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Legal Update

US House Ways and Means Committee Proposes Substantial Green Energy Support

On the night of September 10, 2021, the House Ways and Means Committee (the "Committee") released legislative text covering a range of green energy tax incentives (the "Bill") that it hopes will be enacted through the budget reconciliation process.[1] The Committee has been releasing portions of legislative text that will be taken up in budget reconciliation piecemeal, and the Committee expects to begin markup of the Bill on Tuesday, September 14.[2] The chairman of the Committee, Richard Neal, stated that the proposals in the Bill would "allow us to both address our perilously changing climate and create new, good jobs, all while strengthening the economy and invigorating local communities."

The Bill incorporates elements of various legislative proposals made by Congress and the White House over the past year.[3] The Bill would extend and expand the production tax credit ("PTC") of Section 45[4] and the investment tax credit ("ITC") of Section 48 for renewable power generation, expand the ITC to cover nuclear generation, energy storage and electric transmission property, and enhance incentives for a variety of other green initiatives and activities, such as energy efficient construction and electric vehicles. The Bill also contains a direct pay option for the PTC and ITC, such that developers would no longer need to have positive taxable income or tax equity investors in order to obtain the benefits of these credits, although after a few years, this option will be limited to projects that meet minimum standards for domestic content. The Bill also seeks to incentivize domestic job creation by sharply limiting the PTC and ITC for projects that do not satisfy prevailing wage and apprenticeship requirements and by enhancing credits for certain projects constructed in low-income areas or that meet minimum standards for domestic content. Furthermore, the Bill would reinstate the Hazardous Substance Superfund financing rate, an excise tax on crude oil and imported petroleum products that expired in 1995, at an increased rate of 16.4 cents per gallon, indexed to inflation, as well as a tax on the sale of certain chemicals, which also expired in 1995.

The Bill, if enacted, would significantly boost investment in green energy and other emissions reductions, and its decade-long extension of many of the credits would provide substantial certainty for the renewable energy industry.

Executive Summary

The Bill would provide for:

- Full PTC extension through 2031, with phasedowns for projects beginning construction in 2032 and 2033 and expansion of PTC for solar projects;
- Full ITC extension for projects beginning construction after 2021 and before 2032, with phasedowns for projects beginning construction in 2032 and 2033; projects that began construction in 2020 and 2021 would remain eligible for a 26% ITC;
- Expanded Section 45Q carbon capture tax credit;
- New tax credits for a variety of renewable energy projects, including energy storage technology, electric transmission property and zero emissions facilities;
- Extension and modification of the Section 30D credit for electric vehicles, including elimination of the manufacturer limitations;
- Imposition of prevailing wage and apprenticeship requirements that would subject both the PTC and ITC to an 80% reduction if they are not satisfied; such requirements would also apply to the enhanced Section 45Q carbon capture tax credit and the new tax credit for electric transmission property;
- Increased PTC and ITC for projects meeting minimum standards for domestic content;
- Bonus credits for solar projects in low-income communities; and
- Direct pay option for various credits, including PTC, ITC and Section 45Q, which would be:
  - available to tax-exempt entities and state and local governments;
  - subject to phasedowns for projects that do not meet minimum standards for domestic content; and
  - generally effective for property placed in service after December 31, 2021.

Renewable Energy and Reducing Carbon Emissions

EXTENSION AND MODIFICATION OF THE PRODUCTION TAX CREDIT

The Bill would extend the Section 45 PTC for qualified facilities at 100% of the inflation-adjusted credit amount (currently 2.5 cents per kWh for wind, closed-loop biomass and geothermal energy and 1.3 cents per kWh for open-loop biomass, municipal solid waste, qualified hydropower and marine and hydrokinetic projects) for projects beginning construction prior to 2032, 80% of that amount for projects beginning construction in 2032, and 60% of that amount for projects beginning construction in 2033, phasing out completely for projects beginning construction in 2034 or later. Additionally, the PTC would once again be available for solar projects for the first time since 2005 at a rate of 2.5 cents per kWh. These changes would apply for facilities placed in service after 2021.[5]

The Bill would increase the PTC by 10% of the amount otherwise applicable (e.g., from 2.5 cents per kWh to 2.75 cents per kWh for wind projects) in the case of projects for which the taxpayer certifies that any steel, iron or "manufactured product" used in construction was produced in the United States. "Manufactured product" is treated as produced in the United States if at least 55% of the total cost of components of the product are attributable to components mined, produced or manufactured in the United States. The Bill indicates that this domestic content provision would be applied in a manner that is consistent with the obligations of the United States under international agreements.

