DESCRIPTION OF H.R. 3938, THE "BUILD IT IN AMERICA ACT"

Scheduled for Markup
by the
HOUSE COMMITTEE ON WAYS AND MEANS
on June 13, 2023

Prepared by the Staff
of the
JOINT COMMITTEE ON TAXATION

June 9, 2023
JCX-28-23

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INTRODUCTION

The House Committee on Ways and Means has scheduled a committee markup of H.R. 3938, the "Build It in America Act." This document,[1] prepared by the staff of the Joint Committee on Taxation, provides a description of the bill.

The bill makes several modifications to the Internal Revenue Code regarding cost recovery, supply chain security, and the U.S. taxation of certain cross-border transactions. The bill also repeals several energy-related tax provisions added by Public Law 117-169 (commonly referred to as the "Inflation Reduction Act") and makes modifications to the section 30D credit for certain electric vehicles.[2] In summary, the bill:

- Temporarily suspends mandatory capitalization and amortization of research and experimental expenditures and temporarily adopts rules that allow taxpayers to either deduct, capitalize and amortize, or capitalize such expenditures,
- Temporarily extends rules that allow taxpayers to add back depreciation, amortization, and depletion to adjusted taxable income for purposes of calculating the interest expense limitation,
- Extends 100-percent bonus depreciation through 2025 (2026 for longer production period property and certain aircraft),
- Terminates the financing rate and borrowing authority for the Hazardous Substance Superfund Trust Fund, as reinstated by the Inflation Reduction Act,
- Provides two elections with respect to certain foreign income taxes paid or accrued to certain Western Hemisphere countries,
- Imposes a 60-percent tax on certain purchases of United States agricultural interests by disqualified persons,
- Repeals four credits enacted as part of the Inflation Reduction Act: the clean electricity production credit, the clean electricity investment credit, the credit for previously-owned clean vehicles, and the credit for qualified commercial clean vehicles, and
- Restores, in general, section 30D (the clean vehicle credit) to how it appeared immediately prior to the enactment of the Inflation Reduction Act, but retains the limitations based on modified adjusted gross income and manufacturer suggested retail price, and continues to impose modified critical mineral and battery component requirements.

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[1] This document may be cited as follows: Joint Committee on Taxation, *Description of H.R. 3938, the "Build It in America Act"* (JCX-28-23), June 9, 2023. This document can also be found on the Joint Committee on Taxation website at www.jct.gov. All section references in the document are to the Internal Revenue Code of 1986, as amended (the "Code"), unless otherwise stated.

[2] August 16, 2022.

A. Investment In America

1. Deduction for research and experimental expenditures

Present Law

Public Law 115-97[3] modified the cost recovery rules for research or experimental expenditures paid or incurred in taxable years beginning after December 31, 2021 (with conforming changes made to sections 41 and 280C).[4] Section 174 as applicable to amounts paid or incurred in taxable years beginning before January 1, 2022, is described first below, followed by a description of section 174 as applicable to amounts paid or incurred in taxable years beginning after December 31, 2021.

Amounts paid or incurred in taxable years beginning before January 1, 2022

Business expenses associated with the development or creation of an asset having a useful life extending beyond the current year generally must be capitalized and depreciated over such useful life.[5] However, taxpayers may elect to deduct the amount of reasonable research or experimental expenditures paid or incurred in taxable years beginning before January 1, 2022 in connection with a trade or business.[6] Alternatively, taxpayers may elect to capitalize their research or experimental expenditures and recover them ratably over the useful life of the research, but in no case over a period of less than 60 months.[7] Taxpayers may also elect to amortize their research or experimental expenditures over a period of 10 years.[8] Research and experimental expenditures deductible under section 174 are not required to be capitalized under

[3] December 22, 2017.

[4] Sec. 174.

[5] Secs. 167 and 263(a).

[6] Former secs. 174(a) and (e).

[7] Former sec. 174(b). Taxpayers that have a taxable loss or that would have taxable loss after allowance of the deduction for research and experimental expenses, including taxpayers that incur research and experimental expenses before the start of an active trade or business, may elect to capitalize these expenses under this rule.

[8] Former secs. 174(f)(2) and 59(e). This special 10-year election is available to mitigate the effect of the individual alternative minimum taxable income adjustment for research expenditures set forth in section 56(b)(2). The election under section 59(e) to amortize research or experimental expenditures over a 10-year period does not apply to research or experimental expenditures paid or incurred in taxable years beginning after December 31, 2021. A technical correction may be necessary to reflect this intent.

either section 263(a)[9] or section 263A.[10] Section 174 deductions are generally reduced by the amount of the taxpayer's research credit under section 41.[11]

Research or experimental expenditures generally include all costs incurred in the experimental or laboratory sense related to the development or improvement of a product.[12] In particular, qualifying costs are those incurred for activities intended to discover information that would eliminate uncertainty concerning the development or improvement of a product.[13] Uncertainty exists when information available to the taxpayer is not sufficient to ascertain the capability or method for developing, improving, and/or appropriately designing the product.[14] The determination of whether expenditures qualify as deductible research expenses depends on the nature of the activity to which the costs relate, not the nature of the product or improvement being developed or the level of technological advancement the product or improvement represents.[15] Examples of qualifying costs include salaries for those engaged in research or experimentation efforts, amounts incurred to operate and maintain research facilities (*e.g.*, utilities, depreciation, rent, *etc.*), and expenditures for materials and supplies used and consumed in the course of research or experimentation (including amounts incurred in conducting trials).[16] In addition, under administrative guidance, the costs of developing computer software have been accorded treatment similar to the cost recovery treatment of research and experimental expenditures.[17]

Research or experimental expenditures do not include expenditures for quality control testing; efficiency surveys; management studies; consumer surveys; advertising or promotions; the acquisition of another's patent, model, production or process; or research in connection with

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[9] Sec. 263(a)(1)(B).

[10] Sec. 263A(c)(2).

[11] Former secs. 280C(c)(1) and (2). Taxpayers may instead elect to claim a reduced research credit amount under section 41 in lieu of reducing deductions otherwise allowed. Sec. 280C(c)(3), as effective for amounts paid or incurred in taxable years beginning before January 1, 2022.

[12] Treas. Reg. sec. 1.174-2(a)(1) and (2). Product is defined to include any pilot model, process, formula, invention, technique, patent, or similar property, and includes products to be used by the taxpayer in its trade or business as well as products to be held for sale, lease, or license. Treas. Reg. sec. 1.174-2(a)(11), Example 10, provides an example of new process development costs for which the cost recovery rules of section 174 apply.

[13] Treas. Reg. sec. 1.174-2(a)(1).

[14] *Ibid.*

[15] *Ibid.*

[16] See Treas. Reg. sec. 1.174-4(c). The definition of research and experimental expenditures also includes the costs of obtaining a patent, such as attorneys' fees incurred in making and perfecting a patent application. Treas. Reg. sec. 1.174-2(a)(1).

[17] Rev. Proc. 2000-50, 2000-2 C.B. 601.

literary, historical, or similar projects.[18] For purposes of section 174, quality control testing means testing to determine whether particular units of materials or products conform to specified parameters, but does not include testing to determine if the design of the product is appropriate.[19]

Generally, no deduction under section 174 is allowable for expenditures for the acquisition or improvement of land or of depreciable or depletable property used in connection with any research or experimentation.[20] In addition, no deduction is allowed for any expenditure incurred for the purpose of ascertaining the existence, location, extent, or quality of any deposit of ore or other mineral, including oil and gas.[21]

Amounts paid or incurred in taxable years beginning after December 31, 2021

For taxable years beginning after December 31, 2021, specified research or experimental expenditures must be capitalized and amortized ratably over a five-year period (or, in the case of expenditures that are attributable to research that is conducted outside of the United States, over a 15-year period[22]), beginning with the midpoint of the taxable year in which such specified research or experimental expenditures are paid or incurred (referred to as a half-year convention).[23] Specified research or experimental expenditures that are required to be capitalized include expenditures for software development.[24] Specified research or experimental expenditures exclude expenditures for the acquisition or improvement of land or for depreciable or depletable property used in connection with the research or experimentation and include depreciation and depletion allowances in respect of that property.[25] Also excluded are exploration expenditures incurred for ore or other minerals (including oil and gas).[26]

In the case of retired, abandoned, or disposed property with respect to which specified research or experimental expenditures are paid or incurred, any remaining basis may not be

[18] Treas. Reg. sec. 1.174-2(a)(6).

[19] Treas. Reg. sec. 1.174-2(a)(7).

[20] Former sec. 174(c). However, depreciation and depletion allowances may be considered section 174 expenditures. *Ibid.*

[21] Former sec. 174(d). Special rules apply with respect to geological and geophysical costs (section 167(h)), qualified tertiary injectant expenses (section 193), intangible drilling costs (sections 263(c) and 291(b)), and mining exploration and development costs (sections 616 and 617).

[22] For this purpose, the term "United States" includes the United States, the Commonwealth of Puerto Rico, and any possession of the United States. Sec. 174(a)(2)(B), by reference to sec. 41(d)(4)(F).

[23] Sec. 174(a)(2)(B).

[24] Sec. 174(c)(3).

[25] Sec. 174(c)(3).

[26] Sec. 174(c)(2).

recovered in the year of retirement, abandonment, or disposal, but instead must continue to be amortized over the remaining amortization period.[27]

If a taxpayer's research credit under section 41 for a taxable year beginning after 2021 exceeds the amount allowed as an amortization deduction under section 174 for that taxable year, the amount chargeable to capital account under section 174 for such taxable year must be reduced by that excess amount.[28] A taxpayer instead may elect to claim a reduced research credit amount under section 41.[29] If this election is made, the research credit is reduced by an amount equal to the amount of the credit multiplied by the highest corporate tax rate.[30]

Description of Proposal

The proposal temporarily suspends the application of section 174 for research or experimental expenditures paid or incurred in taxable years beginning after December 31, 2021, and before January 1, 2026. For expenditures to which the suspension of the application of section 174 applies, the proposal provides rules (in new section 174A) similar to the rules of prior law section 174.

The proposal provides that research or experimental expenditures paid or incurred by a taxpayer during the taxable year in connection with the taxpayer's trade or business are deductible. Alternatively, a taxpayer may elect to either (1) capitalize part or all of its research or experimental expenditures and recover them ratably over the useful life of the research (but in no case over a period of less than 60 months), or (2) capitalize part or all of its research or experimental expenditures to a capital account.

Similar to present law section 174, research or experimental expenditures include software development costs.[31]

The proposal requires a taxpayer to reduce the amount taken into account as research or experimental expenditures (whether expensed or capitalized) by the amount of the research credit allowable under section 41. Taxpayers instead may elect to claim a reduced research credit amount under section 41.

For purposes of recognizing taxable income under the percentage of completion method of section 460, a taxpayer that pays or incurs a research or experimental expenditure under a long-term contract must include the amount paid or incurred as a cost allocated to the contract for the taxable year. For example, a taxpayer that pays or incurs $100 of research or

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[27] Sec. 174(d).

[28] Sec. 280C(c)(1).

[29] Sec. 280C(c)(2)(A).

[30] Sec. 280C(c)(2)(B).

[31] Under former section 174, taxpayers relied on Rev. Proc. 2000-50, *supra*, for the treatment of software development expenditures.

experimental expenditures under a long-term contract must include that $100 as a cost allocated to the contract in that year for purposes determining the percentage of completion under section 460, regardless of whether it deducts the full $100 or instead claims a smaller amortization deduction in that year.

The proposal treats the requirement to capitalize and amortize research or experimental expenditures paid or incurred in taxable years beginning after December 31, 2025 as a change in the taxpayer's method of accounting for purposes of section 481. This change is treated as initiated by the taxpayer, is treated as made with the consent of the Secretary, and is applied prospectively on a cut-off basis with no corresponding catch-up adjustment to taxable income under section 481(a).

For research or experimental expenditures paid or incurred in taxable years beginning after December 31, 2025, the proposal coordinates the applicable rules (that is, the present law section 174 rules that the proposal temporarily suspends) with the application of the alternative minimum tax rules for individuals, including the optional election under section 59(e), and the rules for making certain basis adjustments. Under these coordination rules, neither the adjustment to an individual's alternative minimum taxable income under section 56(b)(2) nor the election under section 59(e)(2)(B) to capitalize and amortize research and experimental expenditures over 10 years apply to specified research or experimental expenditures. In addition, the proposal clarifies that the basis of property is reduced by amortization deductions allowed under section 174(a). For purposes of recognizing taxable income under the percentage of completion method of section 460, a taxpayer that pays or incurs a specified research or experimental expenditure under a long-term contract in a taxable year must include the amortization deduction under section 174(a) as a cost allocated to the contract in that year.

Effective Date

The proposal is effective for amounts paid or incurred in taxable years beginning after December 31, 2021.

The proposal provides two elective transition rules. The first election allows a taxpayer that adopts a method of accounting under section 174 before the date of the proposal's enactment for the taxpayer's first taxable year beginning after December 31, 2021, to treat the application of the temporary rules as a change in method of accounting initiated by the taxpayer for the taxpayer's immediately succeeding taxable year with a catch-up adjustment to taxable income under section 481(a) made on a modified cut-off basis.[32]

The second transition rule allows an eligible taxpayer to make a late election under section 59(e)(2)(B) to capitalize and amortize research or experimental expenditures over 10

[32] The section 481(a) adjustment only includes an adjustment for the capitalized expenditures which were not allowed as an amortization deduction by reason of section 174 prior to amendment by the proposal for the taxpayer's first taxable year beginning after December 31, 2021.

years by filing an amended income tax return within one year of the date of enactment.[33] An eligible taxpayer is any taxpayer that does not elect the application of the first transition rule, and that filed an income tax return for the taxpayer's first taxable year beginning after December 31, 2021, before the earlier of the due date for that return and the date of enactment.

