ALLEN & OVERY

Proposed Legislation – Energy Provisions and Related Tax Credits

November 2021

	Current Law	Proposal	Effective Date & Phasedown (if applicable)	Practical Impact
PTC **(Sec. 45)**	60% PTC for wind facilities that start construction before January 1, 2022.	$0.3 cents base PTC; $1.5 cents/kWh (adjusted for inflation, full credit is $2.5 cents/kWh or $25/mWh (***equivalent to 100% 2016 PTC amount***) if labor and wage requirements are satisfied; additional 10% for domestic content usage. Adjusted for inflation on an annual basis; **Solar added; Offshore Wind receives full credit and a lower "manufactured in U.S." percentage requirement for domestic bonus.**	Effective after December 31, 2021 for projects starting construction before January 1, 2027. Direct pay haircut starting for projects that start construction after 2023 for failure to satisfy domestic content.	Higher credit, subject to labor/wage requirements; bonus for domestic content usage. Labor/wage req. deemed met if construction start by 60 days after IRS guidance.
ITC – Stand-alone energy storage **(Sec. 48)**	None	ITC will include stand-alone energy storage technology.	Effective after December 31, 2021	Certainty for stand-alone storage credit, but exclude costs incurred prior to 2022.
ITC – Solar **(Sec. 48)**	30%, 26% or 22% ITC for energy property depending on when construction began; drops to 10% for project placed in service starting in 2026.	6% base ITC; 30% if labor and wage requirements are satisfied; additional 10% of credit base (if meet domestic content usage and prevailing wage/apprenticeship reqs.). Additional 10% if in an "Energy Community" which is a census tract with less than 5% oil/gas employment or a tract where a coal mine has closed. Additional 10% if in a low-income community (low income housing credit census tract or Indian land) or additional 20% if in certain qualified low income buildings or benefit projects.	Effective for projects placed in service after December 31, 2021. Phasedown to 10% for projects starting construction in 2027 with a 20% haircut over 5 years, but 0% if clean energy credit claimed.	Higher credit (up to 40%), subject to labor/wage requirements; bonus for domestic content usage. Labor/wage req. deemed met if construction start by 60 days after IRS guidance.
ITC – Offshore Wind **(Sec. 48)**	30% for projects that start construction before January 1, 2026	6% base ITC; 30% if labor and wage requirements are satisfied; additional 10% for domestic content usage but with a reduced "manufactured in U.S." percentage requirement.	Effective after December 31, 2021. Phasedown to 0% for projects starting construction in 2027 with a 20% haircut over 5 years.	Higher credit (up to 40%), subject to labor/wage requirements; bonus for domestic content usage.

	Current Law	Proposal	Effective Date & Phasedown (if applicable)	Practical Impact
Tax Credit – Carbon Oxide Capture **(Sec. 45Q)**	Up to $50/ton credit for carbon oxides captured and permanently sequestered; indexed for inflation starting in 2026; up to $35, indexed for inflation, for utilization activities.	For CCS: $15 base, $85/ton credit, direct pay option; indexed for inflation beginning in 2026. For utilization: $12 base, $60/ton credit; direct pay option; indexed for inflation beginning in 2026. ***No Domestic Content Bonus.***	Effective after December 31, 2021	Higher credits, subject to labor and wage requirements.
Clean Hydrogen Credit **(Sec. 45X)**	No stand-alone credit for clean hydrogen	Up to $3/kg ($0.60 x 5) for ten years for qualified clean hydrogen if labor/wage requirements are satisfied, otherwise up to $0.60/kg. Amount of credit based on carbon intensity reduction based on lifecycle greenhouse gas emission metrics: (1) 15% of credit if CO2e is between 4-6kg; (2) 20% if between 2.5-4kg; (3) 25% if between 1.5-2.5kg; (4) 33.4% if between .45-1.5kg; and (5) 100% if less than .45kg. Cannot claim credit on same facility that is allowed credits under 45Q for carbon capture. Adjusted for inflation on an annual basis.	Effective for projects placed in service after December 31, 2021 and prior to January 1, 2027; ten year credit tenor.	New credit, choice between 45X, 45Q, or ITC; subject to labor/wage requirements or credit reduced to $0.60.
ITC – Hydrogen **(Sec. 48)**	Clean hydrogen not available for ITC	ITC will include clean hydrogen projects, 6% base ITC, up to 30% (see prior slides) phased down based on lifecycle GHG emissions rates, similar to 45X.	Same as 45X.	Cannot claim 45X or 45Q on facilities that claim ITC. Costs incurred prior to 2022 are excluded.

