The Jewish Federations® OF NORTH AMERICA
Washington D.C. Office

November 3, 2022

VIA ELECTRONIC SUBMISSION

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-48 and Notice 2022-50)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

The Honorable Lilly L. Batchelder
Assistant Secretary for Tax Policy
United States Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, DC 20220

Mr. William M. Paul
Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical)
Internal Revenue Service
1111 Constitution Ave., N.W.
Washington, DC 20224

Re: Comments on sections 179D and 6417 pursuant to Notices 2022-48 and 2022-50 and Request for Meeting

Dear Ms. Batchelder and Mr. Paul:

The Jewish Federations of North America respectfully submit these comments to the U.S. Department of Treasury ("Treasury") and the Internal Revenue Service ("IRS") regarding sections 179D and 6417 pursuant to Notices 2022-48 and Notice 2022-50.[1] We would welcome the opportunity to meet with Treasury and IRS officials to discuss the contents of this letter.

The Jewish Federations of North America ("Jewish Federations") is a section 501(c)(3) organization that represents and serves 146 Jewish federations, 300 independent network Jewish communities across North America, and 30 separately incorporated Jewish community foundations. Local Jewish federations are the central address for thousands of synagogues, hospitals, assisted and independent living facilities, group homes, family service agencies, community centers, camps, schools, and museums, among many other institutions in their communities.

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[1] All section references are to the Internal Revenue Code of 1986 as amended and in effect following the changes made by the Inflation Reduction Act, P.L. 118-169 (Aug. 16, 2022).

Jewish Federations lead a continental federation movement that mobilizes financial and social resources through philanthropic endeavors, strategic initiatives, and internal agencies that strengthen the Jewish people and civil society. This movement provides a full continuum of care for our nation's most vulnerable citizens – older adults, persons with disabilities, children and at-risk youth, and immigrants and refugees, among many others – serving more than one million clients each year, Jewish and non-Jewish alike.

EXECUTIVE SUMMARY

The clean energy provisions contained in the Internal Revenue Code that Congress enacted through the Inflation Reduction Act, P.L. 118-169 (Aug. 16, 2022) will incentivize the thousands of tax-exempt organizations in the federation system that own property to install energy efficient upgrades or design new energy efficient buildings. After consultation with our constituents, Jewish Federations offer relevant comments on two provisions, section 179D and section 6417.

We briefly summarize these provisions below, noting that the summaries are not intended to be comprehensive. We then provide specific recommendations on how the 179D deduction could be assigned by the tax-exempt entity to the energy efficient building designer but still provide benefit to the tax-exempt entity with at least 75% of the value of the deduction accruing to the benefit of the assignor. We also provide a recommendation for an alternative form so that a tax-exempt entity that does not file a Form 990 could still benefit from the section 6417 provision. Taken together, these recommendations, if implemented, provide a meaningful opportunity for tax-exempt organizations to utilize and benefit from these clean energy incentives.

I. SECTION 179D

A. Summary of Provision

The Inflation Reduction Act made significant amendments to section 179D, which has been part of the Code since 2005. Section 179D(a) provides for a deduction for energy efficient commercial building property ("EECBP") that the taxpayer places in service in the taxable year. Section 179D(b)(1) provides this deduction cannot exceed (1) the product of the "applicable dollar value" and the

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square footage of the building over (2) the aggregate amount of section 179D deductions with respect to the building for three previous taxable years.[2]

The "applicable dollar value" is an amount equal to $0.50 increased by $0.02 for each percentage point for which the total energy and power costs for the building are certified to be reduced by a percentage greater than 25 percent, up to a maximum of $1.00.[3] Notwithstanding this $1.00 ceiling, section 179D(b)(3) provides for an increased deduction for EECBP that satisfies certain wage and apprenticeship requirements, or for which installation begins prior to the date that is 60 days after Treasury and the IRS publishes guidance with respect to the wage and apprenticeship requirements. Considering these increases, the applicable dollar amount is an amount equal to $2.50 and is increased by $0.50 for each percentage point which the total energy and power costs for the building are certified to be reduced by a percentage greater than 25 percent, up to a maximum of $5.00.