2. Extension of allowance for depreciation, amortization, or depletion in determining the limitation on business interest

Present Law

Limitation on deduction of business interest expense

Interest paid or accrued by a business generally is deductible in the computation of taxable income, subject to a number of limitations.[34] The deduction for business interest expense[35] is generally limited to the sum of (1) business interest income of the taxpayer for the taxable year,[36] (2) 30 percent of the adjusted taxable income of the taxpayer for the taxable year (not less than zero), and (3) the floor plan financing interest[37] of the taxpayer for the taxable

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[33] Generally, an election under section 59(e)(2)(B) must be filed no later than the date prescribed by law for filing the taxpayer's original income tax return (including extensions) for the tax year in which the amortization of the qualified expenditures subject to the election begins. See Treas. Reg. sec. 1.59-1(b)(1).

[34] Sec. 163(a). Interest deductions limitations that are not described in this document include: denial of the deduction for the disqualified portion of the original issue discount on an applicable high yield discount obligation (sec. 163(e)(5)), denial of deduction for interest on certain obligations not in registered form (sec. 163(f)), reduction of the deduction for interest on indebtedness with respect to which a mortgage credit certificate has been issued under section 25 (sec. 163(g)), disallowance of deduction for interest on debt with respect to certain life insurance contracts (sec. 264(a)), and disallowance of deduction for interest relating to tax-exempt income (sec. 265(a)(2)). In some circumstances, interest expense is required to be capitalized. See, *e.g.*, secs. 263A(f) (capitalization of interest incurred to produce certain tangible property) and 461(g) (prepaid interest). Section 385 also recharacterizes as equity some instruments that are purported to be indebtedness with the result that payments on the interest are treated as nondeductible dividends rather than deductible interest.

[35] Business interest means any interest paid or accrued on indebtedness properly allocable to a trade or business and does not include investment interest (within the meaning of section 163(d)). Sec. 163(j)(5). Section 163(j) applies only to business interest that would otherwise be deductible in the current taxable year, absent the application of section 163(j). Treas. Reg. sec. 1.163(j)-3(b)(1). Thus, section 163(j) applies after the application of provisions that subject interest to deferral, capitalization, or other limitation (*e.g.*, secs. 163(e)(3), 163(e)(5)(A)(ii), 246A, 263A, 263(g), 267, 1277, and 1282), but before application of sections 461(l), 465, and 469. See Treas. Reg. sec. 1.163(j)-3(b)(2)-(6).

[36] Business interest income means the amount of interest includible in the gross income of the taxpayer for the taxable year that is properly allocable to a trade or business and does not include investment income (within the meaning of section 163(d)). Sec. 163(j)(6).

[37] Floor plan financing interest means interest paid or accrued on floor plan financing indebtedness. Floor plan financing indebtedness means indebtedness used to finance the acquisition of motor vehicles held for sale or lease to retail customers and secured by the inventory so acquired. A motor vehicle means a motor vehicle that is: (1) any self-propelled vehicle designed for transporting person or property on a public street, highway, or road; (2) a boat; or (3) farm machinery or equipment. Sec. 163(j)(9).

year.[38] Thus, other than floor plan financing interest, business interest expense in excess of business interest income is generally deductible only to the extent of 30 percent of adjusted taxable income.[39]

The limitation generally applies at the taxpayer level (although special rules apply in the case of partnerships, described below). In the case of a group of affiliated corporations that file a consolidated return, the limitation applies at the consolidated tax return filing level.[40] The amount of any business interest expense not allowed as a deduction for any taxable year is generally treated as business interest expense paid or accrued by the taxpayer in the succeeding taxable year. This business interest expense may be carried forward indefinitely.[41]

Application to passthrough entities

In general

In the case of a partnership, the section 163(j) interest limitation is generally applied at the partnership level.[42] A partner generally must apply 163(j) separately to any business interest expense it incurs. To prevent double counting, the business interest income and adjusted taxable income of each partner are generally determined without regard to the partner's distributive share of any items of income, gain, deduction, or loss of the partnership.[43] However, in cases in which the partnership has an excess amount of business interest income, an excess amount of adjusted taxable income, or both, section 163(j) partnership items generally may to support additional business interest expense deductions by the partnership's partners. Specifically, a partner's business interest deduction limitation is increased by the sum of the partner's distributive share

[38] These rules were modified for taxable years beginning in 2019 or 2020 to permit certain taxpayers to deduct more business interest than would be allowed under the rules described herein. See sec. 163(j)(10).

[39] The business interest limitation does not apply in certain cases. The business interest limitation does not apply to any taxpayer (other than a tax shelter prohibited from using the cash method under section 448(a)(3)) that meets the $25 million gross receipts test of section 448(c). At a taxpayer's election, (1) any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing, or brokerage trade or business (referred to as an "electing real property trade or business") or (2) any farming business or any business engaged in the trade or business of a specified agricultural or horticultural cooperative (referred to as an "electing farming business") is not treated as a trade or business for purposes of the limitation, with the result that the section 163(j) limitation does not apply to an electing real property trade or business or to an electing farming business. The limitation does not apply to certain regulated public utilities. See sec. 163(j)(7).

[40] See Treas. Reg. sec. 1.163(j)-4(d) (providing that a consolidated group has a single sec. 163(j) limitation and generally treating all members of the consolidated group as a single taxpayer for sec. 163(j) purposes).

[41] Sec. 163(j)(2). With respect to corporations, any carryforward of disallowed business interest of a corporation is an item taken into account in the case of certain corporate acquisitions described in section 381 and is subject to limitation under section 382. Secs. 381(c)(20) and 382(d)(3).

[42] Sec. 163(j)(4)(A)(i).

[43] Sec. 163(j)(4)(A)(ii)(I); Treas. Reg. sec. 1.163(j)-6(e)(1).

of the partnership's excess business interest income and 30 percent of the partner's distributive share of the partnership's excess taxable income.[44]

Similar rules apply to an S corporation and its shareholders.[45]

Carryforward rules for partnerships

Special rules for the carryforward of disallowed business interest expense apply only to partnerships and their partners.[46] In the case of a partnership, the general taxpayer-level carryforward rule does not apply. Instead, any business interest expense that is not allowed as a deduction to the partnership for the taxable year (referred to as "excess business interest expense") is allocated to the partners.[47] A partner may not deduct excess business interest expense in the year in which it is allocated to a partner. A partner may deduct its share of the partnership's excess business interest expense in any future year, but only in an amount that is based on the partner's distributive share of excess business interest income and excess taxable income of the partnership the activities of which gave rise to the disallowed business interest expense carryforward.[48] Any amount that is not allowed as a deduction generally continues to be carried forward.[49]

When excess business interest expense is allocated to a partner, the partner's basis in its partnership interest is reduced (but not below zero) by the amount of the allocation, even though the excess business interest expense does not give rise to a deduction in the year of the basis reduction.[50] The partner's deduction in a subsequent year for excess business interest expense does not reduce the partner's basis in its partnership interest. If the partner disposes of a partnership interest the basis of which has been reduced by an allocation of excess business interest expense, the partner's basis in the interest is increased immediately before the disposition by the amount by which the basis reduction exceeds any amount of excess business interest expense that has been treated as business interest expense paid or accrued by the partner as a result of an allocation of excess business interest income or excess taxable income by the same

[44] Sec. 163(j)(4)(A)(ii)(II); Treas. Reg. sec. 1.163(j)-6(e)(1).

[45] Sec. 163(j)(4)(D).

[46] Sec. 163(j)(4)(B).

[47] Sec. 163(j)(4)(B)(i)(II).

[48] Sec. 163(j)(4)(B)(ii)(I); Treas. Reg. sec. 1.163(j)-6(g)(2). See also Joint Committee on Taxation, *General Explanation of Public Law 115–97* (JCS–1–18), December 2018, pp. 175-178 (describing section 163(j)(4) as it was intended to work).

[49] Sec. 163(j)(4)(B)(ii)(II).

[50] Sec. 163(j)(4)(B)(iii)(I); Treas. Reg. sec. 1.163(j)-6(h)(2).

partnership.[51] This rule applies to both total and (on a proportionate basis) partial dispositions of a partnership interest.[52]

The special carryforward rules do not apply to S corporations or their shareholders.[53] Rather, any disallowed business interest expense is carried forward by the S corporation (as opposed to the shareholder) to the succeeding taxable year.[54]

Adjusted taxable income

For purposes of the section 163(j) interest limitation, adjusted taxable income means the taxable income of the taxpayer computed without regard to: (1) any item of income, gain, deduction, or loss that is not properly allocable to a trade or business; (2) any business interest or business interest income; (3) the amount of any net operating loss deduction; or (4) the amount of any deduction allowed under section 199A.

For taxable years beginning before January 1, 2022, adjusted taxable income also is computed without regard to any deduction allowable for depreciation, amortization, or depletion.[55] This definition of adjusted taxable income generally corresponds with the financial accounting concept of earnings before interest, taxes, depreciation, and amortization, or "EBITDA" (hereinafter referred to as the "EBITDA limitation").

For taxable years beginning after December 31, 2021, adjusted taxable income is computed with regard to deductions allowable for depreciation, amortization, or depletion. This definition of adjusted taxable income generally corresponds with the financial accounting concept of earnings before interest and taxes, or "EBIT" (hereinafter referred to as the "EBIT limitation").

Description of Proposal

The proposal temporarily extends the EBITDA limitation under section 163(j) to apply to taxable years beginning before January 1, 2026. Thus, under the proposal, adjusted taxable income is computed without regard to the deduction for depreciation, amortization, or depletion for taxable years beginning before January 1, 2026.

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[51] Sec. 163(j)(4)(B)(iii)(II); Treas. Reg. sec. 1.163(j)-6(h)(3). The special rule for dispositions also applies to transfers of a partnership interest (including by reason of death) in transactions in which gain is not recognized in whole or in part. *Id*. No deduction is allowed to the transferor or transferee for any disallowed business interest resulting in a basis increase under this rule. *Id*.

[52] *Ibid*.

[53] Sec. 163(j)(4)(D).

[54] Treas. Reg. sec. 1.163(j)-6(l)(5).

[55] Sec. 163(j)(8)(A). Treasury regulations provide other adjustments to the definition of adjusted taxable income. Sec. 163(j)(8)(B); Treas. Reg. sec. 1.163(j)-1(b)(1).

Effective Date

The proposal is generally effective for taxable years beginning after December 31, 2022.

The proposal provides an elective transition rule that allows a taxpayer to elect to apply the extension of the EBITDA limitation under section 163(j) to taxable years beginning after December 31, 2021.

3. Extension of 100 percent bonus depreciation

Present Law

A taxpayer generally must capitalize the cost of property used in a trade or business or held for the production of income and recover the cost over time through annual deductions for depreciation or amortization.[56] The period for depreciation or amortization generally begins when the asset is placed in service by the taxpayer.[57] Tangible property generally is depreciated under the modified accelerated cost recovery system ("MACRS"), which determines depreciation for different types of property based on an assigned applicable depreciation method, recovery period, and convention.[58]

Bonus depreciation

An additional first-year depreciation deduction equal to 100 percent of the adjusted basis of qualified property is allowed for property acquired after September 27, 2017,[59] and placed in service before January 1, 2023 (January 1, 2024, for certain property with a recovery period of at

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[56] See secs. 263(a) and 167. In general, only the tax owner of property (*i.e.*, the taxpayer with the benefits and burdens of ownership) is entitled to claim tax benefits such as cost recovery deductions with respect to the property. In addition, where property is not used exclusively in a taxpayer's business, the amount eligible for a deduction must be reduced by the amount related to personal use. See, *e.g.*, sec. 280A.

[57] See Treas. Reg. secs. 1.167(a)-10(b), -3, -14, and 1.197-2(f). See also Treas. Reg. sec. 1.167(a)-11(e)(1)(i).

[58] Sec. 168.

[59] For a description of section 168(k) as it applies to qualified property acquired before September 28, 2017, as well as a transition rule that permits a taxpayer to elect to apply a 50-percent allowance instead of the 100-percent allowance for a taxable year that includes September 28, 2017, see Joint Committee on Taxation, *General Explanation of Public Law No. 115-97* (JCS-1-18), December 2018, pp. 115-128. This document can be found on the Joint Committee on Taxation website at www.jct.gov.

least 10 years or certain transportation property,[60] and certain aircraft[61]).[62] The 100-percent allowance is phased down by 20 percentage points per calendar year for property acquired after September 27, 2017, and placed in service after December 31, 2022 (after December 31, 2023, for longer production period property and certain aircraft).[63] This additional first-year depreciation is commonly referred to as "bonus depreciation." The bonus depreciation applicable percentages for qualified property acquired and placed in service after September 27, 2017 (as well as for specified plants which are planted or grafted after September 27, 2017 (described below)) are as follows.

Placed in Service Year[64]	**Bonus Depreciation Applicable Percentage**	
	Qualified Property in General/Specified Plants	**Longer Production Period Property and Certain Aircraft**
Sept. 28, 2017 – Dec. 31, 2022	100 percent	100 percent
2023	80 percent	100 percent
2024	60 percent	80 percent
2025	40 percent	60 percent
2026	20 percent	40 percent
2027	None	20 percent[65]
2028 and thereafter	None	None

[60] Property qualifying for the extended placed-in-service date must have a recovery period of at least 10 years or constitute transportation property, have an estimated production period exceeding one year, and have a cost exceeding $1 million. Transportation property generally is defined as tangible personal property used in the trade or business of transporting persons or property. Sec. 168(k)(2)(B). Property defined in section 168(k)(2)(B) is hereinafter collectively referred to as "longer production period property."

[61] Certain aircraft which is not transportation property, other than for agricultural or firefighting uses, also qualifies for the extended placed-in-service date, if at the time of the contract for purchase, the purchaser made a nonrefundable deposit of the lesser of 10 percent of the cost or $100,000, and which has an estimated production period exceeding four months and a cost exceeding $200,000. Sec. 168(k)(2)(C).

