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**Notice 2008-40**

***Amplification of Notice 2006-52; Deduction for Energy Efficient Commercial Buildings***

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**SECTION 1. PURPOSE**

This notice clarifies and amplifies Notice 2006-52, 2006-1 C.B. 1175. Notice 2006-52 provides a process that allows a taxpayer who owns a commercial building and installs property as part of the commercial building's interior lighting systems, heating, cooling, ventilation, and hot water systems, or building envelope to obtain a certification that the property satisfies the energy efficiency requirements of § 179D(c)(1) and (d) of the Internal Revenue Code. Notice 2006-52 also provides for a public list of software programs that may be used in calculating energy and power consumption for purposes of § 179D.

This notice sets forth additional guidance relating to the deduction for energy efficient commercial buildings under § 179D and is intended to be used with Notice 2006-52. Any reference in this notice to Standard 90.1-2001 should be treated as a reference to ANSI/ASHRAE/IESNA Standard 90.1-2001, Energy Standard for Buildings Except Low-Rise Residential Buildings, developed for the American National Standards Institute by the American Society of Heating, Refrigerating, and Air Conditioning Engineers and the Illuminating Engineering Society of North America (as in effect on April 2, 2003, including addenda 90.1a-2003, 90.1b-2002, 90.1c-2002, 90.1d-2002, and 90.1k-2002 as in effect on that date).

**SECTION 2. BACKGROUND**

Section 1331 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), enacted § 179D of the Code, which provides a deduction with respect to energy efficient commercial buildings. Section 204 of the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 (2006), extends the § 179D deduction through December 31, 2008.

Section 179D(a) allows a deduction to a taxpayer for part or all of the cost of energy efficient commercial building property that the taxpayer places in service after December 31, 2005, and before January 1, 2009. Sections 179D(d)(1) and 179D(f) allow a deduction to a taxpayer for part or all of the cost of certain partially qualifying commercial building property that the taxpayer places in service after December 31, 2005, and before January 1, 2009. Partially qualifying commercial building property is property that would be energy efficient commercial building property but for the failure to achieve the 50-percent reduction in energy and power costs required under § 179D(c)(1)(D).

**SECTION 3. SPECIAL RULE FOR GOVERNMENT-OWNED BUILDINGS**

.01 *In General.* In the case of energy efficient commercial building property (or partially qualifying commercial building property for which a deduction is allowed under § 179D) that is installed on or in property owned by a Federal, State, or local government or a political subdivision thereof, the owner of the property may allocate the § 179D deduction to the person primarily responsible for designing the property (the designer). If the allocation of a § 179D deduction to a designer satisfies the requirements of this section, the deduction will be allowed only to that designer. The deduction will be allowed to the designer for the taxable year that includes the date on which the property is placed in service.

*.02 Designer of Government-Owned Buildings.* A designer is 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 (or partially qualifying commercial building property for which a deduction is allowed under § 179D). A person that merely installs, repairs, or maintains the property is not a designer.

*.03 Allocation of the Deduction.* If more than one designer is responsible for creating 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) on or in a government-owned building, the owner of the building shall—

- (1) determine which designer is primarily responsible and allocate the full deduction to that designer, or
- (2) at the owner's discretion, allocate the deduction among several designers.

*.04 Form of Allocation.* An allocation of the § 179D deduction to the designer of a government-owned building must be in writing and will be treated as satisfying the requirements of this section with respect to energy efficient commercial building property (or partially qualifying commercial building property for which a deduction is allowed under § 179D) if the allocation contains all of the following:

- (1) The name, address, and telephone number of an authorized representative of the owner of the government-owned building;
- (2) The name, address, and telephone number of an authorized representative of the designer receiving the allocation of the § 179D deduction;
- (3) The address of the government-owned building on or in which the property is installed;
- (4) The cost of the property;
- (5) The date the property is placed in service;
- (6) The amount of the § 179D deduction allocated to the designer;
- (7) The signatures of the authorized representatives of both the owner of the government-owned building and the designer or the designer's authorized representative; and
- (8) A declaration, applicable to the allocation and any accompanying documents, signed by the authorized representative of the owner of the government-owned building, in the following form:

"Under penalties of perjury, I declare that I have examined this allocation, including accompanying documents, and to the best of my knowledge and belief, the facts presented in support of this allocation are true, correct, and complete."

*.05 Obligations of Designer.* Before a designer may claim the § 179D deduction with respect to property installed on or in a government-owned building, the designer must obtain the written allocation described in section 3.04. A designer is not required to attach the allocation to the return on which the deduction is taken. However, § 1.6001-1(a) of the Income Tax Regulations requires that taxpayers maintain such books and records as are sufficient to establish the entitlement to, and amount of, any deduction claimed by the taxpayer. Accordingly, a designer claiming a deduction under § 179D should retain the allocation as part of the taxpayer's records for purposes of § 1.6001-1(a) of the Income Tax Regulations.

*.06 Tax Consequences to Designer of Government-Owned Buildings.* The maximum amount of the § 179D deduction to be allocated to the designer is the amount of the costs incurred by the owner of the government-owned building to place the energy efficient commercial building property in service. A partial deduction may be allocated and computed in accordance with the procedures set forth in sections 2 and 3 of Notice 2006-52. The designer does not include any amount in income on account of the § 179D deduction allocated to the designer. In addition, the designer is not required to reduce future deductions by an amount equal to the § 179D deduction allocated to the designer. Although reducing future deductions in this manner would provide equivalent treatment for designers that are allocated a § 179D deduction and building owners that are required to reduce the basis of their energy efficient commercial building property by the amount of the § 179D deduction they claim, § 179D does not provide for any reductions other than reductions to the basis of the energy efficient commercial building property.

*.07 Tax Consequences to Owner of Public Building.* The owner of the public building is not required to include any amount in income on account of the § 179D deduction allocated to the designer. The owner of the public building is, however, required to reduce the

basis of the energy efficient commercial building property (or partially qualifying commercial building property) by the amount of the § 179D deduction allocated.