EECBP is defined as property with respect to which depreciation (or amortization in lieu of depreciation) is allowable that is installed on any building in the United States as part of the interior lighting systems, the heating, cooling, ventilation, and hot water systems, or the building envelope.[4] The property must be installed on a building that is within the scope of Reference Standard 90.1, and must be certified in accordance with section 179D(d)(5) as being installed as part of a plan designed to reduce the total annual energy and power costs with respect to the interior lighting systems, heating, cooling, ventilation, and hot water systems of the building by 25 percent or more in comparison to a reference building which meets the minimum requirements of Reference Standard 90.1 using methods of calculation set forth in section 179D(d)(1).[5]

Section 179D(f)(1) provides an alternative deduction, at the election of the taxpayer, for the taxable year that includes the qualifying final certification with respect to a "qualified retrofit plan." The alternative deduction is equal to the lesser of (A) the deduction as generally calculated above (substituting "energy use

[2] Where the deduction is allowable to a person other than the taxpayer, this value is the aggregate amount of deductions under section 179D for any taxable year ending during the 4-taxable-year period ending which the taxable year being tested). Section 179D(b)(1)(B).

[3] Section 179D(b)(2).

[4] Section 179D(c)(1).

[5] Section 179D(c)(2) provides that the term "Reference Standard 90.1" means, with respect to any property, "the more recent of (A) Standard 90.1-2007 published by the American Society of Heating, Refrigerating, and Air Conditioning Engineers and the Illuminating Engineering Society of North America; or (B) the most recent Standard 90.1 published by the American Society of Heating, Refrigerating, and Air Conditioning Engineers and the Illuminating Engineering Society of North America for which the Department of Energy has issued a final determination and that has been affirmed by the Secretary, after consultation with the Secretary of Energy, for purposes of section 179D not later than the date that is 4 years before the date such property is placed in service.

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intensity" for "total energy and power costs" and (B) the aggregate adjusted basis of "energy efficient building retrofit property" placed in service pursuant to the qualified retrofit plan.

A "qualified retrofit plan" means a written plan prepared by a qualified professional which specifies modifications to a building which, in the aggregate, are expected to reduce such building's energy use intensity by 25 percent or more in comparison to the baseline energy use intensity of such building, and meets certification requirements as to its energy use intensity and its compliance with Reference Standard 90.1.[6] "Energy efficient building retrofit property" means depreciable or amortizable property that is installed on or in any "qualified building" that is part of the interior lighting systems; the heating, cooling, ventilation, and hot water systems, or the building envelope and is certified to be in compliance with Reference Standard 90.1.[7] A qualified building is any building that is located in the United States and was originally placed in service at least five years prior to the qualified retrofit plan with respect to such building.[8] A "qualifying certification" means a certification made at least one year after the property is installed that certifies that the energy use intensity of such building is not more than 75 percent of the baseline energy use intensity of the building.[9]

Section 179D(d)(3)(A) provides that in the case of EECBP that is installed on or in property owned by a "specified tax-exempt entity," Treasury and the IRS shall issue "regulation 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." The person so allocated that deduction shall be treated as the taxpayer for purposes of section 179D. A "specified tax-exempt entity" includes governmental units, Indian tribal governments and Alaska Native Corporations, and any organization exempt from federal income tax (*e.g.*, under section 501).[10]

B. Jewish Federations Recommendation

With respect to the election under section 179D(d)(3) that permits a specified tax-exempt entity to elect that the "person primarily responsible for designing the property" (the "designer"), often multiple parties including an architect or contractor, receives the deduction, we recommend that the regulations set a floor on the consideration that must be paid to the specified tax-exempt entity to make

[6] Section 179D(f)(2).

[7] Section 179D(f)(3).

[8] Section 179D(f)(4).

[9] Section 179D(d)(5).

[10] Section 179D(d)(3)(B).

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this allocation.[11] We understand the primary intent of including this provision in the Inflation Reduction Act is to incentivize tax-exempt entities to build or retrofit energy efficient buildings by benefitting from the section 179D deduction in the form of a reduced purchase price or rebate. However, we are concerned that the designer may not actually allocate or rebate any amount to the specified tax-exempt entity, that the amount so allocated may be de minimis compared to the tax benefit that the designer enjoys, or that the designer would provide the benefit of the 179D deduction to the specified tax-exempt entity while simultaneously artificially increasing the overall cost to that entity.

