

Biden Administration Takes Big Step by Proposing Clean Energy Tax Incentives

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The Treasury Department recently released “General Explanations of the Administration’s Fiscal Year 2022 Revenue Proposals” (referred to by the tax community as the “Green Book”). The Green Book contains detailed information about the Biden administration’s tax proposals for the fiscal year 2022 as part of the “American Jobs Plan” and the “Made in America Tax Plan,” released earlier this year. Among the proposals detailed in the Green Book are many energy-related tax proposals.

Several of the clean energy tax credit proposals discussed below include a “direct pay” option under which taxpayers can elect a cash payment in lieu of a particular tax credit. If enacted, the direct pay options would make it easier for taxpayers to participate in renewable energy transactions even if they lack sufficient tax “appetite” to utilize the tax credits. Depending on how the direct pay options are structured, including whether the options require a haircut of the credit, direct payment could reduce the use of tax equity structures, such as partnership flips that allow sponsors to immediately monetize the credits through contributions by investors who can utilize the credits. However, the direct pay options also require the IRS to implement a complex system for administration. As the Green Book includes little detail on the direct pay options, taxpayers should continue to monitor the forthcoming legislative proposals and consider the impact that direct pay could have on potential projects and investments.

Extended and Enhanced Renewable and Alternative Energy Incentives

The proposal would extend the full production tax credit (PTC) for qualified facilities commencing construction after December 31, 2021 and before January 1, 2027. Starting in 2027, the credit would begin a five-year phase down to zero.

The proposal would also extend the investment tax credit (ITC) for investments in solar and geothermal electric energy property, qualified fuel cell power plants, geothermal heat pumps, small wind property, offshore wind property, water energy recovery property, and combined heat and power property. Starting in 2022, the ITC would be expanded to include a standalone credit for technology that stores energy for conversion to electricity and has a capacity of not less than five kilowatt hours. The ITC would be restored to the full 30% for eligible property that begins construction after December 31, 2021 and before January 1, 2027. Starting in 2027, the credit would begin a five-year phase down to zero.

The PTC and ITC extension at their full amounts for construction beginning after December 31, 2021 would create an anomaly, whereby projects for which construction begins in later years receive a higher tax credit rate than

projects beginning construction in some earlier years. The same anomaly was created by the 2019 legislation extending the PTC for wind projects at the 60% level for construction beginning in 2020, while not increasing the 40% PTC level applicable for projects beginning construction in 2019.

Taxpayers would have the option to elect a cash payment in lieu of the business tax credits. The Biden administration and Congress will work together on measures to pair the credits with strong labor standards, benefitting employers that provide good-paying and good-quality jobs.

Targeted Investment Tax Credit for High-Voltage Capacity Power Lines

The proposal would provide a tax credit equal to 30% of a taxpayer's investment in qualifying electric power transmission property placed in service in a given year. Qualifying electric power transmission property would include overhead, submarine, and underground transmission facilities meeting certain criteria, including a minimum voltage of 275 kilovolts and a minimum transmission capacity of 500 megawatts. Qualifying property would also include any ancillary facilities and equipment necessary for the proper operation of the transmission facility.

Taxpayers would have the option to elect a cash payment in lieu of the tax credits. The Biden administration and Congress will work together on measures to pair the credits with strong labor standards, benefitting employers that provide good-paying and good-quality jobs. The proposal would be effective for property placed in service after December 31, 2021 and before January 1, 2032.

Reformed and Expanded Section 45Q Credit for Carbon Capture and Sequestration

For the tax credit provided for each metric ton of carbon oxide captured and either disposed of in secure geological storage or used for certain purposes, the proposal would extend the begin-construction deadline for carbon capture and sequestration equipment installed at a qualifying facility by five years to January 1, 2031. The proposal would provide an enhanced credit for carbon oxide captured from hard-to-abate industrial carbon oxide capture sectors, such as cement production, steelmaking, hydrogen production, and petroleum refining. An additional \$35 per metric ton of qualified carbon oxide captured from such sources and disposed of in secure geological storage would be available. The proposal also would provide an enhanced credit in the form of an additional \$70 per metric ton for carbon oxide captured by direct air carbon capture projects with secure geological storage.

Taxpayers would have the option to elect a cash payment in lieu of the Section 45Q credits. The Biden administration and Congress will work together on measures to pair the credits with strong labor standards, benefitting employers that provide good-paying and good-quality jobs. The enhanced credits would be effective after December 31, 2021.

Not included in the Green Book proposal is the adjustment or elimination of the current carbon capture thresholds, which are seen as limiting the number of facilities and industries able to participate in the Section 45Q program and challenging the ability to secure financing for carbon capture projects. Recent legislative proposals have included the reduction or elimination of the thresholds. Taxpayers should continue to monitor current and forthcoming legislative proposals for this issue.

Allocated Credit for Electricity Generation from Existing Nuclear Power Facilities

The proposal would create an allocated PTC for generation from eligible existing nuclear power facilities that bid for the credits. Eligibility would depend on, among other things, demonstration of a good operation and safety record, demonstration that the facility is facing financial operating losses and that future projections include continued losses, and demonstration that emissions of various air pollutants would increase if the facility ceased operations. Eligible facilities would bid to receive credits over two-year windows. Solicitation of bids would be held every two years. Bidding facilities would identify the minimum credit amount per megawatt-hour of their generation that would be sufficient for them to maintain operations during the two-year window. Up to \$1 billion in credits would be available in each year to be allocated based on an evaluation of the bids and goals of maximizing the preservation of existing nuclear electricity generation.

