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112TH CONGRESS
2D SESSION

S. 3591

To amend the Internal Revenue Code of 1986 to improve and extend the deduction for new and existing energy-efficient commercial buildings, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 20, 2012

Ms. SNOWE (for herself, Mr. BINGAMAN, Mrs. FEINSTEIN, and Mr. CARDIN) introduced the following bill; which was read twice and referred to the Committee on Finance

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A BILL

To amend the Internal Revenue Code of 1986 to improve and extend the deduction for new and existing energy-efficient commercial buildings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; AMENDMENT OF 1986 CODE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Commercial Building Modernization Act''.

(b) AMENDMENT OF 1986 CODE.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment

to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1986.

SEC. 2. EXTENSION AND MODIFICATION OF DEDUCTION FOR ENERGY-EFFICIENT COMMERCIAL BUILDINGS.

(a) EXTENSION.—

(1) THROUGH 2016.—Subsection (h) of section 179D is amended by striking ''December 31, 2013'' and inserting ''December 31, 2016''.

(2) INCLUSION OF MULTIFAMILY BUILDINGS.—

(A) IN GENERAL.—Subparagraph (B) of section 179D(c)(1) is amended by striking ''building'' and inserting ''commercial building or multifamily building''.

(B) DEFINITIONS.—Subsection (c) of section 179D is amended by adding at the end the following new paragraphs:

''(3) COMMERCIAL BUILDING.—The term 'commercial building' means a building with a primary use or purpose other than as residential housing.

''(4) MULTIFAMILY BUILDING.—The term 'multifamily building' means a structure of 5 or more dwelling units with a primary use as residential housing, and includes such buildings owned and op-

erated as a condominium, cooperative, or other common interest community.''.

(3) INCLUSION OF PROPERTY LOCATED IN POSSESSIONS OR TERRITORIES.—Clause (i) of section 179D(c)(1)(B) is amended by inserting ''or any possession or territory thereof'' after ''United States''.

(b) INCREASE IN MAXIMUM AMOUNT OF DEDUCTION.—

(1) IN GENERAL.—Subparagraph (A) of section 179D(b)(1) is amended by striking ''$1.80'' and inserting ''$3.00''.

(2) PARTIAL ALLOWANCE.—Paragraph (1) of section 179D(d) is amended to read as follows:

''(1) PARTIAL ALLOWANCE.—

''(A) IN GENERAL.—Except as provided in subsection (f), if—

''(i) the requirement of subsection (c)(1)(D) is not met, but

''(ii) there is a certification in accordance with paragraph (6) that—

''(I) any system referred to in subsection (c)(1)(C) satisfies the energy-savings targets established by the Secretary under subparagraph (B) with respect to such system, or

"(II) the systems referred to in subsection (c)(1)(C)(ii) and subsection (c)(1)(C)(iii) together satisfy the energy-savings targets established by the Secretary under subparagraph (B) with respect to such systems,

then the requirement of subsection (c)(1)(D) shall be treated as met with respect to such system or systems, and the deduction under subsection (a) shall be allowed with respect to energy-efficient commercial building property installed as part of such system and as part of a plan to meet such targets, except that subsection (b) shall be applied to such property described in clause (ii)(I) by substituting '$1.00' for '$3.00' and to such property described in clause (ii)(II) by substituting '$2.20' for '$3.00'.

"(B) REGULATIONS.—

"(i) IN GENERAL.—The Secretary, after consultation with the Secretary of Energy, shall promulgate regulations establishing a target for each system described in subsection (c)(1)(C) which, if such targets were met for all such systems,

the property would meet the requirements of subsection (c)(1)(D).

"(ii) SAFE HARBOR FOR COMBINED SYSTEMS.—The Secretary, after consultation with the Secretary of Energy, and not later than 6 months after the date of the enactment of the Commercial Building Modernization Act, shall promulgate regulations regarding combined envelope and mechanical system performance that detail appropriate components, efficiency levels, or other relevant information for the systems referred to in subsection (c)(1)(C)(iii) and subsection (c)(1)(C)(iv) together to be deemed to have achieved two-thirds of the requirements of subsection (c)(1)(D).".

