

Highlights of the Revised Text of the Inflation Reduction Act of 2022

WRITTEN BY

Mitchell T. Emmert | Adam C. Kobos | Anne C. Loomis | Roger S. Reigner, Jr. | Judy Kwok

On August 7, the Senate passed the Inflation Reduction Act of 2022 (the Act). The House is expected to vote on the legislation on Friday.

The text of an earlier version (the prior version) agreed to by Senator Manchin (D. WV) and Majority Leader Schumer (D. NY) is discussed in our previous [update](#). As revised, pursuant to the consensus reached last week with Senator Sinema (D. AZ), the latest version of the Act contains a handful of negotiated changes to the tax provisions impacting the renewables industry, including those relating to the production tax credit under section 45 (the PTC), the investment tax credit under section 48 (the ITC), the carbon capture credit under section 45Q, the proposed clean electricity production tax credit (the CEPTC), and the proposed clean electricity investment tax credit (the CEITC), as well as the proposed 15% alternative minimum tax for certain corporations (the corporate AMT). Additional changes to the corporate AMT and associated pay-fors were adopted pursuant to proposals by Senators Thune (D. SD) and Warner (D. VA) during the Senate debate on August 7. (Note that these proposals are not included in the version of the Act linked to above; the text of the bill as passed by the Senate is expected shortly.)

General Changes to Renewables Tax Provisions

The prevailing wage and apprenticeship requirements for obtaining the increased PTC, ITC, section 45Q credit, CEITC, and CEPTC are clarified to apply to employees of taxpayers (in addition to employees of contractors and subcontractors).

The definition of “energy community,” for purposes of obtaining an increase in the PTC, ITC, CEITC, and CEPTC, formerly included areas with significant post-1999 employment associated with coal, oil, and natural gas. This category now applies more narrowly to a metropolitan or non-metropolitan statistical area that (1) at any time post-2009 has had at least 0.17% direct employment or 25% local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas, and (2) had an unemployment rate at or above the national average for the previous year, in each case as determined by the Secretary.

Section 45Q

The testing periods for determining baseline carbon oxide production of an electric generating unit (which under the Act governs the minimum capture design capacity of carbon capture equipment for the relevant electricity

generating unit) have been revised. For an electricity generating unit placed in service between one and three years prior to the beginning of construction of the carbon capture equipment, baseline carbon oxide production is based on the period between the electricity generating unit's "placed in service" date and the beginning of construction of the carbon capture equipment; if the electricity generating unit was placed in service more than three years prior, baseline carbon oxide production is determined based on the three highest-emitting years in the 12-year period preceding the date on which construction of the carbon capture equipment began. In addition, the criteria for a post-placed in-service redetermination of baseline carbon oxide production have been narrowed, such that a redetermination is now necessary only if modifications (that are chargeable to capital account) of the electricity generating unit result in a significant increase or decrease in carbon oxide emissions.

The revised Act deletes language in the prior version, stating that if a qualified facility is placed in service before 2023 and an additional carbon capture facility is subsequently added, carbon oxide captured attributable to the nameplate capacity of the facility as of December 31, 2022 is deemed captured under the less favorable pre-Bipartisan Budget Act of 2018 regime for purposes of calculating the section 45Q credit.

Advanced Manufacturing Production Credit

The advanced manufacturing credit generally is available only for sales to an unrelated party of property produced by a taxpayer in the taxpayer's trade or business. The Act would now allow a taxpayer to elect to treat a sale to a related person as a sale to an unrelated person for purposes of the credit, provided that the Secretary may require information or registration necessary to prevent "duplication, fraud, or any improper or excessive amount" with respect to the credit.

Clean Energy Production Tax Credit and Clean Energy Investment Tax Credit

The 10% increase in the CEPTC for a project located in an energy community is now calculated by taking into account any increases arising from the satisfaction of the prevailing wage and apprenticeship requirements. The prior version appeared to calculate such 10% increase on the base CEPTC amount without taking into account the satisfaction of such labor requirements. The Act also clarifies that the 10% increase in the CEPTC for domestic content is determined without regard to such "energy community"-related increase to the CEPTC.

The prior version contained higher thresholds for domestic content for the CEPTC (45%, or 27.5% for offshore wind projects), in each case phasing up to 55% relative to the PTC. The revised Act retains this phase-in, but clarifies that the threshold is 40% (20% for offshore wind projects), consistent with the PTC, for projects beginning construction prior to January 1, 2025.

Direct pay for the CEPTC is now 100% for projects that begin construction prior to January 1, 2024 and 90% for projects that begin construction in 2024. The prior version did not explicitly address the direct pay percentage for such projects.

The revised Act states that the direct pay election generally applies at the partnership (or S corporation) level and that direct pay payments are treated as tax-exempt income for purposes of sections 705 and 1366. The Act adds any corporation operating on a cooperative basis that is engaged in furnishing electricity to rural areas to the list of entities eligible for direct pay. In addition, the Act confirms that a taxpayer that has made a direct pay election with

respect to the advanced manufacturing product credit cannot transfer such credit under proposed section 6418.

Direct Pay and Transferability

The transferability provision in proposed section 6418 now contains procedures for notifying the transferee of recapture events.

Corporate AMT

For purposes of determining the corporate AMT, the calculation of annual adjusted financial statement income is now reduced by depreciation deductions under section 168. This amendment, together with the existing provision that allows the corporate AMT to be offset by general business credits under section 38 (such as the ITC and PTC), should help ensure that even taxpayers subject to the corporate AMT will be able to monetize the key tax benefits of renewable energy investments.

Under the revised Act, annual adjusted financial statement income is also adjusted to exclude depreciation expense on the relevant taxpayer's applicable financial statement and to take into account any other item specified by the Secretary in order to provide that such property is accounted for in the same manner as for U.S. federal income tax purposes. The Act also contains additional rules for determining annual adjusted financial statement income.

We will continue to provide updates. In the meantime, please feel free to contact us with any questions.

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