[62] Sec. 168(k). The bonus depreciation deduction is generally subject to the rules regarding whether a cost must be capitalized under section 263A. For a description of section 263A, see Joint Committee on Taxation, *Present Law and Background Regarding the Federal Income Taxation of Small Businesses* (JCX-10-23), June 5, 2023, pp. 15-17. This document can be found on the Joint Committee on Taxation website at www.jct.gov.

[63] Sec. 168(k)(6)(A) and (B).

[64] In the case of specified plants, this is the year of planting or grafting, as discussed below.

[65] Twenty percent applies to the adjusted basis attributable to manufacture, construction, or production before January 1, 2027, and the remaining adjusted basis does not qualify for bonus depreciation. Twenty percent applies to the entire adjusted basis of certain aircraft described in section 168(k)(2)(C) and placed in service in 2027.

The bonus depreciation deduction is allowed for both regular tax and alternative minimum tax purposes, but is not allowed in computing earnings and profits.[66] The basis of the property and the depreciation allowances in the placed in service year and later years are adjusted to reflect the bonus depreciation deduction.[67] The amount of the bonus depreciation deduction is not affected by a short taxable year.[68] A taxpayer may elect out of bonus depreciation for any class of property for any taxable year.[69] An election out of bonus depreciation may be revoked only with the consent of the Secretary.[70]

Qualified property

Property qualifying for the bonus depreciation deduction must meet all of the following requirements:

- The property must be:

    1. property to which MACRS applies with an applicable recovery period of 20 years or less,

    2. computer software other than computer software required to be amortized under section 197,

    3. water utility property,[71] or

    4. a qualified film, television, or live theatrical production,[72] for which a deduction otherwise would have been allowable under section 181 without regard to the dollar limitation or termination of that section;[73]

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[66] Secs. 56A(c)(13), 168(k)(2)(G) and 312(k)(3).

[67] Sec. 168(k)(1).

[68] Treas. Reg. sec. 1.168(k)-2(e)(1)(ii).

[69] For the definition of a class of property, see Treas. Reg. sec. 1.168(k)-2(f)(1)(ii). Treas. Reg. sec. 1.168(k)-2(f)(1) provides the procedures for making an election not to deduct bonus depreciation.

[70] Sec. 168(k)(7). See also Treas. Reg. sec. 1.168(k)-2(f)(5).

[71] As defined in section 168(e)(5).

[72] As defined in section 181(d) and (e).

[73] Under section 181, a taxpayer may generally elect to deduct up to $15 million of the aggregate production costs ($20 million in the case of productions in certain areas) of any qualified film, television, or live theatrical production, commencing prior to January 1, 2026, in the year the costs are paid or incurred by the taxpayer, in lieu of capitalizing the costs and recovering them through depreciation allowances once the production is placed in service. The costs of the production in excess of the applicable dollar limitation are capitalized and recovered under the taxpayer's method of accounting for the recovery of such property once placed in service (*e.g.*, under section 168(k) if eligible). For a description of section 181, see Joint Committee on Taxation, *General*

- Either (i) the original use of the property must commence with the taxpayer,[74] or (ii) the property must not have been used by the taxpayer at any time before acquisition and the acquisition must meet the requirements of section 179(d)(2)(A)-(C) and (3);[75] and
- The property must be placed in service before January 1, 2027.[76]

The bonus depreciation deduction is not allowed for any property that is required to be depreciated under the alternative depreciation system ("ADS"),[77] or for listed property in respect of which the business use is not greater than 50 percent (as determined under section 280F(b)).[78]

In the case of longer production period property and certain aircraft, the property must also be acquired (or acquired pursuant to a written binding contract entered into) before January 1, 2027, and placed in service before January 1, 2028.[79] With respect to such property that is manufactured, constructed, or produced by the taxpayer for use by the taxpayer, the taxpayer must begin the manufacture, construction, or production of the property before

Explanation of Certain Tax Legislation Enacted in the 116th Congress (JCS-1-22), February 2022, pp. 480-482. This document can be found on the Joint Committee on Taxation website at www.jct.gov.

[74] See Treas. Reg. sec. 1.168(k)-2(b)(3)(ii).

[75] Thus, used property must be purchased in an arm's length transaction. The property must not be acquired (i) from a member of the taxpayer's family, including a spouse, ancestors, and lineal descendants, or from another related entity as defined in section 267, (ii) from a person who controls, is controlled by, or is under common control with, the taxpayer, nor (iii) in a nontaxable exchange such as a reorganization. The property must not be received as a gift or from a decedent. In the case of trade-ins, like-kind exchanges, or involuntary conversions, bonus depreciation applies only to any money paid in addition to the traded-in property or in excess of the adjusted basis of the replaced property. See sec. 179(d)(2)(A)-(C) and (3); Treas. Reg. secs. 1.168(k)-2(b)(3)(iii) and 1.179-4(c) and (d). A special rule applies in the case of a syndication transaction. See sec. 168(k)(2)(E)(iii); Treas. Reg. sec. 1.168(k)-2(b)(3)(vi).

[76] A qualified production is considered placed in service, and thus eligible for the bonus depreciation allowance, at the time of initial release, broadcast, or live staged performance. Sec. 168(k)(2)(H); Treas. Reg. sec. 1.168(k)-2(b)(4)(iii).

[77] See sec. 168(g) (determined without regard to an election to use ADS under section 168(g)(7)). See also Treas. Reg. sec. 1.168(k)-2(b)(2)(ii)(B). ADS is required to be used for tangible property used predominantly outside the United States, certain tax-exempt use property, tax-exempt bond financed property, certain imported property covered by an Executive order, and certain property held by either a real property trade or business or a farming business electing out of the business interest limitation under section 163(j). In addition, an election to use ADS is available to taxpayers for any class of property for any taxable year. Under ADS, all property is depreciated using the straight line method and the applicable convention over recovery periods which generally are equal to the class life of the property, with certain exceptions.

[78] Sec. 168(k)(2)(D). For a description of section 280F, see Joint Committee on Taxation, *General Explanation of Public Law No. 115-97* (JCS-1-18), December 2018, pp. 128-130. This document can be found on the Joint Committee on Taxation website at www.jct.gov.

[79] Secs. 168(k)(2)(B)(i)(II) and (III).

January 1, 2027.[80] Additionally, a special rule limits the amount of costs of longer production period property eligible for bonus depreciation. With respect to this property, only the portion of the basis that is properly attributable to the costs incurred before January 1, 2027 ("progress expenditures") is eligible for the bonus depreciation deduction.[81]

Exception for certain businesses not subject to the limitation on interest expense

Qualified property eligible for the bonus depreciation deduction does not include any property which is primarily used in the trade or business of the furnishing or sale of (1) electrical energy, water, or sewage disposal services, (2) gas or steam through a local distribution system, or (3) transportation of gas or steam by pipeline, if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision thereof, by any agency or instrumentality of the United States, by a public service or public utility commission or other similar body of any State or political subdivision thereof, or by the governing or ratemaking body of an electric cooperative.[82]

Qualified property also does not include any property used in a trade or business that has had floor plan financing indebtedness[83] if the floor plan financing interest related to the indebtedness was taken into account to increase the taxpayer's section 163(j) interest limitation under section 163(j)(1)(C).[84]

Special rules

Passenger automobiles

The limitation under section 280F on the amount of depreciation deductions allowed with respect to certain passenger automobiles is increased in the first year by $8,000 for automobiles that qualify for (and for which the taxpayer does not elect out of) bonus depreciation.[85] While the underlying section 280F limitation is indexed for inflation,[86] the section 280F increase amount is not indexed for inflation.

[80] Sec. 168(k)(2)(E)(i).

[81] Sec. 168(k)(2)(B)(ii). See also Treas. Reg. sec. 1.168(k)-2(e)(1)(iii).

[82] Secs. 168(k)(9)(A) and 163(j)(7)(A)(iv). See also Treas. Reg. sec. 1.168(k)-2(b)(2)(ii)(F).

[83] As defined in section 163(j)(9).

[84] Sec. 168(k)(9)(B). See also Treas. Reg. sec. 1.168(k)-2(b)(2)(ii)(G).

[85] Sec. 168(k)(2)(F). See Rev. Proc. 2019-13, 2019-09 I.R.B. 744, for a safe harbor method of accounting for determining depreciation deductions for passenger automobiles that qualify for bonus depreciation and are subject to the section 280F depreciation limitations.

[86] Sec. 280F(d)(7). See Rev. Proc. 2023-14, 2023-6 I.R.B. 466, for the section 280F limitations that apply to passenger automobiles placed in service during calendar year 2023.

Certain plants bearing fruits and nuts

A farming business[87] is allowed a special election in respect of certain costs of planting or grafting certain plants bearing fruits and nuts.[88] Under the election, the applicable percentage of the adjusted basis of a specified plant which is planted or grafted after September 27, 2017, and before January 1, 2027, is deductible for regular tax and AMT purposes in the year planted or grafted by the taxpayer in the ordinary course of the taxpayer's farming business (rather than in the year the specified plant is placed in service by the taxpayer[89]), and the adjusted basis is reduced by the amount of the deduction.[90] The applicable percentage is 100 percent for specified plants planted or grafted after September 27, 2017, and before January 1, 2023, and then is phased down by 20 percentage points per calendar year beginning in 2023.[91] Thus, the applicable percentage is 80 percent for 2023, 60 percent for 2024, 40 percent for 2025, and 20 percent for 2026.

A specified plant is (i) any tree or vine that bears fruits or nuts, and (ii) any other plant that will have more than one crop or yield of fruits or nuts and which generally has a pre-productive period of more than two years from the time of planting or grafting to the time it begins bearing a marketable crop or yield of fruits or nuts.[92] A specified plant does not include any property that is planted or grafted outside of the United States. If the election is made with respect to any specified plant, the plant is not treated as qualified property eligible for bonus depreciation in the subsequent taxable year in which it is placed in service.[93] Once made, the election is revocable only with the consent of the Secretary.[94]

[87] For this purpose, the term ''farming business'' means the trade or business of farming, including the trade or business of operating a nursery or sod farm, the raising or harvesting of trees bearing fruit, nuts, or other crops, or ornamental trees (other than evergreen trees that are more than six years old at the time they are severed from their roots). Sec. 263A(e)(4).

[88] Sec. 168(k)(5). Treas. Reg. sec. 1.168(k)-2(f)(2) provides the procedures for making a section 168(k)(5) election.

[89] In the case of any tree or vine bearing fruits or nuts, the placed in service date generally does not occur until the tree or vine first reaches an income-producing stage. See Treas. Reg. sec. 1.46-3(d)(2). See also Rev. Rul. 80-25, 1980-1 C.B. 65; and Rev. Rul. 69-249, 1969-1 C.B. 31.

[90] Any amount deducted under this election is not subject to capitalization under section 263A. Sec. 263A(c)(7).

[91] Sec. 168(k)(6)(C).

[92] Sec. 168(k)(5)(B).

[93] Sec. 168(k)(5)(D). However, when placed in service, the remaining adjusted basis of the specified plant may be eligible for expensing under section 179.

[94] Sec. 168(k)(5)(C). See also Treas. Reg. sec. 1.168(k)-2(f)(5).

Long-term contracts

In general, in the case of a long-term contract, the taxable income from the contract is determined under the percentage-of-completion method.[95] Solely for purposes of determining the percentage of completion under section 460(b)(1)(A), the cost of qualified property with a MACRS recovery period of seven years or less is taken into account as a cost allocated to the contract as if bonus depreciation had not been enacted for property placed in service before January 1, 2027 (January 1, 2028, in the case of longer production period property).[96]

Description of Proposal

The proposal extends the allowance of a 100-percent bonus depreciation deduction for property placed in service after December 31, 2022, and before January 1, 2026 (January 1, 2027, for longer production period property and certain aircraft), as well as for specified plants planted or grafted after December 31, 2022, and before January 1, 2026. The proposal retains the present law 20-percent bonus depreciation deduction that is allowed for property placed in service after December 31, 2025, and before January 1, 2027 (after December 31, 2026, and before January 1, 2028, for longer production period property and certain aircraft), as well as for specified plants planted or grafted after December 31, 2025, and before January 1, 2027.

Under the proposal, the bonus depreciation percentage rates are as follows.

Placed in Service Calendar Year[97]	Bonus Depreciation Applicable Percentage	
	Qualified Property in General/Specified Plants	Longer Production Period Property and Certain Aircraft
2023 - 2025	100 percent	100 percent
2026	20 percent	100 percent
2027	None	20 percent[98]
2028 and thereafter	None	None

Effective Date

The proposal applies to property placed in service after December 31, 2022, and to specified plants planted or grafted after that date.

[95] Sec. 460.

[96] Sec. 460(c)(6).

[97] In the case of specified plants, this is the year of planting or grafting.

[98] Twenty percent applies to the adjusted basis attributable to manufacture, construction, or production before January 1, 2027, and the remaining adjusted basis does not qualify for bonus depreciation. Twenty percent applies to the entire adjusted basis of certain aircraft described in section 168(k)(2)(C) and placed in service in 2027.

B. Supply Chain Security

1. Termination of Hazardous Substance Superfund financing rate

Present Law

The Superfund program addresses cleanup activity of hazardous substances at contaminated sites. Before January 1, 1996, an excise tax on domestic crude oil and imported petroleum products (the "Hazardous Substance Superfund financing rate") was imposed at the rate of 9.7 cents per barrel. The Hazardous Substance Superfund financing rate ceased to apply after December 31, 1995.

As of January 1, 2023, the Inflation Reduction Act reinstated the Hazardous Substance Superfund financing rate at an increased rate of 16.4 cents per barrel.[99] The tax is annually indexed for inflation beginning with calendar year 2023. The Inflation Reduction Act also authorized borrowing for the Hazardous Substance Superfund Trust Fund through repayable advances from the General Fund until the end of 2032. The full amount borrowed plus interest is required to be repaid to the General Fund by December 31, 2032.