(c) DENIAL OF DOUBLE BENEFIT RULES.—

(1) IN GENERAL.—Section 179D is amended by redesignating subsections (g) and (h) as subsections (h) and (i), respectively, and by inserting after subsection (f) the following new subsection:

"(g) TAX INCENTIVES NOT AVAILABLE.—Energy-efficient measures for which a deduction is allowed under this section shall not be eligible for a deduction under section 179F.".

(2) LOW-INCOME HOUSING EXCEPTION TO BASIS REDUCTION.—Subsection (e) of section 179D is amended by inserting ''(other than property placed in service in a qualified low-income building (within the meaning of section 42))'' after ''building property''.

(d) ALLOCATION OF DEDUCTION.—Section 179D, as amended by subsection (c)(1), is amended by redesignating subsection (i) as subsection (j) and by inserting after subsection (h) the following new subsection:

''(i) ALLOCATION OF DEDUCTION.—Not later than 180 days after the date of the enactment of this subsection, the Secretary, in consultation with the Secretary of Energy, shall promulgate a regulation to allow the owner of a commercial building, including a non-profit, to allocate any deduction allowed under this section, or a portion thereof, to the person primarily responsible for funding, financing, designing, leasing, operating, or placing in service energy-efficient measures. Such person shall be treated as the taxpayer for purposes of this section and shall include a building tenant, financier, architect, professional engineer, licensed contractor, energy services company, or other building professional. In the case of a commercial building that is owned by a Federal, State, or local government or a subdivision thereof, Internal Revenue No-

tice 2006–52, as amplified by Notice 2008–40, shall apply to any allocation.''.

(e) EARNINGS AND PROFITS CONFORMITY FOR REAL ESTATE INVESTMENT TRUSTS.—Subparagraph (B) of section 312(k)(3) is amended—

(1) by striking ''.—For purposes of'' and inserting ''.—

''(i) IN GENERAL.—Except as provided in clause (ii), for purposes of'', and

(2) by adding at the end the following new clause:

''(ii) EARNINGS AND PROFITS CONFORMITY FOR REAL ESTATE INVESTMENT TRUSTS.—

''(I) IN GENERAL.—For purposes of computing the earnings and profits of a real estate investment trust (other than a captive real estate investment trust), the entire amount deductible under section 179D shall be allowed as deductions in the taxable years for which such amounts are claimed under such section.

''(II) CAPTIVE REAL ESTATE INVESTMENT TRUST.—The term 'captive

real estate investment trust' means a real estate investment trust the shares or beneficial interests of which are not regularly traded on an established securities market and more than 50 percent of the voting power or value of the beneficial interests or shares of which are owned or controlled, directly or indirectly, or constructively, by a single entity that is treated as an association taxable as a corporation under this title and is not exempt from taxation pursuant to the provisions of section 501(a).

"(III) RULES OF APPLICATION.—For purposes of this clause, the constructive ownership rules of section 318(a), as modified by section 856(d)(5), shall apply in determining the ownership of stock, assets, or net profits of any person, and the following entities are not considered an association taxable as a corporation:

"(aa) Any real estate investment trust other than a captive real estate investment trust.

"(bb) Any qualified real estate investment trust subsidiary under section 856, other than a qualified REIT subsidiary of a captive real estate investment trust.

"(cc) Any Listed Australian Property Trust (meaning an Australian unit trust registered as a 'Managed Investment Scheme' under the Australian Corporations Act in which the principal class of units is listed on a recognized stock exchange in Australia and is regularly traded on an established securities market), or an entity organized as a trust, provided that a Listed Australian Property Trust owns or controls, directly or indirectly, 75 percent or more of the voting power or

value of the beneficial interests or shares of such trust.

"(dd) Any corporation, trust, association, or partnership organized outside the laws of the United States and which satisfies the criteria described in subclause (IV).