For that reason, we recommend that the election require that a rebate or discount be granted in an amount that is no less than seventy-five (75) percent of the maximum value of the deduction to be allowed to the designer, to be computed as equal to the designer's marginal tax rate (calculated by applying the highest tax rate in effect for the designer in the taxable year under section 1 or 11, depending on whether the designer is a passthrough entity or a C corporation).[12] The comparison should be made against the baseline price that the designer would offer the EECBP to a for-profit entity, an amount to which the designer should have to aver under penalties of perjury as part of making the election.

Consider this example: A designer's standard cost charge for installing a new HVAC system for a 5,000 square foot office building is $30,000. Suppose that the HVAC system would reduce the total annual energy and power costs for such a building by 25 percent, as calculated under section 179D(d)(1), and that the system otherwise meets the definition of EECBP under section 179D(c)(1). Suppose also that installation will occur prior to the issuance of any guidance on the wage and apprenticeship requirements set forth in section 179D(b)(4)(A) and (5), and that no deductions on section 179D have previously been claimed with respect to the building. The "applicable dollar amount" is therefore $2.50, and the total amount of the section 179D deduction in the hands of the building owner is $2.50 x 5,000 square feet, or $12,500. If the owner of the building is a C corporation, the maximum value of that deduction to the owner is $12,500 x 21 percent (the applicable tax rate), or $2,625.

If the owner in the above example were a synagogue, it could make an election to have the designer claim the deduction (because the synagogue would not otherwise utilize the deduction). Assuming that the designer is a C corporation, the deduction would have a maximum value of $2,625. The rule we are suggesting would require that the designer reduce its purchase price by, or

[11] We expect that guidance will make clear what it means to be "the person primarily responsible for designing the property" for purposes of the section 179D(d)(3) election.

[12] Similar procedures to those set forth in section 6225(d)(4)(A) (relating to modifying imputed underpayments as part of the partnership audit rules) could be used to modify the rate for a passthrough entity the members or partners of which are C corporations.

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provide rebate of, $1,969 to the synagogue (*i.e.*, 75 percent of $2,625). As part of the election process, the designer will need to aver under penalties of perjury that the price of such a system to a for-profit entity would be $30,000.[13]

This approach will ensure that the benefit is reasonably split between tax-exempt entities and designers, which is the purpose of the provision, and will prevent designers from keeping the vast majority or all of the benefit for themselves. To administer the provision, we recommend that regulations require that the election be made jointly between the specified tax-exempt entity and the designer, that both report the total consideration paid for the system, the calculation of the amount of the deduction available to the designer, and the amount of the discount or rebate provided to the tax-exempt entity.

We also note that Treasury and the IRS have a broad mandate to promulgate regulations under section 179D(d)(3)(A), and therefore we believe that such a rule is within their authority to adopt.

Further, we recommend that regulations clarify that the EECBP does not need to be property with respect to which depreciation (or amortization in lieu of depreciation) is allowable in the hands of the specified tax-exempt entity.[14] Many tax-exempt entities do not conduct any trade or business, and therefore property in their hands will not be subject to depreciation or amortization.[15] This is consistent with the clear legislative goal in section 179D(d)(3) to provide some benefit from the deduction to tax-exempt entities.

We also recommend that the regulations clarify and provide guidance explaining that the section 179D(f)(3) election is available with respect to the alternative deduction for energy efficient building retrofit property.

II. SECTION 6417

A. Summary of Provision

Section 6417(a) provides that an "applicable entity" may make an election (at such time and in such manner as the Secretary may provide) with respect to any "applicable credit" to be treated as making a payment against federal income tax in an amount equal to the amount of such credit. "Applicable credit" is defined in section 6417(b) to include 12 credits that were either enacted or expanded by the

[13] Conceivably, the IRS could request additional information verifying this either as part of the application process or on audit, *e.g.*, examples of contracts of similar systems sold to for-profit entities or calculations showing how the baseline purchase price is determined.

[14] *See* section 179D(C)(1)(A).