As discussed below, the Bill would subject the PTC amount to a sharp reduction if prevailing wage and apprenticeship requirements are not met.

The following table summarizes the effect of the Bill on the amount of the PTC for wind projects:

Construction Started:	Current Law		Under the Bill	
	PTC Level[6]	ITC in Lieu of PTC Level	PTC Level	ITC in Lieu of PTC Level
2020	60% (0.9¢/kWh)	60% (18% of basis)	60% (0.9¢/kWh) if PIS before 2022	60% (18% of basis) if PIS before 2022
			100% (1.5¢/kWh) if PIS after 2021	100% (30% of basis) if PIS after 2021
2021	60% (0.9¢/kWh)	60% (18% of basis)	60% (0.9¢/kWh) if PIS before 2022	60% (18% of basis) if PIS before 2022
			100% (1.5¢/kWh) if PIS after 2021*	100% (30% of basis) if PIS after 2021*
2022	0% (0¢/kWh)	0% (0% basis)	100% (1.5¢/kWh)*	100% (30% of basis)*
2023	0% (0¢/kWh)	0% (0% basis)	100% (1.5¢/kWh)*	100% (30% of basis)*
2024-2031	0% (0¢/kWh)	0% (0% basis)	100% (1.5¢/kWh)*	100% (30% of basis)*
2032	0% (0¢/kWh)	0% (0% basis)	80% (1.2¢/kWh)*	80% (24% of basis)*
2033	0% (0¢/kWh)	0% (0% basis)	60% (0.9¢/kWh)*	60% (18% of basis)*
2034 and thereafter	0% (0¢/kWh)	0% (0% basis)	0% (0¢/kWh)*	0% (0% basis)*

*Assuming the prevailing wage and apprenticeship requirements are satisfied; otherwise, the otherwise available ITC is reduced by 80%. See below for an overview of such requirements.

EXTENSION AND MODIFICATION OF THE INVESTMENT TAX CREDIT

The Bill would also extend the Section 48 ITC for qualified energy property. In the case of solar energy property, a 30% ITC would be available for projects placed into service after 2021 that begin construction before 2032, with 26% available for projects that begin construction in 2032, 22% available for projects that begin construction in 2033 and 10% for projects that begin construction after 2033 or that are not placed in service before 2036. Projects that begin construction in 2020 or 2021 and are placed into service before 2022 would still be subject to a 26% ITC.[7]

In the case of qualified fuel cell property, qualified small wind property, waste energy recovery property and equipment using solar energy to illuminate the inside of a structure using fiber-optic distributed sunlight, the same ITC percentages and phaseout schedule apply, except that the ITC is 0% for projects beginning construction after 2033 or that are not placed in service before 2036.

Notably, the Bill would make geothermal projects eligible to receive the ITC at a 30% rate (up from 10%). Geothermal projects would be subject to the same phaseout as solar projects.

The Bill would also increase the otherwise-applicable ITC percentage by 10 percentage points (e.g., from 30% to 40%) for projects satisfying domestic content requirements in a similar manner as for the PTC. This increase is only 2 percentage points if prevailing wage and apprenticeship requirements are not satisfied.

As discussed below, the Bill would subject the ITC amount to a sharp reduction if prevailing wage and apprenticeship requirements are not met.

Bonus Credit for Solar Facilities in Low-Income Communities

The Bill would increase the otherwise-available ITC for solar facilities with a nameplate capacity of 5 megawatts or less that provide benefits to certain low-income communities. The ITC percentage would increase by 20 percentage points in the case of facilities that are part of a "qualified low-income residential building project" or a "qualified low-income economic benefit project" and 10 percentage points for facilities that are located in a low-income community (as defined for New Markets Tax Credit purposes).