"(IV) CRITERIA.—The criteria described in this subclause are as follows:

"(aa) At least 75 percent of the entity's total asset value at the close of its taxable year is represented by real estate assets (as defined in section 856(c)(5)(B)), cash and cash equivalents, and United States Government securities.

"(bb) The entity is not subject to tax on amounts distributed to its beneficial owners, or is exempt from entity-level taxation.

"(cc) The entity distributes at least 85 percent of its taxable income (as computed in the jurisdiction in which it is organized) to the holders of its shares or certificates of beneficial interest on an annual basis.

"(dd) Not more than 10 percent of the voting power or value in such entity is held directly or indirectly or constructively by a single entity or individual, or the shares or beneficial interests of such entity are regularly traded on an established securities market.

"(ee) The entity is organized in a country which has a tax treaty with the United States.".

(f) UPDATED STANDARDS.—

(1) INITIAL UPDATE.—

(A) IN GENERAL.—Section 179D is amended by striking "90.1-2001" each place it appears in subsections (c) and (f) and inserting "90.1-2004".

(B) CONFORMING AMENDMENT.—Paragraph (2) of section 179D(c) is amended by striking ''(as in effect on April 2, 2003)''.

(2) SECOND UPDATE.—

(A) IN GENERAL.—Section 179D is amended by striking ''90.1-2004'' each place it appears in subsections (c) and (f) and inserting ''90.1-2007''.

(B) EFFECTIVE DATE.—The amendments made by subparagraph (A) shall apply to property placed in service after December 31, 2014.

(g) TREATMENT OF LIGHTING SYSTEMS.—Section 179D is amended by striking ''interior'' each place it appears in subsections (c)(1) and (f)(1).

(h) VOLUNTARY REPORTING PROGRAM.—Section 179D, as amended by subsection (d), is amended by redesignating subsection (j) as subsection (k) and by inserting after subsection (i) the following new subsection:

''(i) VOLUNTARY REPORTING PROGRAM.—For purposes of the report required under section 179F(k), the Secretary, in consultation with the Secretary of Energy, shall develop a voluntary program to provide energy consumption data from recipients and current tenants of buildings that received full deductions under this section.''.

(i) EFFECTIVE DATE.—Except as otherwise provided, the amendments made by this section shall apply to property placed in service in taxable years beginning after the date of the enactment of this Act.

SEC. 3. DEDUCTION FOR RETROFITS OF EXISTING COMMERCIAL AND MULTIFAMILY BUILDINGS.

(a) IN GENERAL.—Part VI of subchapter B of chapter 1 of the Internal Revenue Code of 1986 is amended by inserting after section 179E the following new section:

"SEC. 179F. DEDUCTION FOR RETROFITS OF EXISTING COMMERCIAL AND MULTIFAMILY BUILDINGS.

"(a) ALLOWANCE OF DEDUCTION.—With respect to each certified retrofit plan, there shall be allowed as a deduction an amount equal to the lesser of—

"(1) the sum of—

"(A) the design deduction, and

"(B) the realized deduction, or

"(2) 50 percent of the total cost to develop and implement such certified retrofit plan.

"(b) DEDUCTION AMOUNTS.—For purposes of this section—

"(1) DESIGN DEDUCTION.—A design deduction shall be—

"(A) based on projected source energy savings as calculated in accordance with subsection (c)(3)(B),

"(B) correlated to the percent of source energy savings set forth in the general scale in paragraph (3)(A) that a certified retrofit plan is projected to achieve when energy-efficient measures are placed in service, and

"(C) equal to 60 percent of the amount allowed under the general scale.

"(2) REALIZED DEDUCTION.—

"(A) IN GENERAL.—A realized deduction shall be—

"(i) based on realized source energy savings as calculated in accordance with subsection (c)(3)(C),

"(ii) correlated to the percent of source energy savings set forth in the general scale in paragraph (3)(A) as realized by a certified retrofit plan, and

"(iii) equal to 40 percent of the amount allowed under the general scale.