[15] *See* section 167(a), generally requiring that for a depreciation allowance property must either be used in the production of a trade or business or be held for the production of income.

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Inflation Reduction Act. "Applicable entity" is generally defined to mean any entity exempt from federal income tax (*e.g.*, under section 501), any state or political subdivision thereof, the Tennessee Valley Authority, an Indian tribal government, an Alaska Native Corporation, and certain corporations operating on a cooperative basis engaged in furnishing electricity to persons in rural areas.[16] Other entities may elect to be treated as "applicable entities" with respect to certain applicable credits.[17]

Section 6417(d)(3)(A)(i) provides that any election under section 6417(a) shall be made in the case of an entity for which no return is required under section 6011 or 6033, by such date as is determined appropriate by Treasury and the IRS, and in any other case, by the due date (including extensions) for the return of tax for the taxable year for which the election is made, but in no event earlier than 180 days after the enactment of this section. Any such election once made is irrevocable and shall apply (subject to specific exceptions in the statute) with respect to any credit for the taxable year for which the election is made.

Section 6417(d)(3)(4) provides that the deemed payment shall be made in the case of entities other than a government or political subdivision on the later of the due date (determined without regard to extensions) of the return of tax for the taxable year or the date on which such return is filed.

Section 6417(d)(5) provides that as a condition of, and prior to, any amount being treated as a payment which is made by an applicable entity under subsection (a), the Secretary may require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or "excessive payments."

Section 6417(d)(6)(C) defines an "excessive payment" as an amount equal to the payment deemed to be made by the applicable entity under section 6417(a) over the amount of the applicable credit that would otherwise be allowable (without the application of section 6417 and without regard to section 38(c)) to the applicable entity. An applicable entity's tax is increased by 120 percent of the amount of any excessive payment, unless such excessive payment is due to reasonable cause, in which case tax is only increased the amount of the excessive payment.[18]

Section 6417(h) provides that Treasury and the IRS shall issue such regulations or other guidance as may be necessary to carry out the purposes of this section, including guidance to ensure that the amount of the payment or deemed payment

[16] Section 6417(d)(1)(A).

[17] Section 6417(d)(1)(B)-(D).

[18] Section 6417(d)(5).

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made under this section is commensurate with the amount of the credit that would be otherwise allowable, determined without regard to section 38(c).

B. Jewish Federations Recommendation

Jewish Federations represent the interests of many entities in the Jewish community, including many such as synagogues that are not required to file a federal income tax return like Form 990 under section 6011 or 6033.[19] Some of these entities will be interested in pursuing "applicable credits," such as the section 48 energy credit that is potentially available for, inter alia, installing rooftop solar panels.[20]

Thus, guidance is needed for determining when and how these entities make an election under sections 6417(d)(3)(A) and what information is required to be provided under section 6417(d)(5). We recommend that for such entities the election be due on the same date that a Form 990 would have been due under section 6033(a) and Treas. Reg. § 1.6033-1 if the applicable entity were required to file one (*e.g.*, on May 15 for calendar year taxpayers).

We further recommend that the regulations provide that Treasury and the IRS create a separate stand-alone form to be used for this election that taxpayers can file without a Form 990, provided they are otherwise not required to file Form 990. The form should be signed by the applicable entity under penalties of perjury and require it to set forth identifying information (including its EIN), the type and amount of applicable credits being claimed, a brief description of the activity or project generating the applicable credit, and a statement that, to the best of the taxpayer's knowledge, no other entity is claiming the applicable credit for the identified activity or project.

[19] *See* section 6033(a)(3)(A), which provides for an exemption from filing Form 990 other than churches, their integrated auxiliaries, and conventions or associations of churches, and for the exclusively religious activities of any religious order.

[20] *See* Section 6417(b)(10).

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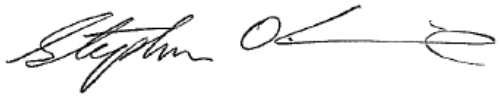
III. CONCLUSION

Jewish Federations believe adopting the suggestions in this comment letter will lead to better implementation and tax administration of the Inflation Reduction Act provisions discussed herein. We welcome the opportunity to meet with Treasury and IRS officials to further discuss the contents of this letter.

Sincerely,



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