A "qualified low-income residential building project" includes a facility installed on a residential building that participates in a covered housing program under the Violence Against Women Act of 1994, a Housing Development Fund Corporation cooperative under article XI of the New York State Private Housing Finance Law, multifamily housing under the U.S. Department of Agriculture's Rural Housing Service, or such other affordable housing programs as the Secretary of the Treasury (the "Secretary") may provide, where the financial benefits of the electricity are allocated equitably to the occupants of dwelling units of the building.

A facility can be part of a "qualified low-income economic benefit project" if at least 50% of the financial benefits of electricity produced are provided to households with income of less than 200% of the applicable poverty line or less than 80% of the area median gross income.

This bonus credit would be subject to a 1.8 gigawatt annual capacity limitation for each of calendar years 2022 through 2031 and would expire after 2031 (although unused capacity would carry over to subsequent calendar years until 2033). In determining which facilities receive allocations of this bonus credit, the Secretary would consider which facilities would provide the greatest health and economic benefits to individuals in low-income communities, employment of such individuals and engagement with, outreach to or ownership by such individuals (including through partnerships with local governments and community based organizations).

The following table summarizes the effect of the Bill on the amount of the ITC for solar projects:

Construction Started:	Current Law		Under the Bill	
	ITC Level	PIS Deadline	ITC Level**	PIS Deadline
2019	30% of basis	12/31/2025*	30% of basis	12/31/2025*
2020	26% of basis	12/31/2025*	26% of basis if PIS before 2022	12/31/2025*
			30% of basis if PIS after 2021	
2021	26% of basis	12/31/2025*	26% of basis if PIS before 2022	12/31/2025*
			30% of basis if PIS after 2021**	
2022	26% of basis	12/31/2025*	30% of basis**	12/31/2035*
2023	22% of basis	12/31/2025*	30% of basis**	12/31/2035*
2024-2031	10% of basis	N/A	30% of basis**	12/31/2035*
2032	10% of basis	N/A	26% of basis**	12/31/2035*
2033	10% of basis	N/A	22% of basis**	12/31/2035*
2034 and thereafter	10% of basis	N/A	10% of basis**	N/A

*Otherwise, only 10% ITC is available. The outside placed-in-service date is subject to any applicable continuity requirement under existing IRS guidance.

**Assuming the prevailing wage and apprenticeship requirements are satisfied; otherwise, the ITC is reduced by 80%.

ITC for Energy Storage and Other Technologies

The Bill would subject both the ITC and PTC to an 80% reduction for projects that do not meet prevailing wage and apprenticeship requirements (describing the reduced credit amount as a "base" credit amount and the full credit as a "bonus" credit amount). These new requirements would apply to projects commencing construction on or after the date of enactment of the Bill and that are placed in service after December 31, 2021, and would not apply to projects with a maximum net output of less than 1 megawatt.

"Energy storage property" means equipment (other than equipment primarily used for the transportation of goods or individuals and not for the production of electricity) that uses batteries, compressed air, pumped hydropower, hydrogen storage, thermal energy storage, regenerative fuel cells, flywheels, capacitors, superconducting magnets or other technologies identified by the Secretary, in consultation with the Secretary of Energy, to store energy for conversion to electricity (or, in the case of hydrogen storage, to store energy), and has a capacity of not less than 5 kWh.

"Qualified biogas property" means property comprising a system that converts biomass into a gas which contains not less than 52% methane and is captured for productive use.

A "microgrid controller" is equipment that is part of a qualified microgrid and is designed to monitor and control energy resources and loads on a microgrid to maintain acceptable frequency, voltage or economic dispatch. The microgrid must include equipment which is capable of generating not less than 4 kilowatts and not more than 20 megawatts, and must be capable of operating both in connection with and independently from the electrical grid.

ITC for Linear Generators

Under current law, the ITC is available for fuel cells that use electrochemical processes. The Bill would make the ITC available for linear generators that use electromechanical processes as well, but only if they have a nameplate capacity of at least 1 kilowatt.

ITC for Dynamic Glass

The Bill would make the ITC available for electrochromic glass that uses electricity to change its light transmittance properties in order to heat or cool a structure. This credit would fall to 0% for projects beginning construction after 2033 or that are not placed in service before 2036.