"(B) ADJUSTMENT OF SOURCE ENERGY SAVINGS.—The percent of source energy savings for purposes of any realized deduction may

vary from such savings projected when energy-efficient measures were placed in service for purposes of a design deduction under paragraph (1).

"(3) GENERAL SCALE.—

"(A) IN GENERAL.—The scale for deductions allowed under this section shall be—

"(i) $1.00 per square foot of retrofit floor area for 20 to 24 percent source energy savings,

"(ii) $1.50 per square foot of retrofit floor area for 25 to 29 percent source energy savings,

"(iii) $2.00 per square foot of retrofit floor area for 30 to 34 percent source energy savings,

"(iv) $2.50 per square foot of retrofit floor area for 35 to 39 percent source energy savings,

"(v) $3.00 per square foot of retrofit floor area for 40 to 44 percent source energy savings,

"(vi) $3.50 per square foot of retrofit floor area for 45 to 49 percent source energy savings, and

"(vii) $4.00 per square foot of retrofit floor area for 50 percent or more source energy savings.

"(B) HISTORIC BUILDINGS.—With respect to energy-efficient measures placed in service as part of a certified retrofit plan in a commercial building or multifamily building on or eligible for the National Register of Historic Places, the respective dollar amounts set forth in the general scale under subparagraph (A) shall each be increased by 20 percent, for the purposes of calculating any applicable design deduction and realized deduction.

"(c) CALCULATION OF ENERGY SAVINGS.—

"(1) IN GENERAL.—For purposes of the design deduction and the realized deduction, source energy savings shall be calculated with reference to a baseline of the annual source energy consumption of the commercial or multifamily building before energy-efficient measures were placed in service.

"(2) BASELINE BENCHMARK.—The baseline under paragraph (1) shall be determined using a building energy performance benchmarking tool designated by the Administrator of the Environmental Protection Agency, and based upon 1 year of source

energy consumption data prior to the date upon which the energy-efficient measures are placed in service.

"(3) DESIGN AND REALIZED SOURCE ENERGY SAVINGS.—

"(A) IN GENERAL.—In certifying a retrofit plan as a certified retrofit plan, a professional engineer shall calculate source energy savings by utilizing the baseline benchmark defined in paragraph (2) and determining percent improvements from such baseline.

"(B) DESIGN DEDUCTION.—For purposes of claiming a design deduction, the regulations issued under subsection (f)(1) shall prescribe the standards and process for a professional engineer to calculate and certify source energy savings projected from the design of a certified retrofit plan as of the date energy-efficient measures are placed in service.

"(C) REALIZED DEDUCTION.—For purposes of claiming a realized deduction, a professional engineer shall calculate and certify source energy savings realized by a certified retrofit plan 2 years after a design deduction is allowed by utilizing energy consumption data after en-

ergy-efficient measures are placed in service, and adjusting for climate, building occupancy hours, density, or other factors deemed appropriate in the benchmarking tool designated under paragraph (2).

"(d) CERTIFIED RETROFIT PLAN AND OTHER DEFINITIONS.—For purposes of this section—

"(1) CERTIFIED RETROFIT PLAN.—The term 'certified retrofit plan' means a plan that—

"(A) is designed to reduce the annual source energy costs of a commercial building, or a multifamily building, through the installation of energy-efficient measures,

"(B) is certified under penalty of perjury by a registered professional engineer, who is not a direct employee of the owner of the commercial building or multifamily building that is the subject of the plan, and is licensed in the State in which such building is located,

"(C) describes the square footage of retrofit floor area covered by such a plan,

"(D) specifies that it is designed to achieve a final source energy usage intensity after energy-efficient measures are placed in service in a commercial building or a multifamily building

that does not exceed on a square foot basis the average level of energy usage intensity of other similar buildings,

"(E) requires that after the energy-efficient measures are placed in service, the commercial building or multifamily building meets the applicable State and local new building code requirements for the area in which such building is located,

"(F) satisfies the regulations prescribed under subsection (f), and

"(G) is submitted to the Secretary of Energy after energy-efficient measures are placed in service, for the purpose of informing the report to Congress required by subsection (l).