Description of Proposal

The proposal repeals the Hazardous Substance Superfund financing rate. The proposal also terminates the authority of the Hazardous Substance Superfund Trust Fund to borrow from the General Fund. All outstanding repayable advances are to be repaid as soon as practicable after the date of enactment.

Effective Date

The proposal terminating the financing rate is effective on January 1, 2023. The termination of borrowing authority is effective on the date of enactment.

2. Election to determine foreign income taxes paid or accrued to certain Western Hemisphere countries without regard to certain regulations

Present Law

In general

Subject to certain limitations, U.S. citizens, resident individuals, and domestic corporations are allowed a credit for foreign income taxes they pay. In addition, a domestic

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[99] Sec. 4611(c)(2)(A). Section 4611(b) imposes a tax on certain uses or exports of domestic crude oil. This tax, in turn, partially funds the Oil Spill Liability Trust Fund and the Hazardous Substance Superfund Trust Fund at specified rates. The Fifth Circuit in *Trafigura Trading LLC v. United States*, 29 F.4th 286 (5th Cir. 2022), held that the tax on exports is unconstitutional. On March 6, 2023, the IRS announced it will no longer seek to collect the tax imposed by section 4611(b)(1)(A) on domestic crude oil that is exported. Internal Revenue Service, *Action on Decision: Trafigura Trading LLC v. United States*, 29 F.4th 286 (5th Cir. 2022), IRB 2023-10 (March 6, 2023) available at https://www.irs.gov/pub/irs-aod/aod-2023-01.pdf.

corporation is allowed a credit for foreign income taxes paid or accrued by a controlled foreign corporation ("CFC") with respect to income included by the domestic corporation as subpart F income or as global intangible low-taxed income ("GILTI"); the taxes paid by the CFC are deemed to have been paid by the domestic corporation for purposes of calculating the foreign tax credit.[100]

The foreign tax credit generally is limited to a taxpayer's U.S. tax liability on its foreign-source taxable income. The limit is intended to ensure that the credit mitigates double taxation of foreign-source income without offsetting U.S. tax on U.S.-source income.[101] The limit for each year is computed by multiplying a taxpayer's total pre-credit U.S. tax liability for the year by the ratio of the taxpayer's foreign-source taxable income for the year to the taxpayer's total taxable income for the year. If the total amount of foreign income taxes paid and deemed paid for the year exceeds the taxpayer's foreign tax credit limitation for the year, the taxpayer may (in certain cases) carry back the excess foreign taxes to the previous year or carry forward the excess to one of the 10 succeeding taxable years (and for purposes of applying the foreign tax credit limitation, the foreign income taxes generally are treated as paid in the year to which they are carried).[102] No carryback or carryover of excess foreign tax credits are allowed in the GILTI foreign tax credit limitation category.

Deemed-paid taxes

For any subpart F income included in the gross income of a domestic corporation, the corporation is deemed to have paid foreign taxes equal to the aggregate foreign income taxes paid or accrued with respect to such income by the CFC.

For any GILTI included in the gross income of a domestic corporation, the corporation is deemed to have paid foreign taxes equal to 80 percent of the corporation's inclusion percentage multiplied by the aggregate foreign income taxes paid or accrued with respect to tested income (but not tested loss) by each CFC with respect to which the domestic corporation is a U.S. shareholder.[103]

Allocation and apportionment of expenses

To determine its foreign tax credit limitation, a taxpayer must first determine its taxable income from foreign sources by allocating and apportioning deductions between U.S.-source gross income and foreign-source gross income in each limitation category. In general,

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[100] Secs. 901, 903, and 960; see also secs. 1291(g) and 1293(f) (providing, in the passive foreign investment company ("PFIC") context, coordination with foreign tax credit rules).

[101] Secs. 901 and 904.

[102] Sec. 904(c).

[103] Sec. 960(d)(1). The inclusion percentage means, with respect to any domestic corporation, the ratio of such corporation's GILTI divided by the aggregate amount of its pro rata share of the tested income (but not tested loss) of each CFC with respect to which it is a U.S. shareholder. Tested foreign income taxes do not include any foreign income tax paid or accrued by a CFC that is properly attributable to the CFC's tested loss (if any).

deductions are allocated and apportioned to the gross income to which the deductions factually relate.[104] However, subject to certain exceptions, deductions for interest expense, stewardship expenses, and research and experimental expenditures are apportioned based on certain ratios.[105] For example, interest expense is apportioned based on the ratio of the corporation's foreign or domestic (as applicable) assets to its worldwide assets.[106]

Limitation categories ("baskets")

The foreign tax credit limitation is applied separately to GILTI, foreign branch income,[107] passive category income, and general category income.[108] For this purpose, GILTI and foreign branch income include only income that is not passive category income. Passive category income means any income which is of a kind which would be foreign personal holding company income (as defined in section 954(c)), such as portfolio interest and dividend income.[109] All other income is in the general category. Passive income is treated as general category income if earned by a qualifying financial services entity or if highly taxed (*i.e.*, if the foreign tax rate is determined to exceed the highest tax rate specified in section 1 or 11, as applicable).[110] Dividends (and subpart F inclusions), interest, rents, and royalties received by a U.S. shareholder from a CFC are assigned to the passive category to the extent the payments or inclusions are allocable to passive category income of the CFC.[111] Dividends received by a 10-percent corporate shareholder of a foreign corporation that is not a CFC are also categorized on a look-through basis.[112]

Foreign income taxes are allocated and apportioned to a limitation category or "grouping" in a three-step process that: (1) assigns items of foreign gross income to groupings, (2) allocates and apportions deductions allowed under foreign law to foreign gross income in

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[104] Treas. Reg. sec. 1.861-8(b) and (c) and Temp. Treas. Reg. sec. 1.861-8T(c).

[105] Treas. Reg. sec. 1.861-8 through Temp. Treas. Reg. sec. 1.861-14T and Treas. Reg. sec. 1.861-17 set forth detailed rules relating to the allocation and apportionment of expenses.

[106] Sec. 864(e)(2).

[107] Foreign branch income is defined for this purpose as "the business profits of [the U.S. taxpayer] which are attributable to 1 or more qualified business units (as defined in section 989(a)) in 1 or more foreign countries." Sec. 904(d)(2)(J).

[108] Sec. 904(d); Treas. Reg. sec. 1.904-4(a). The foreign tax credit limitation is also applied separately to certain additional separate categories. See Treas. Reg. sec. 1.904-4(m).

[109] Sec. 904(d)(2)(A)(i) and (B).

[110] Sec. 904(d)(2)(B).

[111] Sec. 904(d)(3).

[112] Sec. 904(d)(4).

those groupings, and (3) allocates and apportions foreign income tax by reference to the foreign taxable income in those groupings.[113]

Special rules apply to the allocation of income and losses from foreign and U.S. sources within each category of income.[114] Foreign losses from one category first offset foreign-source income from other categories. Any remaining overall foreign loss offsets U.S.-source income. The same principle applies to losses from U.S. sources. In subsequent years, any losses deducted against another category or source of income are recaptured. That is, an equal amount of income from the same category or source that generated a loss in a prior year is recharacterized as income from the other category or source against which the loss was deducted. Foreign-source income in a particular category may be fully recharacterized as income in another category, whereas only up to 50 percent of income from one source in any subsequent year may be recharacterized as income from the other source.

A matching rule intended to prevent the separation of creditable foreign taxes from the associated foreign income may delay (in some cases, indefinitely) the creditability of some foreign tax. Under this rule, a foreign tax generally is not taken into account for U.S. tax purposes, and thus no foreign tax credit is available with respect to that foreign tax, until the taxable year in which the related income is taken into account for U.S. tax purposes.[115]

Recent Treasury regulations

On January 4, 2022, the Treasury Department published in the Federal Register final regulations (the "FTC Final Regulations") relating to the foreign tax credit, including modifications to the requirements for determining whether a foreign levy qualifies as a foreign income tax for purposes of section 901 or a tax in lieu of an income tax for purposes of section 903.[116]

The FTC Final Regulations also include rules for allocating and apportioning foreign income taxes with respect to certain remittances made by a taxable unit, which includes an entity that is disregarded for U.S. federal income tax purposes (such entity, a "disregarded entity payor"), to another taxable unit, which includes its regarded CFC owner.[117]

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[113] Treas. Reg. sec. 1.861-20(c).

[114] Sec. 904(f) and (g).

[115] Sec. 909.

[116] T.D. 9959, 87 Fed. Reg. 276 (Jan. 4, 2022); see also Treas. Reg. secs. 1.901-2 and 1.903-1.

[117] Treas. Reg. sec. 1.861-20(d)(3)(v)(A). In the case of a taxpayer that is a foreign corporation, the term taxable unit is defined to mean a tested unit, as defined in Treas. Reg. sec. 1.951A-2(c)(7)(iv)(A) to include a CFC, an interest held directly or indirectly by a CFC in a pass-through entity that is a tax resident of a foreign country or that is not treated as fiscally transparent for foreign tax purposes, and a branch the activities of which are carried on directly or indirectly by a CFC.

These rules assign the item of foreign gross income that arises from such remittance to a category out of which the disregarded entity payor made the remittance, which is considered to be made ratably out of the accumulated after-tax income of the payor.[118] Accumulated after-tax income is in turn deemed to have arisen in the categories in the proportions in which the tax book value of the assets of the disregarded entity payor are assigned for purposes of apportioning interest expense under the asset method in Treasury regulation section 1.861-9 in the taxable year in which the remittance is made (such assignment, "the tax book value method").[119] Foreign income taxes withheld on such remittance are allocated and apportioned to a category based on the relative amounts of foreign taxable income in each category.[120]

Description of Proposal

The proposal allows taxpayers two separate elections with respect to the application of certain Treasury regulations relating to the determination of foreign income taxes paid or accrued to certain Western Hemisphere countries. The first election relates to the determination of whether any Western Hemisphere tax paid or accrued by a taxpayer is an income, war profits, or excess profits tax. The second election relates to the allocation and apportionment of foreign income taxes relating to disregarded payments from certain disregarded entities. Each election is described below.

Election to defer the application of a specified regulation

The first election under the proposal provides that a taxpayer may make an election to determine whether any Western Hemisphere tax paid or accrued by the taxpayer is an income, war profits, or excess profits tax for purposes of any provision of the Code without regard to any specified regulation. The election shall be made at such time and in such manner as the Secretary may provide.

Western Hemisphere tax includes any tax which is paid or accrued for a taxable year which is in the applicable period to (A) any possession of the United States, or (B) any foreign country (other than Cuba and Venezuela) which is located in North, Central, or South America (including the West Indies).

Separate election with respect to allocation and apportionment of foreign income taxes relating to disregarded payments from certain disregarded entities

The second, separate election under the proposal provides that the owner of any specified disregarded entity may separately elect, for purposes of allocating and apportioning any foreign income taxes paid or accrued by reason of any remittance made by such entity to such owner during the applicable period, to assign any items of foreign gross income included by reason of the receipt of such remittance to a category based on current and accumulated earnings and

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[118] Treas. Reg. sec. 1.861-20(d)(3)(v)(C)(1)(i).

[119] *Ibid.*

[120] Treas. Reg. sec. 1.861-20(f).

profits of such entity (instead of being assigned on the basis of the tax book value method described in a specified regulation).[121] The election shall be made at such time and in such manner as the Secretary may provide. Foreign income taxes are defined in section 986(a)(4) and determined after the application of the election to defer the application of a specified regulation (as discussed above).

The term "specified disregarded entity" means any entity (including any trade or business) if (i) such entity is disregarded as an entity separate from its owner for purposes of applying Chapter 1 of the Code (or is a trade or business); (ii) such entity is created or organized in (A) any possession of the United States, or (B) any foreign country identified above for purposes of determining a Western Hemisphere tax; (iii) at all times after December 31, 2019 (or, if later, the date on which such entity is created or organized), substantially all of the income of the entity is derived from trades or businesses conducted in the possession or country referred to in (A) or (B); and (iv) at all times after the date on which the entity is created or organized, the entity maintains separate books and records. The definition of specified disregarded entity is intended to include a branch as defined under 1.951A-2(c)(7)(iv)(A)(3) of the Treasury regulations.

Taxpayer election, specified regulation, and applicable period

In the case of any tax paid or accrued by a CFC and deemed to have been paid by a U.S. shareholder under section 960, any election shall be made by such CFC and shall be binding on all U.S. shareholders of such CFC, and the applicable period shall be determined with respect to the taxable years of such CFC rather than the U.S. shareholder.

Specified regulation is defined to include Treasury regulations relating to "Guidance Related to the Foreign Tax Credit; Clarification of Foreign-Derived Intangible Income";[122] proposed Treasury regulations relating to "Guidance Related to the Foreign Tax Credit";[123] and any regulation or other guidance published after January 4, 2022, to the extent that the regulation or other guidance is substantially similar to, or predicated upon, any portion of the aforementioned regulations. In the case of any regulation or other guidance which is published after the date of the enactment of this Act and any portion of which is described immediately above, the Secretary shall identify such regulation or guidance (or portion thereof) as not applying with respect to taxpayers which have elected the application of either election described above, as the case may be. For purposes of the proposal, Secretary means the Secretary of the Treasury or the Secretary's delegate.

Applicable period means (1) with respect to the first election described above, all taxable years beginning after December 31, 2021, and before January 1, 2027, and (2) with respect to the second election described above, all taxable years beginning after December 31, 2019, and

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[121] The term remittance is intended to have the same meaning as defined in Treas. Reg. sec. 1.861-20(d)(3)(v)(E)(8).

[122] 87 Fed. Reg. 276; January 4, 2022.

[123] 87 Fed. Reg. 71271; November 22, 2022

before January 1, 2027. The determination of the taxable year for which any tax is paid or accrued, for purposes of determining whether a foreign tax is paid or accrued for a taxable year which is in the applicable period, shall be made without regard to any taxable year with respect to which such tax is deemed to have been paid under section 904(c) or 960. [124]

Effective Date

The proposal is effective on the date of enactment.