Extensions for Offshore Wind

Offshore wind facilities would be able to elect to receive either the ITC or PTC under current law. The Bill would extend the availability of both for offshore wind facilities. Wind facilities electing the ITC would be entitled to the full ITC rate if construction begins prior to 2033.

PREVAILING WAGE AND APPRENTICESHIP REQUIREMENTS FOR PTC, ITC

The Bill would subject both the ITC and PTC to an 80% reduction for projects that do not meet prevailing wage and apprenticeship requirements (describing the reduced credit amount as a "base" credit amount and the full credit as a "bonus" credit amout). These new requirements would apply to projects commencing construction on or after the date of enactment of the Bill and that are placed in service after December 31, 2021, and would not apply to projects with a maximum net output of less than 1 megawatt.

The prevailing wage requirement would require the taxpayer to ensure that laborers and mechanics employed in the construction or repair of the facility are paid wages at rates not less than the prevailing rates for the locality as determined by the Secretary of Labor. This would apply to a facility for the 10-year period beginning on the date it was originally placed in service. A taxpayer could cure a violation by compensating each worker the deficit plus interest, together with paying a penalty to the IRS of $5,000 per affected employee.

The apprenticeship requirement would require the taxpayer to ensure that an increasing percentage of labor hours be performed by "qualified apprentices" who participate in a registered apprenticeship program. For projects beginning construction before 2023, 5% of labor hours must be performed by qualified apprentices; for projects beginning construction in 2023, 10% of labor hours must be by qualified apprentices; and for projects beginning construction after 2023, 15% of labor hours must be by qualified apprentices. Each contractor or subcontractor employing four or more employees to perform construction, alteration or repair work on a project must employ at least one qualified apprentice to perform such work. However, if there is a lack of qualified apprentices and the taxpayer makes a good faith effort to comply with the apprenticeship requirement, a failure to comply may be excused. Notably, while the Section-By-Section Summary prepared by the Committee indicates that a failure to comply with the apprenticeship requirement may be cured by paying a penalty tax of $500 multiplied by the number of labor hours for which the requirement is not met, this cure provision does not appear in the legislative text of the Bill.

DIRECT PAY OPTION

The Bill would effectively make a number of green energy-related credits refundable. Under proposed Section 6417, a taxpayer making an election with respect to any applicable credit would be treated as making a payment against its income tax equal to the amount of that credit. This election would apply to the Section 45 PTC, the Section 48 ITC, the Section 45Q carbon capture and sequestration credit, the Section 30C alternative fuel vehicle refueling property credit and the Section 48C advanced energy project credit, as well as to the new credits enacted under the Bill for transmission property, zero emissions facilities, zero-emission nuclear power production and clean hydrogen. This election would be irrevocable. The text of the Bill states that the direct pay provisions would be generally effective for property placed in service after December 31, 2021.

Additionally, in the case of any tax-exempt organization, state or local government (or political subdivision thereof) or Indian tribal government making this election, any applicable credit would be determined without regard to the restrictions in Sections 50(b)(3) and 50(b)(4)(i), which currently deny credits to property used by such entities. This change would open the door to greater participation in green energy projects by tax-exempt and governmental entities.

The Bill indicates that rules similar to the investment credit recapture rules of Section 50(a) and basis adjustment rules of Section 50(c) would apply for purposes of the direct pay provisions.

However, in the case of the Section 45 PTC, the Section 48 ITC, the new Section 48D credit for qualifying transmission property or the new Section 48E credit for zero emissions facilities, this direct-pay election would be subject to a phaseout in the case of projects not satisfying the domestic content requirements. Specifically, except for projects with a maximum output of less than 1 megawatt, if a taxpayer makes the direct pay election for a project that does not meet the domestic content requirements described above, the credit is reduced by 10% of the otherwise available credit amount for facilities which commence construction in 2024, 15% for facilities which commence construction in 2025 and 100% for facilities which commence construction in 2026 or later. The Secretary may waive this provision and allow full direct pay if the Secretary, in consultation with the Secretary of Commerce, determines that such materials and products are not produced in the United States in sufficient quantity and quality, or that inclusion of domestic material will increase the cost of the facility by more than 25%.