Taxpayers would have the option to elect a cash payment in lieu of the allocated tax credits. The Biden administration and Congress will work together on measures to pair the credits with strong labor standards, benefitting employers that provide good-paying and good-quality jobs. The proposal would be effective after December 31, 2021. The first two-year window would commence on January 1, 2022, and the last would commence on January 1, 2030.

Production Tax Credit for Low-Carbon Hydrogen

The proposal would create a low-carbon hydrogen PTC. “Low carbon” refers to hydrogen produced using zero-carbon emissions electricity (renewables or nuclear) and water as a feedstock, or hydrogen produced using natural gas as a feedstock and with all carbon emitted in the production process captured and sequestered. The credit would apply to each kilogram of qualified low-carbon hydrogen: (1) produced by the taxpayer, (2) for an end use application in the energy, industrial, chemicals, or transportation sector; and (3) from a qualified low-carbon hydrogen production facility during the six-year period beginning on the date the facility was originally placed in service. The credit would be indexed annually for inflation measured after the facility is placed into service, based upon the initial amount of \$3.00 per kilogram of hydrogen between 2022 and 2024 and \$2.00 per kilogram between 2025 and 2027. The hydrogen may be sold to an unrelated third party, or if directly consumed by the taxpayer that owns the facility, the production must be independently verified. Construction of a qualified facility must have begun before the end of 2026 for the facility to be eligible for the PTC.

Taxpayers would have the option to elect a cash payment in lieu of the tax credits. The Biden administration and Congress will work together on measures to pair the credits with strong labor standards, benefitting employers that provide good-paying and good-quality jobs. The proposal would be effective after December 31, 2021.

Tax Credits for Heavy- and Medium-Duty Zero Emissions Vehicles

The proposal would provide a business tax credit for new medium- and heavy-duty zero emissions vehicles, including battery electric vehicles and fuel cell electric vehicles. Manufacturers would submit to the IRS the vehicles eligible for the credit. The vehicles must be acquired for use or lease by the taxpayer and not for resale.

Taxpayers would have the option to elect a cash payment in lieu of a general business credit. The Biden administration and Congress will work together on measures to pair the credits with strong labor standards,

benefitting employers that provide good-paying and good-quality jobs. The proposal would be effective after December 31, 2021.

Electric Vehicle Charging Station Credit

The proposal would modify and extend the tax credit for electric vehicle charging stations. The proposal allows taxpayers to claim the credit on a per-device basis, increases the tax credit limit for property installed for commercial use from \$30,000 per location to \$200,000 per individual device, and extends the credit for five years through December 31, 2026.

Taxpayers would have the option to elect a cash payment in lieu of a general business credit. The Biden administration and Congress will work together on measures to pair the credits with strong labor standards, benefitting employers that provide good-paying and good-quality jobs. The proposal would be effective after December 31, 2021.

New Tax Credits for Qualifying Advanced Energy Manufacturing

The proposal would expand Section 48C so that qualifying advanced energy projects would be revised to include industrial facilities, recycling in addition to production, and expanded eligible technologies, including energy storage and components, electric grid modernization equipment, carbon oxide sequestration, and energy conservation technologies. An additional \$10 billion of Section 48C credits would be authorized for investments in eligible property used in a qualifying advanced energy manufacturing project, with \$5 billion specifically allocated to projects in communities impacted by the closure of coal mines or coal power plants.

Successful applicants would have the option to elect a cash payment in lieu of the Section 48C credits. The Biden administration and Congress will work together on measures to pair the credits with strong labor standards, benefitting employers that provide good-paying and good-quality jobs. The proposal would be effective after December 31, 2021. Applications for the additional credits would be made during the three-year period beginning on the date on which the additional authorization is enacted.

Incentives for Energy Efficient Commercial Buildings

The proposal would increase the maximum Section 179D deduction per square foot from \$1.80 to \$3.00 for qualifying energy efficient commercial property. The partial deduction rate would be increased from \$0.60 to \$1.00 per square foot for qualifying property. The required efficiency standard in relation to the reference building's total annual energy reduction would be adjusted from 50% to 30%.

The proposal would be effective for property placed in service after December 31, 2021.

Repeal of Fossil Fuel Incentives

The following would be repealed, effective for taxable years beginning after December 31, 2021 (unless otherwise specified):

- Enhanced oil recovery credit;
- Credit for oil and gas produced from marginal wells;
- Expensing of intangible drilling costs;
- Deduction for tertiary injectants;
- Exception to passive loss limitations provided to working interests in oil and natural gas properties;
- Percentage depletion for oil and gas wells;
- Two-year amortization of independent producers' geological and geophysical expenditures (to be replaced by allowing amortization over the seven-year period used by integrated oil and gas producers);
- Expensing of exploration and development costs;
- Percentage depletion for hard mineral fossil fuels;
- Capital gains treatment for royalties received on the disposition of coal or lignite (would be effective for amounts realized in taxable years beginning after December 31, 2021);
- Exemption from corporate income tax for publicly traded partnerships with qualifying income and gains from activities related to fossil fuels (would be effective for amounts realized in taxable years beginning after December 31, 2026);
- Oil Spill Liability Trust Fund excise tax exemption for crude oil derived from bitumen and kerogen-rich rock; and
- Accelerated amortization for air pollution control facilities.

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