	Current Law	Proposal	Effective Date	Practical Impact
Clean Electricity Production Credit **(Sec. 45BB)**	No tech-neutral zero emissions PTC.	Credit for qualified facilities with greenhouse gas emissions rate (GGER) not greater than zero; applies to new facilities (BOC after 12/31/2026) and for expansions to current facilities (BOC before 1/1/2027). Credit amount is similar to PTCs; base credit is $0.3 cents per KWh of electricity produced and sold to third party, or stored if metered facility monitored by third party; credit increases to $1.5 cents if labor/wage requirements are satisfied; adjusted annually for inflation; bonus credit for domestic content. GGER determined annually by Secretary for different types of facilities; taxpayer petition for determination of emissions rate for a facility if Secretary has not set a rate. Direct Pay and Domestic Content bonus available; Wage and Labor requirements apply.	Construction starts after 2026 and for expansions of other facilities that start after 2026. 4-year phase-out period begins later of 2031 or the first year the Secretary determines GGEs in the U.S. are less than 25% of the GGE level in 2021; credit phase-out is 0% in year 1, 25% in year 2, 50% in year 3, and 100% in year 4.	Tech-neutral zero emissions credit. Cannot claim if facility is allowed credits under 45, 45J, 45Q, 48, 48A, or 48F.
Clean Electricity Investment Credit **(Sec. 48F)**	No tech-neutral zero emissions ITC.	ITC for qualified facility and grid improvement property (includes energy storage property); 6% base ITC, up to 30%. Qualified facility means BOC after 12/31/2026 (or expansion of facility if BOC prior to 2027) and GGER not greater than zero. Recapture of credit if Secretary determines GGER is greater than 10 grams of CO_2e per KWh. Direct Pay and Domestic Content bonus available; Wage and Labor requirements apply.	Effective for new facilities and expansions BOC after December 31, 2026. 4-year phase-out period increasing 25% per year beginning not before 2032.	Tech-neutral zero emissions credit. Cannot claim if facility is allowed credits under 45, 45J, 45Q, 45BB, 48, 48A, or 48D. Cannot combine with rehabilitation expenditures.

	Proposal	Overview	Effective date/Phase in
Direct Pay	Allows taxpayers to treat credits as taxes already paid; can claim credits as refund instead of having to carry forward. *Available for PTC, ITC, 45Q, 30C, 48C, 48D, 45W, 45X, 45Y, 48E, 45AA, 45BB, 48F, 45CC.*	Annual election; irrevocable for year (i.e., if you elect but do not qualify, then you cannot change to claim the traditional credit). Can be claimed by partnership, rather than partners. Direct Pay "penalty" for PTC, ITC, 48D, 45BB, and 48F if "domestic content" is not satisfied	After December 31, 2021; "penalty" phases in at 10% for projects BOC in 2024, 15% if BOC in 2025, and 100% if BOC in 2026 or after.
Domestic Content	Credit increase for facilities composed of steel, iron, or products manufactured in the U.S. *Applies generally to, PTC, ITC, 36C, 48D, 45BB, 48F; Direct Pay element for PTC, ITC, 48D, 45BB and 48F.*	Products are deemed manufactured in the U.S. if "adjusted percentage" (i.e., 55%) of the costs are for components mined, produced or manufactured in the U.S. Increase is generally 2% or 10% of underlying credit (10% if taxpayer also meets Wage and Apprenticeship requirements); for ITCs the increase is 2 or 10 ***percentage points***.	After December 31, 2021; adjusted percentage phases in at 40% if BOC before 2025, 45% if BOC in 2025, 50% if BOC in 2026, and 55% after 2026. Phase-in for offshore wind is 20% before 2025, 27.5% in 2025, 35% in 2026, 45% in 2027, and 55% after 2027.
Prevailing Wage Requirement	New wage requirement. *Applies to PTC, ITC, 45Q, 45W, 45X, 179D, 30C, 45L, 48C, 45Z, 48E, 45BB, 48F, 45CC, and for full Domestic Content increase.*	Taxpayers must provide written certification that laborers and mechanics are paid "prevailing wages" for locality during construction and for repairs or alterations after projects are PIS (10yrs for PTC, 5yrs for ITC, 12yrs for 45Q). Failure results in 80% credit haircut; taxpayers can cure by remitting wage shortfalls to underpaid employee(s) and paying a $5k (per failure) penalty to IRS ($10k for intentional disregard).	After December 31, 2021; but not until 60 days after Secretary publishes relevant guidance, and only for projects that BOC after that time.
Apprenticeship Requirement	New labor requirement for contractors or subcontractors with 4 or more employees. *Applies to PTC, ITC, 45Q, 45X, 179D, 30C, 48C, 45Z, 48E, 45BB, 48F, 45CC, and for full Domestic Content increase.*	In general, taxpayers must ensure that the "applicable percentage" of total labor hours for construction, alteration or repair work for facility is done by qualified apprentices, i.e., an employee who participates in an apprenticeship program under the National Apprenticeship Act. Failure results in 80% credit haircut; "good faith" exception if employers attempt but cannot find apprentices in their locality.	After December 31, 2021; labor percentage to phase in at 10% if BOC before 2023, 12.5% if BOC in 2023, and 15% after; but not until 60 days after Secretary publishes relevant guidance.
Corporate AMT (Sec. 38 Cap for Corporations)	*15% minimum tax on "adjusted financial statement income" (**AFSI**) minus corporate AMT foreign tax credit. (Business credits cannot offset more than 25% of corporate income tax.)*	Applies to Corps. with 3-yr average AFSI greater than $1 billion; Direct Pay amounts not included in AFSI; AFSI reduced up to 80% by book depreciation.	After December 31, 2021, but most corps will be excluded until calendar year 2023 based on the definition of an applicable corporation.