant or energy services provider who creates the technical specifications for a new building or an addition to an existing building that incorporates energy-efficient commercial building property...A person that merely installs, repairs, or maintains the property is not considered [for application of this deduction] a designer.”ⁱⁱ

Reaffirming this existing definition is important to maintain continuity in the business practices of building industry professionals. Changes to broaden this definition would cause an unnecessary administrative burden on project teams and designers. Uncertainty around the deduction can also have a dampening impact on its practical use and benefit. Treasury and the IRS should maintain existing definitions, where possible.

Importantly, AIA feels strongly that Treasury and the IRS should also issue clarifying guidance that the transfer of the allocation letter to the primary designer cannot be exchanged for a reduction in fees, change in service, or any other concession with monetary value. In practice, some government clients have threatened to withhold the allocation letter from the primary designer unless the designer acquiesced to their demands. This extortionary business practice should be expressly prohibited by Treasury and the IRS. AIA would like to see this clearly addressed.

It is clear that Congressional intent on 179D was for the related allocation letter to be transferred as a solely administrative function, not to be used to demand consideration in contract negotiations. Senator Cardin (D-MD) reiterated this position on the floor of the Senate on August 6, 2022, while speaking in support of the expansion of the 179D deduction in the IRA. Senator Cardin stated:

“I have been made aware of a discouraging trend among those who use section 179D that some entities attempt to receive payments in exchange for providing section 179D allocation letters to private sector building designers. As I have said before, entities seeking to avail themselves of the tax benefits of section 179D cannot seek, accept, or solicit payments from designers in exchange for providing section 179D allocation letters. The issuance of a section 179D allocation letter shall not be used as leverage to request a payment from a designer; allocation letters should be duly issued once the applicable design services have been performed. These actions run counter to the intent of section 179D(d)(4)'s express direction to allow the allocation of the section 179D deduction . . . to the person primarily responsible for designing the property in lieu of the owner of such property.’ Consistent with congressional intent, section 179D allocation letters are administrative in nature and serve to formalize the allocation of the tax deduction to the eligible designer. As section 179D is rightly expanded in the legislation being considered in the Senate, it must be reaffirmed that it is congressional intent that entities cannot seek, accept, or solicit payments in exchange for providing 179D allocation letters.”ⁱⁱⁱ

It is critical that as Treasury and the IRS implement the revisions to 179D, they use this opportunity to clarify misperceptions about the allocation letter and ensure that recipients adhere to the process that Congress intended. The IRA expanded the deduction to non-profit entities. It will be even more important that these newly eligible, tax-exempt property owners understand their role in the allocation letter transfer and that any abuses in the system are corrected.

- **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. (a)**

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

The Treasury Department and the IRS should use existing tools and definitions already widely in use in the building industry and in government to define this term. The EnergyStar program, administered by the Environmental Protection Agency (EPA) and Department of Energy (DOE), defines energy use intensity (EUI) as “calculated by dividing the total energy consumed by the building in one year (measured in kBtu or GJ) by the total gross floor area of the building (measured in square feet or square meters).”^{iv}

DOE also maintains a widely used platform, Portfolio Manager, which can be used to calculate site and source EUI. The use of trusted, well-known platforms is critical for the success of this program. It will enable the exchange of more reliable data and limit administrative costs associated with creating/training building industry professionals on a new platform. When considering regulations or other guidance in this determination, Treasury and the IRS should adhere to existing definitions and platforms as much as possible. This will reduce confusion and associated administrative costs in the building industry. It will also ensure provide a reliable basis for Treasury and IRS determinations going forward.

- **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?**

AIA holds that architects licensed through rigorous examination possess the necessary education, training, and experience to lead the design process to protect the health, safety, and welfare of the public in the built environment. Architects are uniquely qualified to take responsible control for the coordinated integration of building systems through a comprehensive understanding of design, construction, and the coordination of project teams from project inception to completion.

The process of licensure takes an average of 12.3 years to complete, with 7.1 of those years spent on completing experience and examination programs. In addition, AIA architect members are required to complete 18 learning units each year, 12 of which must be in topic areas of health, safety, and welfare. It is therefore not necessary that licensed architects be required to meet additional requirements set by the Secretary.

