

October 15, 2024

The Honorable Jason Smith  
Chair  
U.S. House Committee on Ways & Means  
1139 Longworth House Office Building  
Washington, DC 20515

The Honorable Carol Miller  
Chair, Supply Chains Tax Team  
465 Cannon House Office Building  
Washington, DC 20515

The Honorable Mike Kelly  
Chair, Community Development Tax Team  
1707 Longworth House Office Building  
Washington, DC 20515

Dear Chair Smith, Chair Miller and Chair Kelly:

The Coalition for Energy Efficient Jobs & Investment (“The 179D Coalition”) appreciates the opportunity to submit these comments to the House Ways & Means Committee Republican Tax Teams. Section 179D, the energy efficient commercial buildings deduction, has a long, bipartisan history of incentivizing energy efficient upgrades to commercial and multi-family buildings. We have appreciated the opportunity to work with Congress in recent years to implement improvements to Section 179D through passage of the Consolidated Appropriations Act, 2021 (“CAA”, P.L. 116-260) and the Inflation Reduction Act (“IRA”, P.L. 117-169). This letter discusses the important improvements that have been made to Section 179D in recent years, as well as provides suggestions for making further improvements to Section 179D.

#### **About the 179D Coalition**

The 179D Coalition represents a broad spectrum of stakeholders that have used Section 179D since its inception and have tremendous depth of knowledge with respect to its use, including real estate, manufacturing, architecture, contracting, engineering, building services, financing, labor, education, environmental and energy efficiency advocates. The 179D Coalition is dedicated to ensuring that Section 179D remains a catalyst for energy efficient upgrades to commercial and multi-family buildings that result in critical energy savings that benefit the building owners, tenants and the environment. Importantly, investments in such upgrades will continue to result in economic and job growth across a broad range of industries.

#### **Economic and Jobs Impact of Section 179D**

In general, Section 179D allows taxpayers who own or lease a commercial or multi-family building that is at least four stories tall in the United States to take a deduction for the cost of installing qualified energy efficient systems with respect to building envelope, HVAC and

lighting. The provision, in many ways, is akin to bonus depreciation or accelerated cost recovery, allowing businesses to receive a deduction close to when the property is acquired, encouraging in its investment.

For governmental or tax-exempt building owners, they are able to allocate the deduction to the designer of the energy efficient enhancements, namely architects and engineers. Section 179D has historically worked well in newer buildings that are more easily able to meet the ASHRAE 90.1 Reference Standard required to be eligible for the deduction; however, recent changes have made it easier for older building stock retrofits to also qualify for the deduction by making available an alternative method for the building to calculate its percent of energy savings above the building's own energy use intensity (EUI). We are awaiting guidance from the Internal Revenue Service (IRS) and Department of the Treasury regarding how to calculate the EUI for retrofit projects.

#### *Improvements to Section 179D under the CAA and IRA*

By way of background, Section 179D was first in put in place under the bipartisan Energy Policy Act of 2005. Aimed at creating a path toward energy independence, Section 179D was one of the few provisions in the Energy Policy Act – let alone the Internal Revenue Code – that focuses on energy demand, whereas most other energy tax policies focus on energy supply.

After a strong history of incentivizing energy efficiency investments, the CAA and IRA included a number of bipartisan provisions to strengthen Section 179D and expand its impact. Under the CAA, which was passed under the Trump administration, Section 179D was made permanent; the deduction was indexed for inflation; and it provided a cadence for regular updates to the ASHRAE 90.1 Reference Standard. The IRA built on these important updates, by creating an alternative structure for retrofit projects to qualify for Section 179D; expanding the allocation provision to allow tax-exempt entities to benefit from Section 179D; modifying the percent above the current applicable ASHRAE 90.1 Reference Standard projects must meet from 50% to 25%, a more realistic goal; and, lifting restrictions that limited Section 179D use to only once in the lifetime of the building, and instead allowing projects in the same building after three years to enable regular investments in the latest energy efficiency technologies.

#### *REMI Study on the Economic and Jobs Impact of Section 179D*

REMI, an economics research firm, conducted a study in May 2017 examining the economic impacts of Section 179D. At the time of the study, Section 179D had most recently expired at the end of 2016, prompting discussions about whether to extend, expand, or enhance the deduction. The study analyzed three potential approaches: strengthening and modernizing Section 179D, extending and expanding it to include nonprofit organizations and tribal governments, and simply extending the existing provisions.

