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**VIA ELECTRONIC DELIVERY & FIRST-CLASS MAIL**

Internal Revenue Service  
Attn: Laurie Brimmer  
Room 6129  
1111 Constitution Avenue NW  
Washington, D.C. 20224

Re: Comment Request Concerning Deduction for Energy Efficient Commercial Buildings

Dear Ladies and Gentlemen:

Pursuant to the Comment Request Concerning Deduction for Energy Efficient Commercial Buildings, 84 Fed. Reg. 13,989 (April 8, 2019), focusing on Notices 2006-52 and 2008-40, alliantgroup, L.P. respectfully submits the following comments. alliantgroup is a national tax consulting services firm that works with CPA firms and their clients, generally in the small and mid-size business areas. alliantgroup provides tax consulting services on the 26 U.S.C. §179D deduction (“Section 179D”). In the course of working with CPA firms and clients, alliantgroup has observed how certain portions of the guidance pertaining to Section 179D imposes an administrative burden on both taxpayers and the Service. We believe solutions to the below identified issue exist that can alleviate taxpayer burden and streamline tax administration. We have included a comment and recommendation below for this issue. We look forward to working with the IRS, Office of Chief Counsel, and Office of Tax Policy on these and other matters.

**Need for Clarity in Defining a Designer under Notice 2008-40**

Section 179D prompts the Department of the Treasury (“Treasury Department”) to issue regulations allowing for allocation of the tax benefit to the designers of energy efficient commercial building property when such property is owned by a government entity.<sup>1</sup> To date, the Treasury Department has issued Notice 2008-40 (the “Notice”) as the primary source of guidance for those seeking an allocation from government property owners.

Section 3 of Notice 2008-40 describes the procedures required for obtaining an allocation of the Section 179D benefit and contains the definition of who constitutes a designer eligible to receive an allocation. Sec. 3.02 of the Notice, defines a designer as “a person that creates the technical

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<sup>1</sup> IRC §179D(d)(4); See also IRS Notice 2008-40 §3.

specifications for installation of energy efficient commercial building property.”<sup>2</sup> The Notice broadly and correctly states a designer may include an architect, engineer, contractor, environmental consultant, or energy services provider.<sup>3</sup> The definition goes on to exclude someone who “merely installs, repairs, or maintains” the energy efficient property.<sup>4</sup> Further, Notice 2008-40 anticipates the potential for more than one designer to be involved on a given project,<sup>5</sup> allowing a government property owner to allocate the deduction to multiple designers at varying percentages or to give the full allocation to just one designer at its discretion.<sup>6</sup>

Beyond this broad definition, taxpayers have had little to no other insight into the Service’s interpretation of the terms “designer” or “technical specifications” for over a decade. The lack of guidance has caused confusion amongst taxpayers and IRS examiners, sometimes resulting in disagreements in audit. Further definitional clarity which emphasizes the contributions to technical specifications and energy efficiency made by a wide variety of industries is necessary to alleviate this confusion and preserve the intent of the statute.

In the course of building design and construction, numerous trades have potential to affect the energy efficient performance of the lighting, heating, ventilation, and air conditioning (“HVAC”), and building envelope systems, and thus substantially contribute to the technical specifications for the installation of energy efficient commercial building property. Collaboration among architects, engineers, and contractors, to determine which technical specifications to incorporate, elevate construction designs from concept to reality. Consider the following examples:

#### Architects:

An architect creates specifications for the overall design concept and makeup of the building. Architects will further advance designs through discussions and reviews of recommendations/suggestions provided from other professionals and trades, including professional engineers and contractors.

#### Engineers:

Engineers provide services to develop specifications typically for the structural, mechanical, and electrical systems of a building. Throughout the planning and construction process, engineers work with architects and contractors evaluating recommendations/suggestions to ensure optimum and appropriate specifications as modifications are incorporated into the final design.

#### Contractors:

Contractors, whether hired during planning or construction, provide recommendations and suggestions through feedback to the architect, engineer, or construction manager. For example, a mechanical contractor may determine various HVAC equipment does not meet performance

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<sup>2</sup> IRS Notice 2008-40 §3.02.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See Notice 2008.40 at §3.03.

<sup>6</sup> *Id.*

requirements provided in the bid documents. As a result, the mechanical contractor typically provides feedback and recommends or suggests equipment and installation locations which result in modifications to the technical specifications in order to resolve the performance requirement issue through documents such as a submittal or request for information. Included with these recommendations and suggestions may include sketches providing visual detail to the resolution as well. As such, the changes to technical specifications for the installation of the equipment, thereby, if approved, are incorporated into the construction drawings.

Documents containing technical specifications to incorporate in the final design of a building include, but are not limited to, construction drawings, shop drawings, requests for information, submittals, value engineering forms, and building information models.

Recent application of the law has been inconsistent and at times at odds with the broad definition and examples found in the Notice, resulting in taxpayer and IRS confusion as to whom is eligible to be considered a designer. A more restrictive approach has been taken at times which focuses on creation of technical specifications found only in sealed construction contract documents for the energy efficient commercial building property rather than taking into account the reality that there is a collaborative nature in the construction process.<sup>7</sup> Furthermore, confusion exists as to what qualifies as technical specifications with one example providing for location of energy efficient building property as part of technical specifications and another holding location “did not rise to” that level.<sup>8</sup>

Additional guidance is needed to eliminate this confusion that reflects the wide variety of trades and industries which contribute to the creation of technical specifications for the *installation* of energy efficient commercial building property. In particular, using established construction case law as a guidepost to define technical specifications consistent with the broad nature and spirit of Section 179D would allow for consistent treatment and application of the law.

### Conclusion

Thank you for the opportunity to comment on the Notices. We welcome the chance to meet to discuss the above comments in greater detail or to answer any questions that you may have.

Respectfully submitted,



Steven T. Miller  
alliantgroup – National Office  
National Director of Tax

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<sup>7</sup> See G.C.M. AM 2018-005 (Nov. 28, 2018).

<sup>8</sup> *Id.*