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House Rules Committee Modifies Green Energy Bill

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On October 28, the House Rules Committee released a modified version of the budget reconciliation legislation, the Build Back Better Act (the Bill), including Subtitle D, Green Energy. Before release of the Bill, President Joe Biden announced a framework for the Build Back Better Act, reflecting the administration's negotiations with Democrat senators and representatives. House Speaker Nancy Pelosi has indicated that the text of the Build Back Better Act is still up for consideration and review, and further changes to the Bill are expected. The Bill must be approved by the House Rules Committee before being considered by the House of Representatives.

Key Differences from the Prior Bill

The modified version of the Bill includes significant changes to the version of the Bill approved by the House Ways and Means Committee on September 15 (the Prior Bill), which we covered here, including the following:

- Earlier sunset dates for the PTC and ITC (projects must begin construction before 2027);
- New technology-agnostic clean electricity credits for projects that begin construction after 2026;
- Enhanced ITC for projects that are within census tracts with oil and gas or coal employment or historic coal mine or coal plant closures;
- Expansion of the ITC to cover interconnection property; and
- A 15% alternative minimum tax on profits of certain corporations.

PTC and ITC Extensions

The Prior Bill would have extended the PTC and ITC for wind, solar, and other specified technologies to projects that began construction before 2034, with phasedowns for projects beginning construction after 2031. The updated Bill would pull back the beginning of construction deadline to December 31, 2026, with no phasedowns.

Like the Prior Bill, the updated Bill provides that the PTC and ITC are reduced to 20% of current levels if the project's maximum output is 1MW or greater and the prevailing wage and apprenticeship requirements are not met, subject to a transition rule. However, the updated Bill provides a more favorable transition rule: Projects that begin construction before 60 days after IRS guidance on such requirements is published (as opposed to the date of enactment, as in the Prior Bill) will not be subject to the prevailing wage and apprenticeship requirements.

The updated Bill would change the rules governing whether the PTC and ITC are reduced by certain forms of government support. Under current law, the PTC is, but the ITC is not, reduced by grants, subsidized energy financing, tax-exempt bond proceeds, and other credits. Under the updated Bill, both PTCs and ITCs would be reduced for only tax-exempt bond proceeds, and the maximum reduction would be 15%. This amendment applies only for projects that begin construction after December 31, 2021.

- Two key consequences and potential planning opportunities flow from the Bill's transition rules and credit rates as currently drafted. First, projects that begin construction before the IRS issues guidance on the prevailing wage and apprenticeship requirements will not be subject to those requirements. Second, credit rates for certain projects may be higher if they are placed in service in 2022 than they would be if they were placed in service in 2021.

- We note that, as the Bill is currently drafted, solar ITC projects that begin construction after December 31, 2026 receive a 10% ITC regardless of when placed in service, while projects that begin construction before January 1, 2027 that are placed in service after December 31, 2028 receive no ITC. There does not appear to be a policy reason for this anomaly, and the no ITC result appears to be the result of a drafting error.

Standalone Storage and Interconnection Property

The updated Bill eschews the Prior Bill's "laundry list" of energy storage technologies (with additional technologies to be specified by the Secretary of Energy), and instead broadly defines qualifying energy storage technologies to include any property that receives, stores, and delivers energy for conversion to electricity (or, in the case of hydrogen storage, to store energy), excluding property primarily used in transportation and not for the production of electricity.

The updated Bill also expands Section 7701(e)(3) to cover standalone energy storage facilities. That section provides a safe harbor pursuant to which certain service contracts (including PPAs, capacity agreements, and other power contracts) will not be recharacterized as leases.

The updated Bill expands the ITC to cover qualified amounts paid or incurred for qualified interconnection property in connection with the installation of an otherwise ITC-eligible project that has a capacity of 5 MW or less. Qualified interconnection property includes tangible property that is part of an addition, modification, or upgrade to a transmission or distribution system in order to accommodate interconnection, which is constructed, reconstructed, erected, or financed by a taxpayer and originally used by a utility pursuant to an interconnection agreement.

These changes to the ITC would apply to standalone storage projects and interconnection property placed in service after December 31, 2021, but only to the extent of the basis of the applicable project that is attributable to construction, reconstruction, or erection after December 31, 2021.

- Under current law, energy storage property can qualify for the ITC only if it is part of an otherwise ITC-eligible project (typically solar or wind), and certain other requirements are met. These requirements presumably would continue to apply to energy storage property to the extent of the applicable basis that is attributable to activities occurring before 2022.

Prevailing Wage and Apprenticeship Requirements

The prevailing wage and apprenticeship requirements for the ITC and PTC are substantially the same in the updated Bill. While the Prior Bill would allow taxpayers to cure a failure to satisfy the prevailing wage requirements by making true-up payments to each worker paid below prevailing wage and penalty payments to the Treasury, the updated Bill extends the cure right to a failure to satisfy the apprenticeship requirements. The updated Bill imposes additional interest and penalties to the cure payments in the case of “intentional disregard” of such requirements, and increases the percentage of labor hours that must be performed by qualified apprentices for projects that begin construction in the “phase-up” years 2022 and 2023. The updated Bill also eliminates an exception to the apprenticeship requirement for situations where qualified apprentices are unavailable in the relevant area, but expands the “good faith effort” exception to include situations where the taxpayer requests qualified apprentices from a registered program and receives no response.

