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Legal Update

Energy Storage Tax Credits in the Biden Administration FY 2022 Budget, GREEN Act and Clean Energy for America Act

As the renewable energy sector has grown in recent years, thanks in part to federal income tax credits, researchers and policymakers have begun to focus on the role of energy storage. Because wind and solar are intermittent resources, energy storage is critical to any effort to replace dispatchable, nonrenewable energy sources with wind and solar. In recent years, declines in the cost of energy storage have started to make energy storage a viable investment for renewable energy projects. Moreover, several recent legislative proposals would enact tax credits to support energy storage, including standalone energy storage systems. While tax credits for energy storage were not included in the recent bipartisan infrastructure bill that passed the Senate on August 10, such credits may be included in a subsequent bill passed through budget reconciliation.

Under current law, certain energy storage property (such as a battery system) is eligible for the investment tax credit (the "ITC") under Section 48 of the Internal Revenue Code (the "Code") but only if at least 75% of the energy used by the battery is derived from renewable energy sources. Under regulations and based on a number of IRS private letter rulings, a battery is eligible for the full ITC only if 100% of the energy used by the battery is derived from renewable energy sources; otherwise, the battery is eligible for only a proportionate amount of the ITC (e.g., only 80% of the otherwise available ITC if 80% of the energy used by the battery is derived from renewable energy sources). In PLR 201208035, the IRS ruled that new storage devices added to existing renewable energy systems could qualify as qualified property eligible for the ITC.

If eligible for the ITC, energy storage property is entitled to a nonrefundable ITC of up to 30% of the qualified basis of the energy storage property. The percentage is 30% for projects that began construction before 2020 but drops to 26% for projects that begin construction in 2020, 2021 or 2022; 22% for projects that begin construction in 2023; and 10% for projects that begin construction in 2024 or later. Additionally, the credit is reduced to 10% for projects that are not placed in service by the end of 2025.

In the case of residential systems, Section 25D of the Code provides a Residential Energy Efficient Property Credit of a percentage of the costs of qualified solar electric property, solar water heating property, small wind energy property, geothermal heat pump property and fuel cell property. In the case of fuel cell property, this credit is capped at $500 per half kW of capacity. The percentage is 30%

for property placed in service from 2017 through 2019, 26% for property placed in service from 2020 through 2022, 22% for property placed in service in 2023 and 0% for property placed in service in 2024 or later. This credit does not currently apply to standalone storage property.

There are currently three primary proposals under discussion in Washington that could materially change these federal income tax credits. The table below compares key aspects of these proposals. The three proposals are the Biden Administration FY 2022 Budget, the Growing Renewable Energy and Efficiency Now Act of 2021 (GREEN Act) and the Clean Energy for America Act (introduced by Senator Ron Wyden, chairman of the Senate Finance Committee).

	Biden Administration FY 2022 Budget	GREEN Act	Clean Energy for America Act
Enhanced and Extended ITC	Would expand the ITC, beginning in 2022, to include standalone energy storage technology that stores energy for conversion to electricity. No requirement that the storage property be charged from renewable sources. Minimum capacity of 5 kWh to be eligible for credit. The ITC would be extended at the 30% level for projects starting construction in 2022 through 2026. After that, the ITC would phase down to zero over a 5-year period (i.e., to 24% for projects beginning construction in 2027; 18% in 2028; 12% in 2029; 6% in 2030; and 0% in 2031 or later).	Would expand the ITC to include "energy storage technology," defined as equipment (other than equipment primarily used in the transportation of goods or individuals and not for the production of electricity) that: (i) stores energy for conversion to electricity using batteries, compressed air, pumped hydropower, hydrogen storage (including hydrolysis and electrolysis), thermal energy storage, regenerative fuel cells, flywheels, capacitors, superconducting magnets or other technologies identified by the Treasury Department after consultation with the Department of Energy	Would create a technology-neutral ITC of 30% of the qualified investment with respect to a "qualified facility" placed in service after 2022. This credit would also be available for "grid improvement property," which would include "energy storage property." "Energy storage property" includes property which receives, stores and delivers electricity, or energy for conversion to electricity, provided that the electricity is either sold by the taxpayer to an unrelated person or stored for an unrelated person. Minimum capacity of 5 kWh to be eligible for credit. No requirement that the storage property be charged from renewable sources. In the case of energy storage properties with a maximum net output of less than 5 MW placed in service in a

	Biden Administration FY 2022 Budget	GREEN Act	Clean Energy for America Act
	The ITC would be refundable at the option of the taxpayer. The ITC would also be paired with "strong labor standards, benefitting employers that provide good-paying and good-quality jobs."	and has a capacity of not less than 5 kWh or (ii) stores thermal energy to heat or cool (or provide hot water for use in) a structure (other than for use in a swimming pool). No requirement that the storage property be charged from renewable sources. Only applies to property if construction begins by 2028. Credit would be up to 85% refundable. Would have the same phase down as solar, which would be extended to 30% for projects beginning construction by 2026; 26% by 2027; 22% by 2028; and 10% by 2029 or thereafter (or if not placed in service by 2030).	disadvantaged community or a community with a high level of oil or gas sector employment, the credit would increase to 40%. Credit would be 100% refundable. Phase down not based on beginning of construction date but on the overall greenhouse gas emissions from electricity production falling to 25% or less of their 2021 level. Projects would need to satisfy wage requirements and qualified apprentice requirements.
Residential Energy Storage	Would expand the Residential Energy Efficiency Credit to cover qualified battery storage technology of at least 3 kWh of capacity installed in a residence beginning in 2022.	Would expand the Residential Energy Efficiency Credit to include a credit for "qualified battery storage technology," which would include battery storage technology installed in connection	Would create a Residential Clean Electricity Credit equal to 30% of the expenditures for qualified property and energy storage property that is for use in connection with a dwelling unit in the United States that is used as a residence by the taxpayer.

	Biden Administration FY 2022 Budget	GREEN Act	Clean Energy for America Act
	Credit would be restored to 30% for property placed in service in 2022 through 2026, phasing out over a 5-year period after that.	with a dwelling unit in the United States that is used as a residence by the taxpayer and has a capacity of not less than 3 kWh. Would restore the 30% credit for property placed in service in 2022 through 2026, phasing down to 26% for property placed in service in 2027; 22% in 2028; and 0% in 2029 or later.	This would apply to property placed in service after 2022. Such energy storage property would include property that receives, stores and delivers electricity or energy for conversion to electricity that is consumed or sold by the taxpayer, is equipped with a metering device owned and operated by an unrelated person and has a capacity of not less than 3 kWh. Phase down not based on beginning of construction date but on the overall greenhouse gas emissions from electricity production falling to 25% or less of their 2021 level. Unused credit amounts could be carried forward to the 3 succeeding taxable years.

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