3. Imposition of tax on the acquisition of United States agricultural interests by disqualified persons

Present Law

In general

A foreign person is subject to U.S. net-basis taxation on income effectively connected with the conduct of a trade or business within the United States ("ECI"). ECI generally is subject to tax on a net basis under the same U.S. tax rules and rates that apply to business income earned by U.S. persons.[125]

FIRPTA[126]

A foreign person's gain or loss from the disposition of a U.S. real property interest ("USRPI") is treated as ECI.[127] A foreign person subject to tax on such a disposition is required to file a U.S. tax return. In the case of a foreign corporation, the gain from the disposition of a USRPI may also be subject to the branch profits tax at a 30-percent rate (or lower treaty rate).

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[124] Several Code sections provide that a foreign tax is deemed to have been paid in a year other than the year in which the tax is paid or accrued. The domestic corporation is deemed to have paid the foreign income taxes of the CFC in the domestic corporation's tax year that includes the date on which the CFC's tax year ends. See sec. 905(a) (providing that the credit for foreign taxes may be taken in the year in which the foreign income taxes accrued, which is a year in which all events have occurred which establish the fact of liability, generally the end of the foreign tax year). See also sec. 960 and Treas. Reg. sec. 1.960-1(a). Foreign taxes that give rise to excess foreign tax credits are deemed to have been paid in the first preceding taxable year and in any of the first 10 succeeding taxable years, in that order. See sec. 904(c). For purposes of the applicable period, these deemed tax years are disregarded and the tax year of the foreign corporation is the year that is taken into account.

[125] Secs. 871(b) and 882.

[126] Sections 897 and 1445 were enacted in the Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA"), part of Public Law 96-499.

[127] Sec. 897(a).

The payor of income that FIRPTA treats as ECI is generally required to withhold U.S. tax from the payment.[128] The foreign person may request a refund with its U.S. tax return, if appropriate, based on that person's overall tax liability for the taxable year.

USRPI generally means an interest in real property (including an interest in a mine, well, or other natural deposit) located in the United States or the Virgin Islands, and any interest (other than an interest solely as a creditor) in any domestic corporation unless the taxpayer establishes (at such time and in such manner as the Secretary by regulations prescribes) that the corporation was at no time a United States real property holding corporation ("USRPHC") during the shorter of (1) the period after June 18, 1980, during which the taxpayer held the interest, or (2) the five-year period ending on the date of the disposition of the interest (the "USRPHC test").[129] A USRPHC is any corporation if (A) the fair market value of its USRPIs equals or exceeds 50 percent of (B) the fair market value of (i) its USRPIs, (ii) its interests in real property located outside the United States, plus (iii) any other of its assets which are used or held for use in a trade or business.[130]

If any class of stock of a corporation is regularly traded on an established securities market, stock of that class is treated as a USRPI only in the case of a person who, at some time during the shorter of the periods described above, held more than five percent of that class of stock (the "publicly traded test").[131] For real estate investment trusts ("REITs"), the threshold is 10 percent instead of five percent.[132]

Penalties for failure to file certain returns

Standard penalties apply for failure to file certain information returns or payee statements.[133] The penalty is imposed with respect to each return or statement with respect to which a failure occurs and varies depending on whether the error is timely remedied or whether the failure was due to intentional disregard of rules and regulations. The penalties may be

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[128] Sec. 1445 and the regulations thereunder.

[129] Sec. 897(c)(1)(A).

[130] Sec. 897(c)(2).

[131] Sec. 897(c)(3).

[132] Sec. 897(k)(1)(A).

[133] These penalties are generally assessable penalties for failure to comply, or to correct errors timely, such as failure to file correct information returns (sec. 6721), failure to furnish correct payee statements (sec. 6722), and failure to comply with other information reporting requirements (secs. 6723 and 6725). Whether a statement or return is within the scope of these penalties is determined by whether the statement or return is identified in section 6724.

waived under certain circumstances, including a showing of reasonable cause. The penalty amounts are indexed for inflation.[134]

Description of Proposal

In general

The proposal creates a new tax under a new section 5000E.

If a disqualified person acquires a U.S. agricultural interest ("USAI"), the disqualified person must pay a tax equal to 60 percent of the amount paid for the USAI.

For this purpose, USAI has the meaning which would be given USRPI by section 897(c) if that provision applied generally with respect only to interests in agricultural land. In addition, the USRPHC test and the publicly traded test do not apply by looking backward; instead, each test is applied only at the time of acquisition. An interest in a domestic corporation is treated as a USAI only if the taxpayer fails to establish that the corporation was not a USRPHC at the time of acquisition. With respect to any class of stock of a corporation regularly traded on an establish securities market, the stock is treated as a USAI only if held by a person that holds more than five percent of the class of stock (10 percent in the case of a REIT) at the time of acquisition.

For this purpose, agricultural land means any land used for agricultural, forestry, or timber production purposes, and land used for livestock production purposes, as determined by the Secretary of Agriculture under regulations to be prescribed by the Secretary of Agriculture.

Disqualified persons

For purposes of the proposal, disqualified person means: (A) any citizen of a country of concern (other than a citizen, or lawful permanent resident, of the United States and other than an individual domiciled in Taiwan possessing a valid identification card or number issued by the government of Taiwan); (B) any entity domiciled in a country of concern (other than an entity domiciled in Taiwan); (C) any country of concern and any political subdivision, agency, or instrumentality thereof; and (D) any entity (other than a specified publicly traded corporation or an entity controlled by specified publicly traded corporations) if persons described in subparagraph (A), (B), or (C) (in the aggregate) 10-percent control the entity.[135]

For this purpose, 10-percent control means control as defined under section 954(d)(3) (generally, among other rules, ownership of more than 50 percent of the stock of a corporation by vote or value), determined by treating the rules of section 958(a)(2) as applying to both

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[134] For information returns or statements due in calendar year 2023, the applicable rates are $50 per statement or return if no more than 30 days late; $110 if more than 30 days late but filed on or before August 1; $290 if filed after August 1 or not filed; and $580 if the failure to file is due to intentional disregard of rules or regulations.

[135] For this purpose, control has the meaning given such term under section 954(d)(3), determined by treating the rules of section 958(a)(2) as applying to both foreign and domestic corporations, partnerships, trusts, and estates.

foreign and domestic corporations, partnerships, trusts, and entities, and determined by substituting "10 percent" for "50 percent" in both places it appears in section 954(d)(3).

For this purpose, country of concern means any country the government of which is engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or the security and safety of U.S. persons, including the People's Republic of China, the Russian Federation, Iran, North Korea, Cuba, and the regime of Nicolas Maduro in Venezuela.

Also for this purpose, specified publicly traded corporation means any corporation if (1) the stock of the corporation is regularly traded on an established securities market located in the United States, and (2) specified disqualified persons do not (in the aggregate) control the corporation. Specified disqualified persons are, with respect to any corporation, any person described in (A), (B), or (C) above and has 10-percent control of the corporation.

Prorated tax on acquisitions by certain entities

In the case of any entity (other than a specified publicly traded corporation or an entity controlled by specified publicly traded corporations) controlled more than 10 percent but less than 50 percent by disqualified persons described in (A), (B), or (C) above, the tax is prorated and only the applicable percentage of the 60-percent tax is due. Applicable percentage means the highest percentage which could be substituted for "50 percent" in both places it appears in section 954(d)(3) without causing disqualified persons described in (A), (B), or (C) above (in the aggregate) to control (determined by taking into account the substitution) the entity.

Reporting

Under the proposal, the required reporting person, with respect to any acquisition of any USAI by a presumptively disqualified person to which the proposed tax described above applies, must make a return at the time as the Secretary may provide setting forth (1) the name, address, and TIN of the presumptively disqualified person, (2) a description of the USAI (including the street address, if applicable), and (3) the amount paid for the USAI.

Every person required to make a return described above must furnish, at the time as the Secretary may provide, to each presumptively disqualified person whose name is required to be set forth in the return a written statement showing (1) the name and address of the information contact of the required reporting person, and (2) the return information described above which relates to the disqualified person.

For this purpose, required reporting person means, with respect to any acquisition of any USAI, (1) the person (including any attorney or title company) responsible for closing the transaction in which the USAI is acquired, or (2) if no one is responsible for closing the transaction (or in such other cases as the Secretary may provide), the transferor of the USAI.

Also for this purpose, presumptively disqualified person means any person unless the person furnishes to the required reporting person an affidavit by the person stating, under penalty of perjury, that the person is not a disqualified person (as defined above).

If the required reporting person, with respect to any acquisition of any USAI, has not (as of the time of the acquisition) been furnished the affidavit described above by the acquirer of the interest, the required reporting person must furnish to the acquirer (at such time) a written statement informing the acquirer of the required reporting person's obligation to make the return described above with respect to the acquisition and including such other information as the Secretary may require.

The standard penalties apply for failure to file the return and the two written statements described above.

Effective Date

The proposal applies to acquisitions after the date of enactment.

C. Repeal of Special Interest Tax Provisions

1. Repeal of clean electricity production credit

Present Law

Renewable electricity production credit

In general

An income tax credit is available for electricity produced from qualified energy resources at qualified facilities (the "renewable electricity production credit") and sold to an unrelated person.[136] Qualified energy resources comprise wind, solar, closed-loop biomass, open-loop biomass, geothermal energy, municipal solid waste, qualified hydropower production, and marine and hydrokinetic renewable energy. Qualified facilities are, generally, facilities that generate electricity using qualified energy resources.

The base credit rate is 0.3 cents per kilowatt-hour of electricity produced. The credit rate is increased to 1.5 cents per kilowatt-hour for facilities with a maximum output of less than one megawatt and for larger facilities that meet certain wage and apprenticeship requirements. These credit rates are adjusted annually for inflation using 1992 as the base year and rounded to the nearest twentieth of a cent. In 2022, for facilities placed in service after December 31, 2021, the inflation adjustment factor is 1.7593, making the base credit rate 0.55 cents per kilowatt-hour and the enhanced credit rate 2.75 cents per kilowatt-hour.[137]

The credit expires for facilities the construction of which begins after December 31, 2024.

Election to claim energy credit in lieu of renewable electricity production credit

A taxpayer may make an irrevocable election to have certain property which is part of a qualified renewable electricity production facility treated as energy property eligible for an investment credit under section 48. The base credit rate is 6 percent. This rate is increased to 30 percent if the wage and apprenticeship requirements are met. For purposes of the investment credit, qualified facilities are facilities otherwise eligible for the renewable electricity production credit with respect to which no credit under section 45 has been allowed. A taxpayer electing to treat a facility as energy property may not claim the renewable electricity production credit. The eligible basis for the investment credit for taxpayers making this election is the basis of the depreciable (or amortizable) property that is part of a facility capable of generating electricity eligible for the renewable electricity production credit.

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[136] Sec. 45. A number of changes to this Code section were made in August 2022 by Public Law 117-169 (the Inflation Reduction Act). This summary reflects those changes. Different rules continue to apply for certain older renewable electricity production facilities.

[137] Announcement 2022-23, 2022-48 I.R.B. 499, November 28, 2022.

Prevailing wages

A taxpayer can meet the prevailing wage requirements if it ensures that prevailing wages are paid to any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction of a qualified facility, and for the repair of such facility during the 10-year credit-eligible production period. Prevailing wages are wages paid at rates not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality as determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code.

A taxpayer that fails to pay prevailing wages may bring a facility into compliance with the prevailing wage requirement, and thus remain eligible for the increased credit rate, by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. This amount is multiplied by three in the case of intentional disregard of the requirements. In addition, such taxpayer must pay a penalty to the IRS equal to $5,000 per affected worker. The penalty is increased to $10,000 per affected worker in the case of intentional disregard of the requirements. The deficiency procedures do not apply with respect to the assessment or collection of these penalties, and payment must be made within 180 days of the penalty's determination.

Apprenticeship requirements

To be eligible for the enhanced credit, a taxpayer must also ensure that certain qualified apprenticeship requirements are satisfied by ensuring that not less than 15 percent (10 percent for projects the construction of which begins before calendar year 2023 and 12.5 percent for projects beginning in calendar year 2023) of the total labor hours of construction, alteration, or repair work on any applicable project are performed by qualified apprentices (including such work performed by any contractor or subcontractor). Labor hours are the total number of hours devoted to construction, alteration, or repair work by employees of the contractor or subcontractor and excludes certain hours worked by managers, owners, or certain other bona fide executives, administrators, or professionals. A qualified apprentice is an employee of the contractor or subcontractor who is participating in a registered apprenticeship program. In addition, the ratio of apprentice-to-journeyworker must meet the standard set by the Department of Labor or applicable State apprenticeship agency.

Each taxpayer, contractor, or subcontractor who employs four or more individuals to perform construction, alteration, or repair work with respect to the construction of a qualified facility must employ one or more qualified apprentices to perform such work. Exceptions from these requirements are provided for taxpayers that make a good faith effort to comply with the requirements by requesting qualified apprentices from a registered apprenticeship program but where such request is denied or where the registered apprenticeship program fails to respond to a request within five business days.

A taxpayer that fails to satisfy the apprenticeship requirements can come into compliance and thus remain eligible for the increased rate by paying a penalty in the amount of $50 per

missing apprenticeship labor hour. In the case of intentional disregard of the apprenticeship rules, this amount is increased to $500 per labor hour.

Domestic content bonus

The credit rate is increased by 10 percent (calculated without regard to the application of the energy communities bonus described below) with respect to facilities that meet certain domestic content requirements. To meet these requirements, a taxpayer must certify to the Secretary that any steel, iron, or manufactured product which is a component of a qualified facility (upon completion of construction) was produced in the United States. For purposes of steel and iron, this requirement shall be applied consistent with section 661.5 of title 49, Code of Federal Regulations. Manufactured products which are components of a qualified facilities are deemed to have been produced in the United States if not less than 40 percent (20 percent in the case of offshore wind facilities) of the total costs of all manufactured products of such facility are attributable to manufactured products (including components) which are mined, produced, or manufactured in the United States.