Domestic Content Requirements

The updated Bill generally liberalizes the domestic content requirements, clarifying that (i) the requirements cover only those components that are part of the completed facility (as opposed to components that are used in the construction of the facility), (ii) the requirements do not apply to steel or iron used in a manufactured product “not primarily made of steel or iron,” and (iii) the applicable domestic content threshold is calculated by taking into account all components comprising all manufactured products of the facility. The updated Bill also implements a “phase-up” approach for the 55% domestic content threshold (40% for projects that begin construction before 2025, 45% for projects that begin construction in 2025, 50% for projects that begin construction in 2026, and 55% thereafter), with significantly lower phase-up period thresholds for offshore wind projects.

Direct Pay Election

The updated Bill provides guidance as to the extent to which a taxpayer can elect to receive a direct payment with respect to a specific credit or project. The general rule is that a direct pay election applies to any credit for the taxable year for which the election is made. However, for PTCs only, a direct pay election can be made on a facility-by-facility basis (in the case of a wind project, on a turbine-by-turbine basis), for the taxable year of the original placed in service date, and applies for all future years of the production credit. The updated Bill clarifies that the restrictions in Section 46(e) on the extent to which REITs can take ITCs and PTCs do not apply to direct pay. The updated Bill also provides that payments subject to sequestration will be grossed up to effectively ensure that the taxpayer is entitled to the full pre-sequestration amount.

Transmission Property ITC

The Prior Bill provided an ITC for transmission line and related property if construction on the property begins after 2021, and it is placed in service before 2032. The updated Bill expands the credit to include conversion equipment along the electric transmission line. The updated Bill clarifies that no credit is available where a regional transmission organization or ISO has selected the relevant property in a regional transmission plan prior to January 1, 2022, and that for purposes of the transmission ITC, construction begins when the taxpayer has begun on-site physical work of a significant nature. The updated Bill also includes a reduction to the credit for tax-exempt bond financing, similar to that for the PTC and ITC described above.

Clean Electricity Production Credit and Clean Electricity Investment Credit

The updated Bill adds broad emissions-based credits that cover projects used for the generation of electricity with a greenhouse gas emissions rate at or below zero that begin construction after December 31, 2026 (or existing projects to the extent construction of a new unit or addition of capacity begins after 2026).

Assuming the prevailing wage and apprenticeship requirements are satisfied, the incentive would be available in the form of a 10-year production tax credit (CEPTC) or 30% investment tax credit (CEITC). The CEPTC would be calculated similarly to the PTC. The CEPTC and CEITC generally incorporate increases and decreases to the credit, with respect to prevailing wage and apprenticeship requirements, domestic content, and energy and low-income communities.

The CEPTC and CEITC would phase down to 75% of the applicable credit amount for projects that begin construction the later of 2033 or the second calendar year after the electric power sector emits 75% less carbon than 2021, then to 50% for projects that begin construction the following year, with no credits available for projects that begin construction thereafter.

Low-Income Community Enhancements

The Prior Bill provided an enhanced ITC (for 2022 through 2026) for certain solar projects in low-income communities to which the Secretary makes an allocation of environmental justice solar capacity limitation. The updated Bill expands this enhanced ITC to both wind projects and projects located on Indian land and implements a similar provision for the CEITC.

Energy Communities Enhancements

The updated Bill provides for an enhanced ITC and an enhanced CEITC for projects that are placed in service within an energy community. “Energy community” means a census tract or any adjacent census tract in which at least 5% of the employment is within the oil and gas sector (in the year construction began), a coal mine has closed after 1999, or a coal-fired electric generating unit has been retired after 2009. The increased credit rate is 10% of the energy property basis, unless the applicable project does not satisfy the prevailing wage and apprenticeship requirements, in which case the increased credit rate is 2%.

Corporate Alternative Minimum Tax

The Prior Bill would have increased corporate tax rates for certain taxpayers. The updated Bill generally does not include corporate tax rate increases, but Subtitle G of the Bill, Responsibly Funding Our Priorities, adds a 15% alternative minimum tax on corporate profits.

Under the Bill, the corporate alternative minimum tax would apply to corporations that have average annual adjusted financial statement income in excess of $1 billion over a three-year period. Adjusted financial statement income is the net income or loss set forth on the corporation's applicable financial statement, subject to adjustments, rather than its tax books.

The corporate alternative minimum tax would be offset by general business credits under Section 38, such as the ITC and PTC, subject to limitations (*e.g.,* Section 38 credits may offset only up to 75% of the sum of a corporation's normal income tax and alternative income tax that exceeds $25,000).

- It remains to be seen to what extent tax equity investors could be affected by the corporate alternative minimum tax. The proposal could implicate tax law change provisions in tax equity documents.

- The Bill does not provide an offset for depreciation deductions, which are significant in the case of solar and wind projects.

- The corporate alternative minimum tax language is substantially similar to a proposal by Senators Elizabeth Warren (D-MA), Angus King (I-ME), and Ron Wyden (D-OR) announced on October 26, 2021 (Proposal). Prior to release of the Bill, The American Council on Renewable Energy issued a statement, requesting that the Proposal be modified to protect depreciation associated with renewable energy projects.

As noted above, the Build Back Better Act is not yet final. Significant areas of disagreement remain between progressive and moderate Democrats and between the House and the Senate. Accordingly, it's important to factor in the possibility of significant changes to the Bill before enactment.

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

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