In the case of “mirror code” possessions of the United States, which include Guam, the U.S. Virgin Islands and the Northern Mariana Islands, the Bill would make the new direct pay provisions not be treated as part of the income tax laws of the United States for purposes of determining the tax law of the possession unless the possession elects to have the provisions treated as part of their tax law.

NEW TAX CREDIT FOR ELECTRIC TRANSMISSION PROPERTY

The Bill would add Section 48D, which would provide a 30% ITC for qualifying electric transmission property the construction of which begins after 2021 and which is placed in service before 2032.

“Qualifying electric transmission property” includes tangible property that is either an electric transmission line capable of transmitting electricity at a voltage of not less than 275 kilovolts and which has transmission capacity of not less than 500 megawatts, as well as certain tangible property related to a transmission line. The credit is available to replacement transmission lines and upgrades to lines, but the 500 megawatt requirement is increased by the transmission capacity of the existing line, and no credit is allowed for the basis of the existing line.

The Section 48D credit for transmission property would be subject to the same prevailing wage and apprenticeship requirements as the Section 45 PTC and Section 48 ITC. The Section 48D credit would also be subject to the same increase of up to 10 percentage points for domestic content as the Section 48 ITC.

NEW TAX CREDIT FOR ZERO EMISSIONS FACILITIES

The Bill would also add Section 48E, which would provide a 30% ITC for a "zero emissions facility." A "zero emissions facility" is a facility that generates electricity, does not generate any greenhouse gases and uses a technology or process that does not account for more than 3% of overall electricity production in the United States.

The Section 48E credit is subject to an annual credit limitation of $250,000,000 for each of calendar years 2022 through 2031 and expires thereafter. Unused credit amounts carry over until the credit expires after 2031. The Secretary, in consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, would select which facilities are allocated these credits based on which facilities will result in the greatest reduction of greenhouse gas emissions, which will have the greatest potential for technological innovation and commercial deployment and which will result in the greatest reduction of local harmful environmental effects.

The Section 48E credit would be subject to the same prevailing wage and apprenticeship requirements as the Section 45 PTC and Section 48 ITC.

ENHANCED SECTION 45Q CARBON CAPTURE TAX CREDIT

The Bill would increase the Section 45Q carbon capture tax credit for "direct air capture facilities." Specifically, the Bill would increase the credit for carbon oxide captured and sequestered by a direct air capture facility to $180 per metric ton, adjusted for inflation, and to $130 per metric ton for carbon oxide captured and used as a tertiary injectant in a qualified enhanced oil or natural gas recovery project or otherwise used in an approved manner. The Bill would also immediately raise the Section 45Q credit for otherwise qualified projects to $50 per metric ton of carbon oxide captured and sequestered and to $35 per metric ton of carbon oxide captured and used as a tertiary injectant or otherwise used an in approved manner.

The Bill would also reduce the minimum capture thresholds for carbon capture facilities to receive the credit. Direct air capture facilities must capture not less than 1,000 metric tons of carbon oxide (down from 100,000 metric tons under current law). Electricity generating plants must capture not less than 18,750 tons and not less than 75% of the carbon oxide that would otherwise be released into the atmosphere by such facility, and other facilities must capture 12,500 metric tons, and not less than 50% of the carbon oxide that would otherwise be released into the atmosphere by such facility (down from 500,000 metric tons for electric plants emitting more than 500,000 tons and 100,000 metric tons for other facilities under current law).

Additionally, the Section 45Q carbon capture tax credit would be extended to facilities that begin construction before the end of 2031.

The Section 45Q carbon capture tax credit would also be subject to the prevailing wage and apprenticeship requirements.

NEW ZERO-EMISSION NUCLEAR POWER PRODUCTION CREDIT

The Bill would add Section 45W, which would provide a production tax credit of 1.5 cents per kWh for electricity produced at a qualified nuclear power facility. This would apply to nuclear power facilities placed in service before the date of enactment of the Bill that have not received an allocation under the Section 45J advanced nuclear power facility production credit.

The amount of the Section 45W credit would decline as the sale price of electricity increases, with the credit reduced (but not below zero) by 80% of the excess of gross receipts from electricity produced over 0.5 cents times the number of kWh of electricity sold.

The Section 45W credit would be subject to prevailing wage and apprenticeship requirements and would expire at the end of 2026.