Reduction of elective payment if domestic content rules are not satisfied

Certain taxpayers may elect to have the credit paid directly to the extent there is insufficient income tax liability to absorb the credit.[138] The amount of this direct payment is reduced by 10 percent if the domestic content requirements described above for the domestic content bonus are not satisfied. This rule applies only to facilities having a maximum net output of at least one megawatt (as measured in alternating current) whose construction begins after December 31, 2023. An exception to the rule applies if the Secretary determines that the inclusion of steel, iron, or manufactured products which are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent, or if the relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality. This waiver does not apply for purposes of determining the availability of the domestic content bonus described above.

Energy communities bonus

The credit rate is increased by 10 percent (calculated without regard to the domestic content bonus described above) with respect to facilities located in an "energy community." An energy community is defined as: (1) a brownfield site; (2) a metropolitan statistical area or non-metropolitan area with an unemployment rate at or above the national average for the previous year which has (or had after 2009) 0.17 percent or greater direct employment or 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas; or (3) a census tract (or directly adjoining tract) in which, in the period since 1999, a coal mine has closed, or, in the period since 2009, a coal-fueled power plant has been retired.

[138] Sec. 6417.

Credit reduced for tax-exempt bonds

The credit is reduced for facilities financed with tax-exempt bonds. With respect to such bond-financed facilities, the credit is reduced by the lesser of 15 percent or a percentage calculated using as the numerator the amount of tax-exempt financing with respect to a facility (for the taxable year and all prior years) and as the denominator the aggregate amount of additions to the capital account for such facility (for the taxable year and all prior years). For purposes of this calculation, the numerator includes bond proceeds that are used for capital expenditures of qualified facilities but does not include proceeds that are used for other purposes, such as reserve funds.

Clean electricity production credit

In general

For facilities placed in service after December 31, 2024, the renewable electricity production credit described above is replaced by the clean electricity production credit.[139]

The clean electricity production credit is available with respect to electricity produced by the taxpayer at a qualified facility and sold to an unrelated person during the taxable year. The credit is also available where such electricity is consumed or stored by the taxpayer during the taxable year and there is no third-party sale, but only if the qualified facility is equipped with a metering device owned and operated by an unrelated person. The credit is available for electricity produced during the 10-year period beginning when the qualified facility is originally placed in service. Consumption, sales, or storage are only taken into account with respect to electricity produced within the United States or a possession of the United States.

Like the renewable electricity production credit, the clean electricity base credit rate is 0.3 cents per kilowatt-hour. This amount is increased to 1.5 cents per kilowatt-hour for facilities with a maximum output of less than one megawatt of electricity (as measured in alternating current) and for facilities that meet certain prevailing wage and apprenticeship requirements These amounts are adjusted for inflation in a manner similar to the inflation adjustments for the clean electricity production credit, with the credit adjusted using 1992 as the base year and increased in increments of one-twentieth of a cent for the base credit and one-tenth of a cent for the enhanced credit. The inflation adjustments must be published annually by the Secretary no later than April 1 of each calendar year.

A qualified facility is an electricity generation facility owned by the taxpayer that is placed in service after December 31, 2024, and for which the greenhouse gas emissions rate is not greater than zero. With respect to a facility placed in service before January 1, 2025, a qualified facility includes new units and additions to capacity placed in service after December 31, 2024. A qualified facility does not include any facility for which a credit is allowed under sections 45, 45J, 45Q, 45U, 48, 48A, or 48E for the taxable year or any prior taxable year.

[139] Sec. 45Y.

The greenhouse gas emissions rate means the amount of greenhouse gases emitted into the atmosphere by a facility in the production of electricity, expressed as grams of carbon dioxide equivalents per kilowatt-hour (“CO_2e per KWh”; see definitions below for how this is measured). In the case of a facility which produces electricity through combustion or gasification, the greenhouse gas emissions rate for such facility shall be equal to the net rate of greenhouse gases emitted into the atmosphere by such facility (taking into account lifecycle greenhouse gas emissions, as described in section 211(o)(1)(H) of the Clean Air Act) in the production of electricity, expressed as grams of CO_2e per KWh.

The Secretary must publish annually greenhouse gas emissions rates for types or categories of facilities, for use by taxpayers to determine whether a facility qualifies. In the case of any facility for which an emissions rate has not been established by the Secretary, a taxpayer which owns such a facility may file a petition with the Secretary for a determination of the emissions rate with respect to such facility.

The amount of greenhouse gases emitted into the atmosphere by a facility in the production of electricity does not include any qualified carbon dioxide that is captured by the taxpayer and sequestered in secure geological storage under rules similar to the rules applicable under section 45Q(f) or utilized by the taxpayer in a manner described in section 45Q(f)(5).[140]

The credit is part of the general business credit.

Phaseout of credit

The credit begins to phase out in the “applicable year,” which is defined as the later of 2032 or the calendar year in which the Secretary determines that the annual greenhouse gas emissions from the production of electricity in the United States are equal to or less than 25 percent of the annual greenhouse gas emissions from the production of electricity in the United States for calendar year 2022. The credit is reduced by 25 percent for a facility the construction of which begins during the second calendar year following the applicable year, by 50 percent for a facility the construction of which begins during the third calendar year following the applicable year, and by 100 percent for a facility the construction of which begins during any subsequent calendar year.

Wage and apprenticeship requirements

The prevailing wage and apprenticeship requirements follow a structure similar to those required by the renewable electricity production credit. Generally, the prevailing wage rules require that the taxpayer ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction, alteration, or repair of a project are paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality where the project is located as determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code. The

[140] Thus, in addition to zero emission facilities that generate electricity from solar, wind, geothermal, and nuclear energy, facilities that generate electricity using a combustion technology could also theoretically qualify if sufficient carbon oxides are captured and sequestered or utilized.

apprenticeship requirements require that, generally, not less than a certain percentage of total labor hours of the construction, alteration, or repair work (including work performed by any contractor of subcontractor) on a project must be performed by qualified apprentices.[141]

Definitions and guidance

CO_2e per KWh means, with respect to any greenhouse gas, the equivalent carbon dioxide (as determined based on global warming potential) per kilowatt hour of electricity produced. The term greenhouse gas has the same meaning given such term under section 211(o)(1)(G) of the Clean Air Act. Qualified carbon dioxide means carbon dioxide captured from an industrial source which (1) would otherwise be released into the atmosphere as industrial emission of greenhouse gas, (2) is measured at the source of capture and verified at the point of disposal or utilization, and (3) is captured and disposed or utilized within the United States or a possession of the United States.

The Secretary is required to issue implementation guidance no later than January 1, 2025, including guidance on the calculation of greenhouse gas emission rates for qualified facilities and the determination of clean electricity production credits.

Combined heat and power system property

For purposes of determining the clean electricity production credit, the kilowatt hours of electricity produced by a taxpayer at a qualified facility include any production in the form of useful thermal energy by any combined heat and power system property within such facility, and the amount of greenhouse gases emitted into the atmosphere by such facility in the production of such useful thermal energy is included for purposes of determining the greenhouse gas emissions rate for such facility. For this purpose, the term combined heat and power system property has the same meaning given such term for purposes of the section 48 energy credit, without regard to the sunset date, capacity limitations, or special biomass rule. The amount of kilowatt-hours of electricity produced in the form of useful thermal energy equals the total useful thermal energy produced by the combined heat and power system property within the qualified facility divided by the heat rate for such facility. For this purpose, the heat rate means the amount of energy used by the qualified facility to generate one kilowatt-hour of electricity, expressed as British thermal units per net kilowatt-hour generated.

Energy communities bonus

As with the renewable electricity production credit, in the case of any qualified facility which is located in an energy community the credit amount is increased by 10 percent.

[141] See the description of the renewable electricity production credit, above, for a more detailed explanation of these requirements, including procedural rules and penalties.

Credit reduced for tax-exempt bonds

The credit is reduced for tax-exempt bonds under rules similar to the rules of section 45(b)(3).

Domestic content bonus

The credit is increased by 10 percent (calculated without regard to the energy communities bonus) if certain domestic content requirements are met. The domestic content requirements are generally the same as those set forth in section 45(b)(9), except that the percentage of content that must be domestically produced with respect to manufactured products is different. For the clean electricity production credit, except with respect to offshore wind facilities, the percentage is 40 percent for a facility the construction of which begins before January 1, 2025, 45 percent for a facility the construction of which begins in calendar year 2025, 50 percent for a facility the construction of which begins in calendar year 2026, and 55 percent for a facility the construction of which begins after December 31, 2026. For offshore wind facilities, the percentage is 20 percent for a facility the construction of which begins before January 1, 2025, 27.5 percent for a facility the construction of which begins in calendar year 2025, 35 percent for a facility the construction of which begins in calendar year 2026, and 45 percent for a facility the construction of which begins in calendar year 2027, and 55 percent for a facility the construction of which begins after December 31, 2027.

Reduction of elective payment if domestic content rules are not satisfied

Like the renewable electricity production credit, certain taxpayers may elect to have the credit paid directly to the extent there is insufficient tax liability to absorb the credit. This direct payment is reduced if the domestic content requirements are not satisfied. This rule is similar to that provided in section 45(b)(10), except that the payment is reduced by 10 percent if construction of the facility begins in calendar year 2024, by 15 percent if construction the facility begins in calendar year 2025, and by 100 percent if the construction of the facility begins after December 31, 2025.

As with the rule set forth in section 45(b)(10), an exception applies if the Secretary determines that the inclusion of steel, iron, or manufactured products which are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent, or if the relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.

Special rules

In the case of a qualified facility in which more than one person has an ownership interest, except to the extent provided in regulations prescribed by the Secretary, production from the facility shall be allocated among such persons in proportion to their respective ownership interests in the gross sales from such facility.

Persons shall be treated as related to each other if such persons would be treated as a single employer under the regulations prescribed under section 52(b). In the case of a corporation which is a member of an affiliated group of corporations filing a consolidated return,

such corporation shall be treated as selling electricity to an unrelated person if such electricity is sold to such a person by another member of such group.

With respect to trusts and estates, under rules prescribed by the Secretary, rules similar to the rules of section 52(d) apply, which for any taxable year apportion the amount of a credit between an estate or trust and its beneficiaries on the basis of the income of the estate or trust allocable to each.

In the case of agricultural cooperatives, rules similar to the rules of section 45(e)(11) apply, which allocate credits to patrons of such cooperatives.

Description of Proposal

The proposal repeals the clean electricity production credit (section 45Y). The renewable electricity production credit (section 45) remains unchanged under the proposal.

Effective Date

The proposal is effective as if included in section 13701 of Public Law 117-169 (the Inflation Reduction Act).

2. Repeal of clean electricity investment credit

Present Law

Energy credit

In general

An investment credit is available for qualified energy property originally placed in service by the taxpayer.[142] The base credit rate is 6 percent. This rate is increased to 30 percent if certain wage and apprenticeship requirements are met. The credit is generally available for property placed in service before January 1, 2025, except for geothermal heat pump property, which must be placed in service before January 1, 2035.[143]

Qualified property

The following types of property qualify for the energy credit.

- Solar energy property
- Fuel cell property

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[142] Sec. 48. A number of changes to this Code section were made in August 2022 by Public Law 117-169 (the Inflation Reduction Act). This summary reflects those changes.

[143] The credit rate for geothermal heat pump property is subject to certain phase-down rules in calendar years 2033 and 2034.

- Geothermal power property
- Fiber optic solar and electrochromic glass property
- Small wind property
- Waste energy recovery property
- Energy storage technology property
- Biogas property
- Microgrid controller property
- Combined heat and power system property, and
- Geothermal heat pump property

A taxpayer may also make an irrevocable election to have certain property which is part of a qualified renewable electricity production facility treated as energy property eligible for an investment credit under section 48. For purposes of the investment credit, qualified facilities are facilities otherwise eligible for the renewable electricity production credit with respect to which no credit under section 45 has been allowed. A taxpayer electing to treat a facility as energy property may not claim the renewable electricity production credit.

Domestic content bonus

Where certain domestic content requirements are satisfied, the energy credit rate is increased by two percentage points (ten percentage points where the wage and apprenticeship requirements are met). The domestic content requirements are similar to those provided for in section 45(b)(9).

Reduction of elective payment if domestic content rules are not satisfied

Certain taxpayers may elect to have the credit paid directly to the extent there is insufficient income tax liability to absorb the credit.[144] The amount of this direct payment is reduced by 10 percent if the domestic content requirements described above for the domestic content bonus are not satisfied. This rule is similar to those provided in section 45(b)(10).

Credit reduced for tax-exempt bonds

The energy credit is reduced when the qualified property is financed using tax-exempt bonds. The rules governing this reduction are similar to those provided in section 45(b)(3).

Energy communities bonus

If energy property is placed in service in an "energy community," the energy credit rate increases by two percentage points (10 percentage points where the wage and apprenticeship

[144] Sec. 6417.

requirements are met). The definition of energy community is the same as that set forth in section 45(b)(11).

Low-income communities bonus for certain wind and solar facilities

A credit rate bonus is available for certain qualified solar and wind facilities placed in service in connection with low-income communities. Qualified solar and wind facilities are facilities that generate electricity solely from solar or wind property,[145] have a maximum net output of less than five megawatts (as measured in alternating current), and are either (1) located in a low-income community (as defined in section 45D(e)) or on Indian land (as defined in section 2601(2) of the Energy Policy Act of 1992 (25 U.S.C. sec. 3501(2))) or (2) part of a qualified low-income residential building project or a qualified low-income economic benefit project. In the case of facilities located in a low-income community or on Indian land, the bonus credit rate is 10 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, the bonus credit rate is 20 percentage points.