- **Please provide comments on any other topics relating to the § 179D deduction that may require guidance.**

The IRA establishes the reference standard for new construction at ASHRAE 90.1-2007 or the most recent ASHRAE Standard “for which the Department of Energy has issued a final determination and which has been affirmed by the Secretary, after consultation with the Secretary of Energy, for purposes of this section not later than the date that is 4 years before the date such property is placed in service.” AIA recommends that Treasury affirm ASHRAE 90.1-2016 as soon as possible, to take effect January 1 of the applicable year (four years from the date of Treasury action). We recommend that all updates to the reference standard take place on the first of the calendar year for clarity in tax filings.

ASHRAE 90.1-2016 is a stronger reference standard than ASHRAE 90.1-2007 in key ways. Most importantly, ASHRAE 90.1-2016 provides additional pathways for compliance: a prescriptive path, which is more traditional and two incorporate building performance paths, which allows designers to meet or exceed requirements. Additionally, ASHRAE 90.1-2016 is significantly more energy efficient than earlier standards.

DOE analysis indicates that buildings meeting 90.1-2016 (as compared to the previous 2013 edition) would result in approximately 8.2 percent of national energy cost savings.^v

Compared to ASHRAE 90.1-2004, this standard is 34.2 percent more energy efficient.^{vi} AIA also believes that this reference standard best meets the law's requirements for Treasury to appropriately consult with the Secretary of Energy. The DOE has fully affirmed ASHRAE 90.1-2016, and has issued a final determination that has gone into effect for the States. While DOE has issued a final determination on ASHRAE 90.1- 2019, States will not need to certify it until July 28, 2023.^{vii}

For many design projects across the country, achieving a 25%-50% reduction over the ASHRAE 90.1-2016 will be a challenging but attainable goal. The ultimate purpose of 179D is to change market behavior, accelerating trends toward building decarbonization at a speed and scale that would not be possible through market forces alone. The deduction must set targets that push the market to exceed current practice but that remains remain attractive to prospective clients who might not otherwise pursue energy efficiency investments. AIA believes that at this time, ASHRAE 90.1-2016 strikes this necessary balance.

AIA urges Treasury and the IRS to revisit this affirmation on an annual basis and consider affirming the latest ASHRAE standard as building technology continues to improve.

Thank you for your consideration of these comments. If you have any questions or would like additional information, please do not hesitate to contact me. We look forward to continuing to work with you to support the successful implementation of 179D and other incentives to decarbonize the built environment.

Sincerely,



Sarah Dodge
Senior Vice President of Advocacy & Relationships, AIA

ⁱ RK Stewart, FAIA, American Institute of Architects, Senate Committee on Energy and Natural Resources, Subcommittee on Energy Hearing, "Receive Recommendations on Policies and Programs to Improve the Energy Efficiency of Buildings and to Expand the Role of Electric and Gas Utilities in Energy Efficiency Programs," February 12, 2007 <https://www.scribd.com/document/329979733/SENATE-HEARING-110TH-CONGRESS-ENERGY-EFFICIENCY-OF-BUILDINGS>

ⁱⁱ Internal Revenue Bulletin: 2008-14, Notice 2008-40, Amplification of Notice 2006-52; Deduction for Energy Efficient Commercial Buildings, Section 3. Special Rule for Government-Owned Buildings, April 7, 2008.

ⁱⁱⁱ Congressional Record, Vol 168, No. 133, Honoring the Dedication of the Ball Family, August 6, 2022.

^{iv} EnergyStar, Commercial Buildings, "What is Energy Use Intensity?"

https://www.energystar.gov/buildings/benchmark/understand_metrics/what_eui#:~:text=It%27s%20calculate%20by%20dividing%20the,square%20feet%20or%20square%20meters).

^v ASHRAE, "ASHRAE Standard 90.1-2016 Receives Determination From US Department of Energy," March 2, 2018, <https://www.ashrae.org/about/news/2018/ashrae-standard-90-1-2016-receives-determination-from-u-s-department-of->

[energy#:~:text=Standard%2090.1%2D2016%20was%20published,regulated%20by%20the%20model%20code.](https://www.ashrae.org/about/news/2018/ashrae-standard-90-1-2016-receives-determination-from-u-s-department-of-energy#:~:text=Standard%2090.1%2D2016%20was%20published,regulated%20by%20the%20model%20code)

^{vi} ASHRAE, "ASHRAE's Perspective on Recent Changes to the 179D Tax Deduction,"

<https://www.ashrae.org/file%20library/about/government%20affairs/public%20policy%20resources/ashrae-statement-on-changes-to-179d.pdf>

^{vii} Department of Energy, Building Energy Codes Program, Determinations,

<https://www.energycodes.gov/determinations>