ACEC

AMERICAN COUNCIL OF ENGINEERING COMPANIES

November 3, 2022

The Honorable Janet Yellen
Secretary
Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

RE: IRS-2022-0048

Dear Secretary Yellen:

On behalf of the American Council of Engineering Companies (ACEC) – the national voice of America's engineering industry – I am writing to respond to questions in Notice IRS-2022-0048 regarding the changes to the Section 179D energy-efficient commercial buildings deduction that were included in the Inflation Reduction Act (IRA).

Founded in 1906, ACEC is a national federation of 52 state and regional organizations representing more than 5,600 engineering firms and 600,000+ engineers, surveyors, architects, and other specialists nationwide. ACEC member firms drive the design of America's infrastructure and built environment.

A significant number of ACEC member firms do the design work on HVAC systems, lighting, and the building envelope that qualifies for the Section 179D energy-efficient buildings deduction, and when appropriate have been allocated the deduction by clients that are governmental entities. ACEC supports the expansion of the allocation provision to tax-exempt entities.

We think that implementation of the IRA presents an opportunity to make the allocation process more transparent and address some issues our members have encountered. There have been circumstances when the governmental entity has allocated the deduction to the contractor that installed the energy-efficient system but did not do any of the design work merely because the contractor asked about the deduction before the design firm. There have also been circumstances where the deduction could be divided to reflect, for example, the architect designing the lighting and the engineer designing the HVAC and building envelope. However, this type of reasonable division of the deduction does not occur if all parties to the contract do not have the opportunity to discuss the deduction and their design work with the client.

One model for addressing this problem that Treasury and the IRS could consider is the approach developed by the General Services Administration (GSA). In order to receive the Section 179D deduction, GSA requires the contractor to consult with all other contractors and subcontractors on the project and certify that they are not also seeking the allocation of the deduction. This gives all the designers on a project the opportunity to consult and potentially divide the deduction equitably based on the specific design work performed. GSA outlines their requirements on their website (https://www.gsa.gov/real-estate/facilities-management/facilities-operations/energyefficient-commercial-building-tax-deduction) and more specific information can be found in their letter of intent form (https://www.gsa.gov/cdnstatic/EECBTD_LOI_-_Appendix_A.pdf). If other governmental entities and tax-exempt entities followed this approach, the outcomes would more closely align with congressional intent that the deduction be allocated to the designer of the energy-efficient systems.

We would also like to raise the problem that some government entities and their intermediaries have solicited payments in exchange for signing the allocation letter. In these situations, the designer is told that they must make a payment to the governmental entity and pay a fee to the intermediary before the governmental entity will sign the allocation paperwork. Neither the statutory text nor regulatory guidance contemplates providing a payment to a government entity in exchange for allocation of the Section 179D deduction. In response to a question Senator Ben Cardin asked about this practice in 2019, Treasury Assistant Secretary for Tax Policy David Kautter stated "We have further researched and considered this issue, and it is our view that, as you correctly noted in your question, the allocation letter provided by the government entity to the architect, engineer, or contractor for the purpose of verifying that they qualify for the deduction should be a simple, administrative act."

In addition to undercutting the purpose of Section 179D in promoting energy efficiency, the harmful effects of this practice fall heaviest on small engineering and architectural firms. In many cases, small firms do not have the wherewithal to meet demands for these payments. The result is that these businesses lose the opportunity to work on important projects that support the employment of highly skilled workers, with reverberating effects throughout local economies.

ACEC member firms are also very concerned about the ethical implications of making such payments in exchange for the deduction. Professional engineers are required to meet strict ethical standards to maintain their license and any indication that an engineering firm made a cash payment to obtain the allocation letter could be brought before the state licensing board.

As Treasury and the IRS develop regulations to implement the IRA, ACEC urges the agencies to prohibit governmental entities and tax-exempt entities from soliciting and receiving payments in exchange for allocating the Section 179D deduction.

Finally, ACEC encourages Treasury and the IRS to revisit the IRS Office of Chief Counsel memorandum AM 2010-007 stating that the Section 179D deduction reduces the owner's tax basis in the ownership interest. This position makes it difficult for

engineering firms that are organized as passthrough entities to benefit from the allocation of the deduction in the same way as engineering firms organized as C corporations.

Design firms structured as passthrough entities are required to take the allocated 179D deduction at the entity level which reduces the individual owner's basis. This results in additional tax when the benefit of this deduction is distributed to the owner. This tax consequence for passthrough entities places C corporations in a more favorable position as there is no similar reduction of the tax benefit they are able to claim. This disparity could be remedied by issuing regulations that provide for basis to be retained for the passthrough owner in the case of a 179D allocation, or by issuing regulations that direct the deduction to be taken at the owner level rather than the entity level. The former Section 199 is an example of how passthrough entities can fairly benefit from a deduction being computed at the owner level rather than the entity level.

Thank you for your consideration and please let us know how we can assist in this matter.

Sincerely,

Linda Bauer Darr
President & CEO