The findings of the REMI study highlight the significant economic benefits of these proposals. We are grateful that some of the proposals have since been enacted. The REMI study nonetheless continues to reinforce the strong jobs and economic growth impact of Section 179D.

The strengthening and modernizing option, which proposed increasing the value of the deduction from \$1.80 to \$3.00 per square foot and updating energy efficiency standards, was projected to

create over 76,000 jobs annually. It would also contribute \$7.4 billion to national GDP and \$5.7 billion to personal income each year. Changes made to Section 179D under the IRA allow for the possibility of receiving a deduction of up to \$5.65 per square foot if certain conditions are met.

The study also emphasizes the role of accelerated cost recovery, which as noted above allows private building owners to recover the cost of energy-efficient improvements more quickly by accelerating the depreciation deduction. Under Section 179D, private building owners can deduct these costs in the year the property is placed into service, providing immediate financial incentives for making energy-efficient investments. This accelerated depreciation boosts investment by reducing the overall cost of implementing energy-saving technologies. Moreover, the energy cost savings allow these businesses to make investments in their business over time, fostering jobs and economic growth.

The extension and expansion proposal, which would have expanded the allocation of the deduction from governmental entities to also include nonprofit organizations and tribal governments, was estimated to support 39,388 jobs annually and contribute \$3.7 billion to GDP and \$3 billion to personal income per year. The IRA expanded Section 179D to allow nonprofit organizations and tribal governments to allocate the deduction to the project designer.

### **Looking Ahead – Continuing to Improve Section 179D**

As the House Ways & Means Republican Tax Teams consider potential tax reform in 2025, the 179D Coalition would like to offer several proposals to continue to strengthen Section 179D and incentivize ongoing energy efficient enhancements that reduce energy costs for building owners and tenants.

#### *Prevailing Wage and Apprenticeship Requirements under Section 179D*

The prevailing wage and apprenticeship (PWA) requirements introduced under the IRA present significant challenges when applied to Section 179D. Section 179D provides a non-economic, allocable tax deduction for energy efficient improvements to commercial and multi-family buildings, functioning similarly to accelerated depreciation, rather than as a tax credit. However, the PWA requirements, typically focused on labor-intensive construction projects, do not easily translate to this type of deduction.

#### Challenges with Allocation and Compliance

One of the key complexities arises when governmental or tax-exempt entities own the building and allocate the deduction to the primary designer—often an architect or engineer. According to Section 179D(d)(3)(A), the designer is treated as the taxpayer for purposes of the deduction. The governmental or tax-exempt entity, which remains the project owner, is not responsible for the tax benefit. Designers, however, do not typically employ laborers or mechanics, nor do they hire contractors or subcontractors, who are the focus of the PWA requirements. These professionals provide design and advisory services, not manual or physical labor.<sup>1</sup> Consequently, giving designers, as taxpayers, the responsibility to ensure PWA compliance, as outlined in Section 45(b)(7) and 45(b)(8), raises uncertainty about whether they have the necessary information to verify compliance.

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<sup>1</sup> <https://www.federalregister.gov/documents/2023/08/30/2023-18514/increased-credit-or-deduction-amounts-for-satisfying-certain-prevailing-wage-and-registered>.

In addition, governmental or tax-exempt entities that allocate the deduction may have limited incentive to assume the administrative burden of meeting PWA requirements. Since these entities are not direct beneficiaries of the tax deduction and may already be subject to local contracting requirements, such as using minority-owned or small businesses, they may be further deterred from providing the necessary information to designers to verify PWA compliance. While the Department of the Treasury and IRS released final regulations with respect to the PWA requirements earlier this year, the final regulations concluded that determining how the PWA requirements apply in Section 179D's allocation context is outside the scope of the final regulations and will be addressed in future guidance.

#### Impact on the Uptake of Section 179D

The small value of the base deduction compared to the enhanced deduction under the PWA requirements is another concern. If meeting the PWA requirements for the enhanced deduction proves too costly or complex, many stakeholders may opt to forgo using Section 179D, undermining the policy's goal of encouraging energy efficient upgrades that provide energy cost savings to building owners and tenants. Simply put, with limited ability and incentive of the entities involved in the transaction to meet the requirements of the enhanced deduction and the limited value of the base deduction, we are concerned there will be less uptake on Section 179D, leaving significant energy savings on the table.

#### Apprenticeship Requirements

While many Section 179D projects already utilize prevailing wage rates, we are concerned the apprenticeship requirement may be particularly challenging to meet in rural or less densely populated areas where apprenticeship programs may not be readily available.