The standard under subparagraph (D) shall be 300,000 British thermal units or less per square foot unless the Secretary, in consultation with the Administrator of the Environmental Protection Agency, develops distinct minimum standards for a particular category or subcategory of building based on the best available information used by the ENERGY STAR program.

"(2) COMMERCIAL BUILDING.—

"(A) IN GENERAL.—The term 'commercial building' means a building located in the United States or any possession or territory thereof—

"(i) that is in existence and occupied on the date of the enactment of this section,

"(ii) for which a certificate of occupancy has been issued at least 10 years before energy efficiency measures are placed in service, and

"(iii) with a primary use or purpose other than as residential housing.

"(B) SHOPPING CENTERS.—In the case of a retail shopping center, the term 'commercial building' shall include an area within such building that is—

"(i) 50,000 square feet or larger that is covered by a separate utility grade meter to record energy consumption in such area, and

"(ii) under the day-to-day management and operation of—

"(I) the owner of such building as common space areas, or

"(II) a retail tenant, lessee, or other occupant.

"(3) ENERGY-EFFICIENT MEASURES.—The term 'energy-efficient measures' means a measure, or combination of measures, placed in service through a certified retrofit plan—

"(A) on or in a commercial building or multifamily building,

"(B) as part of—

"(i) the lighting systems,

"(ii) the heating, cooling, ventilation, or hot water systems,

"(iii) the building envelope, which may include an energy-efficient cool roof,

"(iv) a continuous commissioning contract, or

"(v) building operations or monitoring systems, and

"(C) including equipment, materials, and systems within subparagraph (B) with respect to which depreciation (or amortization in lieu of depreciation) is allowed.

"(4) ENERGY SAVINGS.—The term 'energy savings' means source energy usage intensity reduced

on a per square foot basis through design and implementation of a certified retrofit plan.

"(5) MULTIFAMILY BUILDING.—The term 'multifamily building'—

"(A) means—

"(i) a structure of 5 or more dwelling units located in the United States or any possession or territory thereof—

"(I) that is in existence and occupied on the date of the enactment of this section,

"(II) for which a certificate of occupancy has been issued at least 10 years before energy efficiency measures are placed in service, and

"(III) with a primary use as residential housing, and

"(B) includes such buildings owned and operated as a condominium, cooperative, or other common interest community.

"(6) SOURCE ENERGY.—The term 'source energy' means the total amount of raw fuel that is required to operate a commercial building or multifamily building, and accounts for losses that are in-

curred in the generation, storage, transport, and delivery of fuel to such a building.

"(e) TIMING OF CLAIMING DEDUCTIONS.—Deductions allowed under this section may be claimed as follows:

"(1) DESIGN DEDUCTION.—In the case of a design deduction, in the taxable year that energy efficiency measures are placed in service.

"(2) REALIZED DEDUCTION.—In the case of a realized deduction, in the second taxable year following the taxable year described in paragraph (1).

"(f) REGULATIONS.—

"(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this section, and after opportunity for public notice and comment, the Secretary, in consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, shall prescribe regulations—

"(A) for the manner and method for a registered professional engineer to certify retrofit plans, model projected energy savings, and calculate realized energy savings, and

"(B) to provide, as appropriate, for a recapture of the deductions allowed under this section if a retrofit plan is not fully implemented, or a retrofit plan and energy savings

are not certified or verified in accordance with regulations prescribed under this subsection.

"(2) RELIANCE ON ESTABLISHED PROTOCOLS, ETC.—To the maximum extent practicable and available, such regulations shall rely upon established protocols and documents used in the ENERGY STAR program, and industry best practices and existing guidelines, such as the Building Energy Modeling Guidelines of the Commercial Energy Services Network (COMNET).