A facility is treated as part of a qualified low-income residential building project if the facility is installed on a residential rental building[146] which participates in a covered housing program (as defined in section 41411(a) of the Violence Against Women Act of 1994 (34 U.S.C. 12491(a)(3)), a housing assistance program administered by the Department of Agriculture under title V of the Housing Act of 1949, a housing program administered by a tribally designated housing entity (as defined in section 4(22) of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4103(22))) or such other affordable housing programs as the Secretary may provide, and the financial benefits of the electricity produced by such facility are allocated equitably among the occupants of the dwelling units of such building.

A facility is treated as part of a qualified low-income economic benefit project if at least 50 percent of the financial benefits of the electricity produced by such facility are provided to households with income of (1) less than 200 percent of the poverty line (as defined in section 36B(d)(3)(A)) applicable to a family of the size involved or (2) less than 80 percent of area median gross income (as determined under section 142(d)(2)(B)). For purposes of determining whether a facility is part of a qualified low-income residential building project or a qualified low-income economic benefit project, electricity acquired at a below-market rate shall be taken into account as a financial benefit.

The bonus is subject to an annual capacity limitation of 1.8 gigawatts for each of calendar years 2023 and 2024 and zero thereafter. The Secretary is required to establish a program to allocate the capacity limitation to qualified solar and wind facilities. In establishing such program, the Secretary must provide procedures to allow for an efficient allocation process,

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[145] Eligible property includes energy storage technology installed in connection with such energy property. In the case of wind facilities, either the facilities must be small wind facilities under section 48(a)(3)(A)(vi) or an election for an investment credit in lieu of a production credit must have been made under section 48(a)(5).

[146] For this purpose, a facility installed next to a building or in a building complex's common area may be treated as installed on a residential building.

including, when appropriate, consideration of multiple projects in a single application if such projects will be placed in service by a single taxpayer.

Facilities that have been awarded credits must be placed in service within four years of the date such facilities have been allocated electricity generation capacity by the Secretary. If a facility is not placed in service within this four-year period, the electric generation capacity allocated to such facility may be reallocated by the Secretary. In addition, if the annual capacity limitation for 2023 is not fully allocated, the unallocated portion is added to the amount available in calendar year 2024.

The bonus credit is subject to recapture if the property to which it relates ceases to meet the applicable requirements, notwithstanding the fact such property still qualifies for the energy credit under section 50(a).

Clean electricity investment credit

In general

The clean electricity investment credit is equal to the applicable percentage of qualified investment for any taxable year with respect to any qualified facility and any energy storage technology. The base rate is 6 percent. This base rate is increased to 30 percent (the "alternative rate") for facilities with a maximum output of less than one megawatt of electricity (as measured in alternating current) and for facilities that meet certain prevailing wage and apprenticeship requirements (or for which construction began more than 60 days before the Secretary publishes guidance with respect to such prevailing wage and apprenticeship requirements).

The clean electricity investment credit is allowable for property placed in service after December 31, 2024. The credit is part of the general business credit.

Qualified investment with respect to a qualified facility

For purposes of determining the amount of the credit, a qualified investment with respect to any qualified facility for the taxable year is the sum of the basis of any qualified property placed in service by the taxpayer during such taxable year which is part of a qualified facility, plus the amount of any expenditures that are paid or incurred by the taxpayer for qualified interconnection property (as defined in section 48(a)(8)).

Qualified property is tangible personal property or other tangible property (not including a building or its structural components), but only if such property is used as an integral part of a qualified facility. In addition, such property must consist of depreciable or amortizable property that is either built by the taxpayer or the original use of which begins with the taxpayer.

A qualified facility is an electricity generation facility owned by the taxpayer that is placed in service after December 31, 2024, and for which the greenhouse gas emissions rate is not greater than zero. With respect to a facility placed in service before January 1, 2025, a qualified facility includes new units and additions to capacity placed in service after December 31, 2024. The greenhouse gas emissions rate is determined using rules similar to the rules set

forth in section 45Y(b)(2) and the terms “greenhouse gas,” “greenhouse gas emissions rate,” and “CO_2e per KWh” have the same meaning given such terms under section 45Y.

A qualified facility does not include any facility for which a credit is allowed under sections 45, 45J, 45Q, 45U, 45Y, 48, or 48A for the taxable year or any prior taxable year. The qualified investment with respect to any qualified facility for any taxable year does not include that portion of the basis of any property which is attributable to qualified rehabilitation expenditures (as defined in section 47(c)(2)).

Qualified investment with respect to energy storage technology

The qualified investment with respect to energy storage technology for any taxable year is the basis of any energy storage technology placed in service by the taxpayer during such taxable year. The term “energy storage technology” has the meaning given such term in section 48(c)(6) (except that subparagraph (D) of such section shall not apply).

Wage and apprenticeship requirements

The prevailing wage and apprenticeship requirements follow the structure established in sections 48(a)(10) and 45(b)(8), respectively. Generally, the prevailing wage rules require that the taxpayer ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction, alteration, or repair of a project are paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality where the project is located as determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code. The apprenticeship requirements require that, generally, not less than a certain percentage of total labor hours of the construction, alteration, or repair work (including work performed by any contractor of subcontractor) on a project must be performed by qualified apprentices, similar to the rules of section 45(b)(8).

Certain progress expenditure rules made applicable

Rules similar to the rules of subsections (c)(4) and (d) of section 46 (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990) apply.

Credit reduced for tax-exempt bonds

The credit is reduced for tax-exempt bonds under rules similar to the rules of section 45(b)(3).

Phaseout of credit

The credit phases out under rules similar to the rules set forth in section 45Y(d)(3).

Recapture of the credit

If the Secretary determines that the greenhouse gas emissions rate for a qualified facility is greater than 10 grams of CO_2e per KWh, any property for which a credit was allowed under

this section with respect to such facility ceases to be investment credit property in the taxable year in which the determination is made and such credit is subject to recapture under the rules of section 50.

Energy communities bonus

If energy property is placed in service in an "energy community," the base rate is increased by two percentage points and the alternative rate by ten percentage points. The definition of energy community is the same as that set forth in section 45(b)(11)(B).

Domestic content bonus

An additional credit amount is available for property that meets certain domestic content requirements similar to those used in section 48 but applying the adjusted percentage set forth in section 45Y(g)(11)(C).[147]

Reduction of elective payment if domestic content rules are not satisfied

In the case of a taxpayer making an election under section 6417 with respect to a credit under this section, rules similar to the rules of section 45Y(g)(12) apply.

Special rules for certain facilities placed in service in connection with low-income communities

A bonus credit amount applies for certain qualified facilities placed in service in connection with low-income communities. The bonus credit amount is an allocated credit and follows rules similar to the rules set forth in section 48(e). Under the clean electricity investment credit, the annual capacity limitation is 1.8 gigawatts of direct current capacity for each calendar year beginning on January 1, 2025, and ending on December 31 of the applicable year (as defined by section 45Y(d)(3)), and zero thereafter. Certain carryover rules apply with respect to unused limitation amounts.

Description of Proposal

The proposal repeals the clean electricity investment credit (section 48E). The energy credit (section 48) remains unchanged under the proposal.

Effective Date

The proposal is effective as if included in section 13702 of Public Law 117-169 (the Inflation Reduction Act).

[147] A technical correction may be necessary to reflect this intent.

3. Modification of clean vehicle credit

Present Law

In general

A credit is available for each new clean vehicle placed in service (the "CV credit").[148] A new clean vehicle is a motor vehicle the original use of which commences with the taxpayer, is acquired for use or lease and not for resale, is made by a qualified manufacturer,[149] has a gross vehicle weight rating of less than 14,000 pounds, is treated as a motor vehicle for purposes of title II of the Clean Air Act, and is propelled to a significant extent by an electric motor drawing electricity from a battery (1) with at least seven kilowatt-hours of capacity and (2) which is capable of being recharged from an external source of electricity.[150] The person who sells the vehicle must provide a report to the taxpayer and the Secretary that includes the name and taxpayer identification number of the taxpayer, the vehicle identification number of the vehicle, the battery capacity of the vehicle, verification that original use of the vehicle commences with the taxpayer, and the maximum credit allowable to the taxpayer with respect to the vehicle.[151] A new clean vehicle must have final assembly occur within North America.[152]

New qualified fuel cell motor vehicles[153] which have final assembly within North America and for which sellers provide a report, as described above, are new clean vehicles for purposes of the credit.[154]

Vehicles with any applicable critical minerals in the battery that are extracted, processed, or recycled by a foreign entity of concern that are placed in service after December 31, 2024, or vehicles with any components contained in the battery of the vehicle that are manufactured or assembled by a foreign entity of concern that are placed in service after December 31, 2023, do not qualify for the credit.[155]

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[148] Sec. 30D.

[149] A qualified manufacturer must be a manufacturer as defined in regulations prescribed by the Administrator of the Environmental Protection Agency for purposes of the administration of title II of the Clean Air Act (42 U.S.C. 7521 *et seq.*) and must provide periodic written reports to the Secretary which include vehicle identification numbers. Sec. 30D(d)(3).

[150] Sec. 30D(d)(1).

[151] Sec. 30D(d)(1)(H).

[152] Sec. 30D(d)(1)(G).

[153] As defined in section 30B(b)(3).

[154] Sec. 30D(d)(6).

[155] Sec. 30(d)(7).

CV credit amount

A new clean vehicle is eligible for two $3,750 amounts for satisfying certain criteria. One $3,750 amount is allowed if certain critical minerals requirements for the battery are met.[156] Another $3,750 amount is allowed if certain battery components requirements are met.[157] Therefore, a new clean vehicle is eligible for a maximum credit of $7,500 if both critical minerals and battery components requirements are met.

Critical minerals requirement

To satisfy the critical minerals requirement, a new clean vehicle's battery (from which the electric motor draws electricity) must have a percentage of the value of applicable critical minerals[158] that were (1) extracted or processed in the United States or a country that has a free trade agreement with the United States or (2) recycled in North America equal to or greater than an applicable percentage.[159]

For this purpose, the applicable percentage is 40 percent for a vehicle placed in service before January 1, 2024. The applicable percentage is 50 percent for a vehicle placed in service during calendar year 2024, 60 percent for 2025, 70 percent for 2026, and 80 percent after 2026.[160]

Battery components requirement

To satisfy the battery components requirement, a new clean vehicle's battery (from which the electric motor draws electricity) must have a percentage of the value of the components that were manufactured or assembled in North America equal to or greater than an applicable percentage.[161]

For this purpose, the applicable percentage is 50 percent for a vehicle placed in service before January 1, 2024. The applicable percentage is 60 percent for a vehicle placed in service during calendar year 2024 or 2025, 70 percent for 2026, 80 percent for 2027, 90 percent for 2028, and 100 percent after 2028.[162]

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[156] Sec. 30D(b)(2).

[157] Sec. 30D(b)(3).

[158] Critical minerals as defined in sec. 45X(c)(6).

[159] Sec. 30D(e)(1)(A).

[160] Sec. 30D(e)(1)(B).

[161] Sec. 30D(e)(2)(A).

[162] Sec. 30D(e)(2)(B).

Regulations and guidance

The Secretary is directed to issue regulations or other guidance to carry out the critical mineral and battery component requirements and must issue proposed guidance no later than December 31, 2022.[163]

Vehicle price and AGI limitations

The manufacturer's suggested retail price ("MSRP") of a new clean vehicle purchased by the taxpayer may not exceed certain limitations. That is, the credit amount is $0 if the MSRP for the vehicle exceeds the applicable limitation. This limitation is $80,000 in the case of a van, sport utility vehicle, or pickup truck, and $55,000 in the case of any other vehicle. The Secretary is directed to release regulations or guidance to characterize vehicles into the appropriate category by applying rules similar to those employed by the Environmental Protection Agency ("EPA") and the Department of Energy to determine vehicle class and size.[164]

Additionally, no credit is allowed if the taxpayer's income exceeds $300,000 in the case of a joint return or surviving spouse, $225,000 in the case of a head of household, or $150,000 in the case of any other taxpayer.[165] For purposes of this limitation, the taxpayer's income is the lesser of modified AGI of the current taxable year or modified AGI of the preceding taxable year.[166]

Transfer of credit

A taxpayer who has purchased or leased a vehicle may elect to transfer the credit to an eligible entity, subject to regulations or guidance the Secretary deems necessary. The eligible entity is then treated as the taxpayer with respect to the credit.[167] The Secretary is directed to establish a program to provide advance payments of these credit amounts to eligible entities.[168] An election to transfer the credit must be made on or before the date of vehicle purchase.[169]

An eligible entity is a dealer[170] which meets the following requirements: First, the dealer must be registered with the Secretary. Second, prior to the election of transfer, the dealer must

[163] Sec. 30D(e)(3).

[164] Sec. 30D(f)(11).

[165] Sec. 30D(f)(10).

[166] Modified AGI is AGI increased by any amount excluded from gross income under section 911, 931, or 933. Sec. 30D(f)(10)(C).

[167] Sec. 30D(g)(1).

[168] Sec. 30D(g)(7).

[169] Sec. 30D(g)(3).

[170] A dealer is a person licensed by a State, territory of the United States, Indian tribal government, or Alaska Native Corporation to engage in the sale of vehicles. Sec. 30D(g)(8).

disclose information to the buyer on the MSRP of the vehicle, value of the credit and other incentives available, and the amount provided by the dealer as a condition of an election to transfer. Third, the dealer must pay the taxpayer for the amount of the credit allowable. Finally, the dealer must ensure that the availability or use of any other available manufacturer or dealer incentive does not limit the ability of the taxpayer to make an election and that the election will not limit the value or use of any such incentive.[171] The Secretary may revoke the registration of dealers that fail to comply with these requirements.[172]

The payment made by dealers to buyers in connection with a credit transfer election is not includable in the gross income of the taxpayer and is not deductible to the dealer.[173]

The tax liability of a taxpayer that does not meet the AGI requirements for the credit, that elects to transfer a credit, and that receives a payment in connection with such credit transfer, is increased by the amount of such payment.[174]

Other rules

A vehicle that is predominantly used outside the United States does not qualify for the credit.[175] A vehicle must meet certain emissions and safety standards in order to qualify for the credit.[176]

The basis of any qualified vehicle is reduced by the amount of the credit.[177] The portion of the credit attributable to vehicles of a character subject to an allowance for depreciation is treated as part of the general business credit; the nonbusiness portion of the credit is allowable to the extent of the excess of the regular tax and the alternative minimum tax (reduced by certain other credits) for the taxable year.[178]

A taxpayer must include the vehicle identification number of the vehicle on a tax return to claim the credit.[179]

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[171] Sec. 30D(g)(2).