#### Exemption or Safe Harbor Solutions

To address the challenges discussed above, the 179D Coalition requests that Congress consider a potential small building exemption, exemption for projects utilizing the allocation provision, or an overall exemption for Section 179D from the PWA requirements. As we noted above, Section 179D is a deduction and not a credit, and is notably the only provision the PWA requirements apply to that is not a credit. The current lack of guidance with respect to Section 179D and the PWA requirements is leaving potential projects on the sidelines. Additionally, the unique challenges with respect to the allocation provision have made implementation of the PWA requirements particularly challenging. It is important for us to determine a path forward that makes sense within the context of the Section 179D deduction to allow these projects to move forward.

#### *Other Areas for Improvement*

In addition to reviewing the impact of the PWA requirements on Section 179D, the 179D Coalition also would appreciate Congress' consideration of several other potential improvements to Section 179D.

#### Challenges in Addressing Unconditioned New Construction Buildings

The 179D Coalition would appreciate clarification regarding the eligibility of unconditioned new construction buildings, such as parking garages under the Section 179D deduction. These

structures do not have heating or cooling systems, making it difficult to model their energy efficiency according to current ASHRAE 90.1 Reference Standards. A similar issue was resolved in the past following the creation of Section 179D through IRS Notice 2008-40, which allowed certain unconditioned buildings to qualify for the deduction. Stakeholders are requesting that a similar fix be contemplated to ensure that such structures, particularly with respect to lighting projects, remain eligible for the deduction.

#### Disconnect Between Multifamily Housing and the ASHRAE 90.1 Reference Standard

Another concern relates to the disconnect between multi-family housing buildings and ASHRAE 90.1 Reference Standard, which is primarily designed with commercial buildings in mind. Multi-family housing projects, especially older buildings undergoing energy retrofits, often face difficulties in applying the requirements under the ASHRAE 90.1 Reference Standard. Traditional energy modeling methods may not be appropriate for these types of projects, particularly when trying to retrofit older multi-family housing properties that don't align with commercial building standards. Stakeholders have suggested that using a baseline energy comparison approach, rather than traditional modeling, might be more suitable for multi-family retrofits.

#### **Considering the Implications of *Loper Bright v. Raimondo* on Rulemaking**

The U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo Relentless, Inc.*,<sup>2</sup> which overturned the Chevron doctrine<sup>3</sup>, may have implications for how the Department of the Treasury and IRS choose to implement recent changes made to Section 179D under the CAA and IRA. The Chevron doctrine historically required courts to defer to federal agencies' reasonable interpretations of ambiguous statutes. With this precedent now overturned, agencies may no longer have the same level of flexibility in interpreting the statutory language in the CAA and IRA. While the full impact of *Loper Bright* is still being considered, there may be a need for more explicit statutory language to support the IRS and Treasury in promulgating rules that align with the goals of Section 179D as outlined in the CAA and IRA. This would help ensure that future rulemaking provides clear, consistent standards while maintaining flexibility for diverse building types and projects.

#### **Need for Updated Section 179D Guidance**

In summary, Section 179D was designed as a deduction to encourage energy efficient commercial and multi-family housing building upgrades, rather than as a construction-based tax credit. The recent passage of the CAA and IRA have led to an increasing need for guidance on Section 179D to address complexities created by the statutes. We strongly encourage Congress to reach out to the Department of the Treasury and IRS to urge them to issue guidance expeditiously to ensure that important energy efficient upgrade projects do not remain on the sidelines.

#### **Conclusion**

The 179D Coalition for Energy Efficient Jobs and Investment appreciates the opportunity to submit these comments to the House Ways & Means Republican Tax Teams. We are excited for the possibilities created under the CAA and IRA, and look forward to working together with

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<sup>2</sup> *Loper Bright Enterprises v. Raimondo Relentless, Inc.*, 603 U.S. \_\_\_\_ (2024).

<sup>3</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Congress to address concerns around a few specific areas to ensure that Section 179D projects can move forward and generate significant energy savings for building owners and tenants. We would also appreciate Congress' help with encouraging the Department of the Treasury and IRS to release guidance on Section 179D as soon as possible. This would contribute to greater certainty for stakeholders as they navigate gray areas created by the CAA and IRA.

We are happy to serve as a resource for the Tax Teams. Please do not hesitate to contact us with any questions or for additional information.

Sincerely,  
The 179D Coalition for Energy Efficient Jobs &  
Investment