"(3) ALLOWANCE OF DEDUCTIONS PENDING ISSUANCE OF REGULATIONS.—Pending issuance of the regulations under paragraph (1), the owner of a commercial building or a multifamily building shall be allowed to claim or allocate a deduction allowed under this section.

"(g) NOTICE TO OWNER.—Each certification of a retrofit plan and calculation of energy savings required under this section shall include an explanation to the owner of a commercial building or a multifamily building regarding the energy-efficient measures placed in service and their projected and realized annual energy costs.

"(h) ALLOCATION OF DEDUCTION.—Not later than 180 days after the date of the enactment of this section, the Secretary, in consultation with the Secretary of En-

ergy, shall promulgate a regulation to allow the owner of a commercial building or a multifamily building, including a non-profit, to allocate any deduction allowed under this section, or a portion thereof, to the person primarily responsible for funding, financing, designing, leasing, operating, or placing in service energy-efficient measures. Such person shall be treated as the taxpayer for purposes of this section and shall include a building tenant, financier, architect, professional engineer, licensed contractor, energy services company, or other building professional. In the case of a commercial building or a multifamily building that is owned by a Federal, State, or local government or a subdivision thereof, Internal Revenue Notice 2006–52, as amplified by Notice 2008–40, shall apply to any allocation.

"(i) BASIS REDUCTION.—For purposes of this subtitle, if a deduction is allowed under this section with respect to any energy-efficient measures placed in service under a certified retrofit plan other than in a qualified low-income building (within the meaning of section 42), the basis of such measures shall be reduced by the amount of the deduction so allowed.

"(j) TAX INCENTIVES NOT AVAILABLE.—

"(1) ENERGY EFFICIENT COMMERCIAL BUILDINGS DEDUCTION.—Energy-efficient measures for

which a deduction is allowed under this section shall not be eligible for a deduction under section 179D.

"(2) NEW ENERGY EFFICIENT HOME CREDIT.—No deduction shall be allowed under this section with respect to any building or dwelling unit with respect to which a credit under section 45L was allowed.

"(k) REPORT TO CONGRESS.—Biennially, beginning with the first year after the enactment of this section, the Secretary of Energy shall submit a report to Congress explaining the energy saved, the energy-efficient measures implemented, the realization of energy savings projected, and the amounts and types of deductions allowed, determining the number of jobs created as a result of the deduction allowed under this section, and how the use of any deduction allowed under this section may be improved, based on the information provided to the Secretary of Energy as part of a certified retrofit plan. The Secretary and the Secretary of Energy shall share such information on deductions allowed under this section and related reports submitted, as requested by each agency to fulfill its obligations under this section, with such redactions as deemed necessary to protect the personally identifiable financial information of a taxpayer. In addition, the report will include recommendations on providing energy-efficient tax

incentives for subsections of buildings that operate with specific utility grade metering. In addition, the Secretary of Energy shall, to the maximum extent practicable, incorporate conclusions of this report into current Department of Energy's building performance and energy efficiency programs and include statutory recommendations to Congress that would reduce energy consumption in new and existing commercial buildings located in the United States. Finally, the Secretary of Energy shall, working with stakeholder groups, provide in such report aggregated data that is publicly available.

"(l) TERMINATION.—This section shall not apply with respect to property placed in service after December 31, 2016.".

(b) EFFECT ON DEPRECIATION ON EARNINGS AND PROFITS.—Subparagraph (B) of section 312(k)(3), as amended by this Act, is amended—

(1) by striking "or 179E" both places it appears in clause (i) and inserting "179E, or 179F",

(2) by striking "OR 179E" in the heading and inserting "179E, OR 179F", and

(3) by inserting "or 179F" after "section 179D" in clause (ii).

(c) CONFORMING AMENDMENT.—The table of sections for such part is amended by inserting after the item relating to section 179E the following new item:

"Sec. 179F. Deduction for retrofits of existing commercial and multifamily buildings.".

(d) EFFECTIVE DATE.—Except as otherwise provided, the amendments made by this section shall apply to property placed in service in taxable years beginning after the date of the enactment of this Act.

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