[172] Sec. 30D(g)(4).

[173] Sec. 30D(g)(5).

[174] Sec. 30D(g)(10).

[175] Sec. 30D(f)(4).

[176] Sec. 30D(f)(7).

[177] Sec. 30D(f)(1).

[178] Sec. 30D(c).

[179] Sec. 30D(f)(9).

Expiration

No credit is allowed for any vehicle placed in service after December 31, 2032.[180]

Description of Proposal

In general

The proposal generally reverts the clean vehicle credit to how it appeared immediately prior to the enactment of Public Law 117-169 (the Inflation Reduction Act), providing a credit for "new qualified plug-in electric drive motor vehicles." The proposal retains limitations based on modified AGI and MSRP and continues to impose modified critical mineral and battery component requirements. The proposal does not apply with respect to any vehicle which is acquired by the taxpayer pursuant to a written binding contract that was in effect on the date of the proposal's introduction and which is placed in service before the date which is one year after such date.

The proposal allows a credit for each new qualified plug-in electric drive motor vehicle placed in service (the "EV credit"). A "new qualified plug-in electric drive motor vehicle" is a motor vehicle the original use of which commences with the taxpayer, is acquired for use or lease and not for resale, is made by a manufacturer,[181] has a gross vehicle weight rating of less than 14,000 pounds, is treated as a motor vehicle for purposes of title II of the Clean Air Act, and is propelled to a significant extent by an electric motor drawing electricity from a battery (1) with at least four kilowatt-hours of capacity and (2) which is capable of being recharged from an external source of electricity.[182]

EV credit amount

The base amount of the EV credit is $2,500 and the credit is increased by $417 for each kilowatt-hour of battery capacity in excess of four kilowatt-hours. The maximum credit for a qualified vehicle is $7,500.[183]

Vehicle price and AGI limitations

The requirements for vehicle price and taxpayer AGI under present law, described above, are not modified by the proposal. No credit is allowed for vehicles and taxpayers that do not meet these limitations.

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[180] Sec. 30D(h).

[181] Manufacturer is defined in regulations prescribed by the Administrator of the Environmental Protection Agency for purposes of the administration of title II of the Clean Air Act (42 U.S.C. 7521 *et seq.*). Sec. 30D(d)(3).

[182] Sec. 30D(d)(1).

[183] Sec. 30D(b).

Critical minerals and battery component requirement

Under the proposal no credit is allowed for a new clean vehicle unless such vehicle satisfies three sourcing requirements.

First, 80 percent or more of the value of applicable critical minerals[184] that are contained in a new clean vehicle's battery (from which the electric motor draws electricity) must come from applicable critical minerals that were (1) extracted or processed in the United States or a country that has a free trade agreement with the United States or (2) recycled in North America.[185]

Second, all the components contained in a new clean vehicle's battery (from which the electric motor draws electricity) must have been manufactured or assembled in North America.[186]

Finally, vehicles placed in service after December 31, 2024, may not have any applicable critical minerals in the battery that were extracted, processed, or recycled by a foreign entity of concern.[187]

Manufacturer limitation and phaseout

For each manufacturer, once a total of 200,000 new plug-in electric drive motor vehicles have been manufactured and sold by such manufacturer for use in the United States after December 31, 2009, the credit phases out over four calendar quarters.[188] The phaseout period begins in the second calendar quarter following the quarter during which the vehicle cap has been reached. Taxpayers may claim one-half of the otherwise allowable credit during the first two calendar quarters of the phaseout period and twenty-five percent of the otherwise allowable credit during the next two quarters. After this, no credit is available.[189]

Other rules

In general, the credit is available to the vehicle owner, including the lessor of a vehicle subject to lease. If the qualified vehicle is used by certain tax-exempt organizations, governments, or foreign persons and is not subject to a lease, the seller of the vehicle may claim the credit so long as the seller clearly discloses to the user in a document the amount that is

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[184] Critical minerals as defined in sec. 45X(c)(6).

[185] Sec. 30D(e)(1).

[186] Sec. 30D(e)(2).

[187] Sec. 30D(e)(3).

[188] This includes vehicles sold during the period in which the changes made to section 30D by Public Law 117-169 (the Inflation Reduction Act) are in effect.

[189] Sec. 30D(g).

allowable as a credit.[190] Generally, the other rules described in the present law description above continue to apply.

Effective Date

The proposal is generally effective for vehicles placed in service after the date of introduction of the proposal. The final assembly and per manufacturer limitations are effective for vehicles sold after the date of introduction of the proposal. However, the per manufacturer phase out period is determined taking into account all vehicles described in section 30D(g), as amended by the proposal.

4. Repeal of credit for previously-owned clean vehicles

Present Law

In general

A credit is available for previously-owned clean vehicles (the "previously-owned CV credit") placed in service by a qualified buyer. A "previously-owned clean vehicle" is a motor vehicle with a model year at least two years earlier than the calendar year in which the taxpayer acquires the vehicle, the original use of which commences with a person other than the taxpayer, which has a gross vehicle weight rating of less than 14,000 pounds,[191] which is acquired by the taxpayer in a qualified sale, and that meets certain emissions standards.[192]

A qualified sale is a sale by a dealer[193] that is the first transfer since the date of enactment of this section to a qualified buyer other than the person with whom the original use of such vehicle commenced.[194] A qualified sale does not include transfers to qualified buyers made after the vehicle has been used and owned by a person other than the person with whom the original use of such vehicle commenced, even if such use and ownership was not by a qualified buyer.[195]

Additionally, a previously-owned clean vehicle must be an electric vehicle or a fuel-cell vehicle that satisfies certain criteria. Specifically, a previously-owned clean vehicle must either (1) be propelled to a significant extent by an electric motor drawing electricity from a battery (a) with at least seven kilowatt-hours of capacity and (b) which is capable of being recharged from an external source of electricity, made by a qualified manufacturer, and with respect to which the person who sells the vehicle provides a report to the taxpayer and Secretary that includes the

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[190] Sec. 30D(f)(3).

[191] Sec. 25E(c)(1).

[192] Sec. 25E(e).

[193] A dealer is a person licensed by a State, territory of the United States, Indian tribal government, or Alaska Native Corporation to engage in the sale of vehicles. Sec. 30D(g)(8).

[194] Sec. 25E(c)(2).

[195] A technical correction may be needed to reflect this intent.

name and taxpayer identification number of the taxpayer, the vehicle identification number of the vehicle, the battery capacity of the vehicle, and the maximum credit allowable to the taxpayer with respect to the vehicle,[196] or (2) be propelled by power derived from one or more cells which convert chemical energy directly into electricity by combining oxygen with hydrogen fuel stored on board the vehicle and have received certain emissions-standard certification.[197]

A taxpayer must include the vehicle identification number of the vehicle on a tax return to claim the credit.[198]

A qualified buyer is an individual who purchases a vehicle for use and not resale, who cannot be claimed as a dependent, and during the three-year period prior to such purchase, has not made any purchases for which a previously-owned CV credit was claimed.

Previously-owned CV credit amount

The amount of the credit is the lesser of (1) $4,000 or (2) 30 percent of the sale price of the vehicle.[199]

The sale price of a previously-owned clean vehicle purchased by the taxpayer may not exceed $25,000.[200] That is, the credit amount is $0 if the sale price for the vehicle exceeds this amount.

Additionally, no credit is allowed if the taxpayer's income exceeds $150,000 in the case of a joint return or surviving spouse, $112,500 in the case of a head of household, or $75,000 in the case of any other taxpayer.[201] For purposes of this limitation, the taxpayer's income is the lesser of modified AGI of the current taxable year or modified AGI of the preceding taxable year.[202]

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[196] Sec. 25E(c)(1)(D)(i).

[197] Sec. 25E(c)(1)(D)(ii). Fuel cell vehicles must satisfy the requirements of section 30B(b)(3)(A) and (B).

[198] Sec. 25E(d).

[199] Sec. 25E(a).

[200] Sec. 25E(c)(2)(B).

[201] Sec. 25E(b).

[202] Modified AGI is AGI increased by any amount excluded from gross income under section 911, 931, or 933. Sec. 25E(b)(3).

Other rules

In general, the credit is available to the vehicle owner, including the lessor of a vehicle subject to lease. A vehicle must be used predominantly in the United States to qualify for the credit and the basis of any qualified vehicle is reduced by the amount of the credit.[203]

Transfer of credit

For vehicles acquired after December 31, 2023, a taxpayer may elect to transfer the credit to an eligible entity under rules similar to those for the transfer of the clean vehicle credit.[204] These rules are explained in the description of section 303 of the proposal, modification of clean vehicle credit.

Expiration

No credit is allowed for any vehicle acquired after December 31, 2032.[205]

Description of Proposal

The proposal repeals the previously-owned CV credit. The proposal does not apply with respect to any vehicle which is acquired by the taxpayer pursuant to a written binding contract that was in effect on the date of the proposal's introduction and which is placed in service before the date which is one year after such date.

Effective Date

The proposal is effective for vehicles acquired after the date of the introduction of the proposal.

5. Repeal of credit for qualified commercial clean vehicles

Present Law

Present law allows for a credit for qualified commercial clean vehicles originally[206] placed in service by a taxpayer. A qualified commercial clean vehicle is a vehicle made by a qualified manufacturer,[207] acquired for use or lease by the taxpayer and not for resale, that either

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[203] Secs. 25E(e) and 30D(f).

[204] Sec. 25E(f).

[205] Sec. 25E(g).

[206] A technical correction may be necessary to reflect this intent.

[207] Qualified manufacturer has the same meaning as in section 30D. For more detail see the description of section 303 of the proposal, modification of clean vehicle credit.

(1) is manufactured primarily for use on public streets, roads, and highways,[208] or (2) is mobile machinery,[209] and of a character subject to the allowance of depreciation.[210]

Additionally, a qualified commercial clean vehicle must be an electric vehicle or a fuel-cell vehicle that satisfies certain criteria. Specifically, a qualified commercial clean vehicle must either (1) be propelled to a significant extent by an electric motor drawing electricity from a battery (a) with at least 15 kilowatt-hours of capacity (or seven kilowatt-hours for a vehicle with a gross vehicle weight rating of less than 14,000 pounds) and (b) which is capable of being recharged from an external source of electricity[211] or (2) be propelled by power derived from one or more cells which convert chemical energy directly into electricity by combining oxygen with hydrogen fuel stored on board the vehicle and have received certain emissions-standard certification.[212]

A taxpayer must include the vehicle identification number of the vehicle on a tax return to claim the credit.[213] Only one credit is allowed per vehicle, determined by such vehicle identification number.[214]

A qualified commercial clean vehicle must also meet certain emissions standards to be eligible for a credit.[215]

Qualified commercial clean vehicle credit amount

A qualified commercial clean vehicle qualifies for a credit equal to the lesser of (1) 15 percent of the basis of such vehicle (30 percent if the vehicle is not powered by a gasoline or diesel internal combustion engine) or (2) the incremental cost of the vehicle.[216] The credit is limited to $40,000 ($7,500 for a vehicle with a gross vehicle weight rating of less than 14,000 pounds).[217]

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[208] Vehicles operated exclusively on a rail or rails are excluded.

[209] This is mobile machinery as defined in section 4053(8) and includes vehicles not designed to perform a function of transporting a load over public highways.

[210] Sec. 45W(c).

[211] Sec. 45W(c)(3)(A).

[212] Sec. 45W(c)(3)(B). Fuel cell vehicles must satisfy the requirements of sections 30B(b)(3)(A) and (B).

[213] Sec. 45W(e).

[214] Secs. 45W(d)(1) and 30D(f)(8).

[215] Sec. 45W(d)(1).

[216] Sec. 45W(b)(1).

[217] Sec. 45W(b)(4).

The incremental cost of the vehicle is the amount by which the purchase price of the vehicle exceeds the purchase price of a comparable vehicle (one powered solely by gasoline or a diesel internal combustion engine which is comparable in size and use).[218]

Other rules

The basis of any qualified vehicle is reduced by the amount of the credit.[219] No credit is allowed for any vehicle for which a new clean vehicle credit is allowed.[220]

The requirement that a qualified clean commercial vehicle is of a character subject to the allowance of depreciation does not apply to vehicles that are not subject to a lease and which are placed in service by certain tax-exempt entities.[221]

A vehicle must be used predominantly in the United States to qualify for the credit.[222]

Regulations and guidance

The Secretary is directed to issue regulations or other guidance relating to determining the incremental cost of any qualified commercial clean vehicle in addition those necessary to carry out this provision.[223]

Expiration

No credit is allowed for any vehicle placed in service after December 31, 2032.[224]

Description of Proposal

The proposal repeals the credit for qualified commercial clean vehicles. The proposal does not apply with respect to any vehicle which is acquired by the taxpayer pursuant to a written binding contract that was in effect on the date of the proposal's introduction and which is placed in service before the date which is one year after such date.

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[218] Secs. 45W(b)(2) and (3).

[219] Secs. 45W(d)(1) and 30D(f)(1).

[220] Sec. 45W(d)(3).

[221] Sec. 45W(d)(2).

[222] Secs. 45W(d)(1) and 30D(f)(4).

[223] Sec. 45W(f).

[224] Sec. 45W(g).

Effective Date

The proposal is effective for vehicles acquired after the date of the introduction of the proposal.