GREEN ENERGY PUBLICLY TRADED PARTNERSHIPS

Under current law, "publicly traded partnerships" are subject to taxation as corporations unless at least 90% of their gross income consists of "qualifying income," which includes a variety of types of passive income as well as income and gains from exploration, development, mining, production, processing, refining, transportation and marketing of any mineral or natural resource. The Bill would expand the list of qualifying income categories to include income and gains from the generation of electric power or thermal energy from qualified energy resources under Section 45, the operation of energy property under Section 48, the accepting or processing of open-loop biomass or municipal solid waste, the production, transportation or storage of certain alternative fuels and the operation of a carbon capture facility.

Renewable Fuels

ALTERNATIVE FUELS AND BIOFUELS

The Bill would extend the income and excise tax credits for biodiesel and biodiesel mixtures at $1 per gallon, the 10 cent per gallon small agri-biodiesel producer credit, the 50 cent per gallon excise tax credits for alternative fuels and alternative fuel mixtures and the second generation biofuel income tax credit through 2031.

NEW SUSTAINABLE AVIATION FUEL CREDIT

The Bill would add Section 40B, establishing a refundable blenders tax credit for each gallon of sustainable aviation fuel sold as part of a qualified fuel mixture. The credit would be determined on a sliding scale from $1.25 to $1.75 per gallon depending on the reduction in lifecycle emissions of the fuel. This credit can be claimed as a credit against excise tax liability under Section 4041.

This credit would apply to fuel sold or used after 2022 and before 2032.

NEW CLEAN HYDROGEN CREDIT

The Bill would add Section 45X, which would provide a production credit for clean hydrogen produced at a clean hydrogen facility. The credit would be available beginning in 2022 for facilities beginning construction before 2029 during the 10-year period beginning on the placed-in-service date of the facility.

The amount of the credit would depend on the reduction in lifecycle greenhouse gas emissions as compared with hydrogen produced by steam-methane reforming, with the credit per kilogram of clean hydrogen equal to $3 (adjusted for inflation) multiplied by an "applicable percentage." The "applicable percentage" is:

- 20% for lifecycle greenhouse gas emissions reductions of at least 40% and less than 75%;
- 25% for lifecycle greenhouse gas emissions reductions of at least 75% and less than 85%;
- 34% for lifecycle greenhouse gas emissions reductions of at least 85% and less than 95%; and
- 100% for lifecycle greenhouse gas emissions reductions of at least 95%.

No Section 45X credit is permitted for production at a facility that includes property for which a Section 45Q carbon capture tax credit is allowed. Taxpayers seeking the Section 45 PTC for electricity from renewable sources may treat electricity used at a qualified clean hydrogen facility to produce qualified clean hydrogen as being sold to an unrelated person during the 10-year period after the qualified clean hydrogen facility is placed in service. Alternatively, a taxpayer may choose to treat a qualified clean hydrogen facility as an energy property for purposes of the Section 48 ITC, in which case the otherwise-available ITC percentage is multiplied by the "applicable percentage" listed above depending on the reasonably expected lifecycle greenhouse gas emissions reductions at the facility.

The Section 45X credit would be subject to prevailing wage and apprenticeship requirements.

Green Energy and Energy Efficiency Incentives for Individuals

NONBUSINESS ENERGY PROPERTY CREDIT

The Bill would extend the energy property credit for nonbusiness energy property under Section 25C to property placed in service before December 31, 2031. Starting in 2022, the Bill would make several other changes to the credit, including:

- Limiting the overall credit to $1,200 annually;
- Increasing the percentage of the credit for installing qualified energy efficiency improvements to 30% of the cost; and
- Expanding the credit to cover the costs of home energy audits, allowing a 30% credit of such costs up to $150.

RESIDENTIAL ENERGY EFFICIENT PROPERTY

The Bill would allow a 30% credit for the cost of qualified residential energy efficient property expenditures, which includes solar electric, solar water heating, fuel cell, small wind energy, battery storage and geothermal heat pumps through December 31, 2031. The provision phases down to 26% in 2032 and to 22% in 2033.

ENERGY EFFICIENT COMMERCIAL BUILDINGS

The Bill would expand the current Section 179D energy efficient commercial buildings deduction by increasing the maximum deduction and changes the maximum from a lifetime cap to only a three-year cap. Among other changes, the Bill would also require that the property reduce associated energy costs by 25% or more. The changes to the provision would expire after December 31, 2031.

EXTENSION OF NEW ENERGY EFFICIENT HOME CREDIT

The Bill would extend the Section 45L new energy efficient home credit through 2031.

Greening the Fleet and Alternative Vehicles

NEW QUALIFIED PLUG-IN ELECTRIC DRIVE MOTOR VEHICLE CREDIT FOR INDIVIDUALS

The Bill would make various changes to the electric drive motor vehicle credit under Section 30D. The Bill would allow for a tax credit for new qualified plug-in electric drive motor vehicles placed into service by the taxpayer during the taxable year. The amount of the credit would be $4,000 plus $3,500 for vehicles placed into service before January 1, 2027, with a battery capacity of at least 40 kilowatt hours and for vehicles with a battery capacity of at least 50 kilowatt hours thereafter. The credit would increase by $4,500 if the final assembly of the vehicle is at a facility in the United States which operates under a union-negotiated collective bargaining agreement. The overall amount of the credit is limited to 50% of its purchase price.

The Bill would eliminate the existing limitation on the number of credit eligible electric vehicles that each manufacturer can sell and, beginning on January 1, 2022, would make the credit a refundable personal credit for eligible vehicles acquired after that date. The Bill would also direct the Secretary to issue regulations or guidance to allow a taxpayer to transfer the credit to an eligible entity who would be treated as the taxpayer with regard to the credit. An eligible entity would be a dealer that meets certain requirements including the requirement that the dealer must pay the taxpayer for the amount of the credit allowable.

After January 1, 2027, the credit would only be allowed for vehicles for which final assembly is within the United States.

CREDIT FOR PREVIOUSLY OWNED ELECTRIC VEHICLES

The Bill would create a credit for the purchase of a used plug-in electric car after the date of the Bill's enactment through 2031 for a base of $1,250 and capped at the lesser of $2,500 or 30% of the sales price.

CREDIT FOR QUALIFIED COMMERCIAL ELECTRIC VEHICLES

The Bill would create a credit for qualified commercial electric vehicles placed into service equal to 30% of the cost of such vehicle. The credit would begin after December 31, 2021 and ends December 31, 2031.

QUALIFIED FUEL CELL MOTOR VEHICLES

The Bill would extend the existing credit for qualified fuel cell motor vehicles under Section 30B through 2031 for vehicles not of the kind subject to depreciation. Beginning January 1, 2022, vehicles subject to depreciation would be eligible for a new credit.

ALTERNATIVE FUEL REFUELING PROPERTY CREDIT

The Bill would extend the existing Section 30C credit for alternative fuel refueling property through 2031.

FRINGE BENEFITS FOR BICYCLE COMMUTING

The Bill would allow an exclusion for qualified bicycle commuting benefits and increase the maximum benefit to $52.50 per month.

ELECTRIC BICYCLE CREDIT

The Bill would allow a 15% refundable tax credit for qualified electric bicycles placed into service before January 1, 2032. Beginning in 2022, taxpayers could claim a credit up to $1,500 for electric bicycles placed into service by the taxpayer for use within the United States, for up to one bicycle per taxable year per taxpayer.

Investment in Green Workforce

ADVANCED ENERGY PROJECT CREDIT

The Bill would revive the Section 48C qualified advanced energy property credit. In order for a project to be eligible for the credit, taxpayers would need to meet: (i) prevailing wage requirements for the establishment, expansion, or re-equipping of a manufacturing facility, which would need to remain satisfied for five years after the project is placed into service, and (ii) apprenticeship requirements during the construction of the project.

LABOR COSTS FOR INSTALLING MECHANICAL INSULATION PROPERTY

The Bill would allow a credit for up to 10% of the labor costs incurred by a taxpayer in installing mechanical insulation property into a mechanical system which was originally placed in service at least one year before the date on which such property is installed.

Qualified Environmental Justice Program Credit

The Bill would create a capped refundable competitive credit of $1 billion for each year from 2022 through 2031 to institutions of higher education for environmental justice programs. Specifically, these programs would include programs designed to address, or improve data about, "environmental stressors," including contamination of the air, water, soil, or food, or change relative to historical norms in weather conditions of an area, for the primary purpose of improving, or facilitating the improvement of, health and economic outcomes of individuals residing in low-income areas or areas that experience, or are at risk of experiencing, multiple exposures to such environmental stressors.

The base credit would be 20% of the costs to be spent within five years by the receiving institution, and a higher 30% credit is available for programs with material participation from Historically Black Colleges and Universities and Minority Serving Institutions.

Reinstatement of Superfund

The Bill would reinstate the Hazardous Substance Superfund Financing Rate on crude oil and imported petroleum products at 16.4 cents/per gallon, indexed to inflation starting after December 31, 2021 until January 1, 2032.

Infrastructure Financing

QUALIFIED INFRASTRUCTURE BONDS

The Bill would create a new category of taxable bonds called qualified infrastructure bonds as an alternative to traditional tax-exempt bonds under Section 103. These bonds are bonds that finance capital improvements and would be tax-exempt bonds under Section 103 but for the application of the qualified infrastructure bond rules. Issuers would receive a tax credit equal to an "applicable percentage" of interest paid on such bonds, with the credit decreasing over time. The "applicable percentage" is 35% for bonds issued in 2022, 2023 or 2024, 32% for bonds issued in 2025, 30% for bonds issued in 2026 and 28% for bonds issued in 2027 or thereafter.

EXEMPT FACILITY BONDS FOR ZERO-EMISSION VEHICLE INFRASTRUCTURE

The Bill would amend Section 142 to allow zero-emission vehicle infrastructure to be financed by exempt facility bonds. Zero-emission vehicle infrastructure would include property (other than buildings and structural components) that is part of a unit which is used to charge or fuel zero-emissions vehicles, is located where the vehicles are charged or fueled, is of a character subject to depreciation allowances, is made available for use by members of the general public, accepts payment via credit card readers and is capable of charging or fueling vehicles produced by more than one manufacturer. It also would include utility service connections, utility panel upgrades, line extensions and conduit, transformer upgrades and similar property. The requirements that the infrastructure be available for use by members of the general public, accept payment via credit card readers and be capable of charging or fueling vehicles produced by more than one manufacturer would not apply to property used exclusively for fleets of commercial or governmental vehicles.

Appropriations

The Bill would appropriate $3,831,000,000 to remain available through 2031 for the IRS to carry out the various green initiative provisions of the Bill.

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Endnotes

[1] Text of the Bill is available here: https://taxequitytimes.mayerbrownblogs.com/wp-content/uploads/sites/15/2021/09/WM-Recon-Sub-Title-F-SUBFGHJ_xml.pdf. Text of the House Ways and Means Committee Section-by-Section Summary is available here: https://taxequitytimes.mayerbrownblogs.com/wp-content/uploads/sites/15/2021/09/Section-by-Section-Subtitle-F-G-H-J.pdf.

[2] https://waysandmeans.house.gov/media-center/press-releases/chairman-neal-announces-additional-day-markup-build-back-better-act.

[3] For our prior coverage of some of these proposals, see, e.g., https://www.mayerbrown.com/en/perspectives-events/publications/2021/08/energy-storage-tax-credits-in-the-biden-administration-fy-2022-budget-green-act-and-clean-energy-for-america-act (energy storage credit proposals); https://www.mayerbrown.com/en/perspectives-events/publications/2021/06/energy-tax-implications-of-the-administrations-fy2022-budget-tax-proposals (Biden administration proposals); https://www.mayerbrown.com/en/perspectives-events/publications/2021/04/recent-legislative-proposals-could-drastically-change-us-energy-taxation (Congressional green energy proposals).

[4] Unless otherwise specified, all "Section" references are to the Internal Revenue Code of 1986, as amended (the "Code").

[5] As a result, if the Bill is enacted as currently drafted, some taxpayers might benefit from delaying placement into service until 2022.

[6] PTC rates shown in this table are prior to adjustment for inflation.

[7] As a result, if the Bill is enacted as currently drafted, some taxpayers might benefit from delaying placement into service until 2022.