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# President Biden to sign largest ever U.S. investment in clean energy

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On August 16, 2022, President Biden is expected to sign the Inflation Reduction Act of 2022 (IRA), an energy and healthcare bill that includes approximately $369 billion in tax credits and investments in clean energy. Once enacted, the bill will be the largest clean energy investment in U.S. history. This client update outlines the key climate and energy provisions of the IRA, as well as companion legislation under consideration relating to permitting of energy projects.

On August 16, 2022, President Biden is expected to sign the Inflation Reduction Act of 2022 (IRA). Once enacted, the IRA – essentially a whittled-down version of the Build Back Better Act proposed in 2021 – will be the most significant federal effort at decarbonizing the U.S. economy to date, with experts estimating reductions of greenhouse gas (GHG) emissions of roughly 40% by 2030 compared with 2005 levels. Unlike prior efforts at climate change legislation or regulation, which generally sought to accomplish GHG emissions reductions through mandates or penalties, the IRA seeks to accomplish its GHG reduction goals mainly through approximately $369 billion in tax credits and investments designed to incentivize the development of renewable energy and GHG reduction technologies, with the notable exception of a program imposing fees on methane emissions from oil and gas facilities. In addition, as part of the concessions necessary to secure sufficient support for passage, the IRA includes provisions supporting oil and gas development on federal lands and offshore areas. Congressional leadership also agreed to take up companion legislation streamlining permitting of a wide variety of energy projects by the end of September 2022.

## Key clean energy provisions of the IRA

### Tax credits to decarbonize the economy

About $270 billion[1] of the approximately $369 billion in investments promoting clean energy and climate resilience are in the form of federal tax credits to incentivize decarbonizing the economy through energy production from clean sources, carbon sequestration, clean transportation and manufacturing of clean energy equipment. The key tax credit programs extended or introduced under the IRA include the following:

- **Electricity from zero-carbon sources.** The IRA modifies and extends through 2024 the existing Production Tax Credit (PTC) and the Investment Tax Credit (ITC) programs, which provide tax credits for facilities that generate electricity from certain categories of renewable sources. After 2024, these programs will be replaced with new "clean electricity" PTC and ITC programs, which will generally apply to any zero-carbon technology and will be phased out beginning in 2032 or when certain clean energy targets are met, whichever is later. In addition, the IRA provides a new PTC for qualifying zero-carbon nuclear power facilities.
- **Carbon capture and sequestration.** The existing tax credit for facilities that capture and sequester carbon dioxide emissions, currently set to expire by 2024, would be extended through 2032. The tax credit would also be expanded by reducing the amount of carbon that a facility will need to capture to qualify for the credit.

- **Clean fuels.** The existing tax credit for biodiesel, renewable diesel and other renewable fuels, set to expire in 2021 and 2022, would be expanded through 2024. The IRA also creates a new tax credit for qualifying sustainable aviation fuels that will expire at the end of 2024. After 2024, both programs will be replaced with a general "clean fuels" PTC expiring in 2027. The IRA also creates a new hydrogen fuel PTC expiring in 2033, with the credit varying based on the hydrogen fuel's lifecycle GHG emissions (in lieu of this PTC, taxpayers could elect to receive an ITC).
- **Renewable energy manufacturing.** The IRA allocates $10 billion to an extension of the existing Advanced Energy Project Credit program. Under the program, a sponsor of an "advanced energy project"[2] applies to the Treasury Department to be awarded the tax credit. In addition, the IRA creates a new tax credit for the manufacturing of wind or solar energy components, which would start to phase out in 2029 and expire in 2032.
- **Clean vehicles.** The IRA extends tax credits to purchasers of new and used consumer "clean" (i.e., electric or fuel cell) vehicles. The credit for new vehicles is subject to restrictions based on where the battery components were sourced, manufactured or processed. Tax credits are also available for commercial clean vehicles. In addition to vehicle credits, the IRA extends an existing credit offered to alternative fuel refueling properties (e.g., battery charging stations) to 2032.
- **Energy efficient buildings/homes.** Existing tax credits for energy efficient improvements for residential buildings, as well as for eligible contractors building and selling energy efficient homes, have been extended through 2032. Tax credits for the purchase of certain clean energy properties have also been extended through 2034, restoring the 30% credit rate through 2032 and then reducing the credit rate to 26% in 2033 and 22% in 2034. In addition, commercial buildings must increase their efficiency by 25% to qualify for deductions allowable for energy-saving at commercial buildings.
- **Superfund tax.** The IRA permanently reinstates the Superfund excise tax on domestic crude oil received by refineries and imported petroleum products.
- **Credit enhancements for meeting labor or domestic content standards or benefiting certain communities.** Many of the tax credit programs described above include bonuses or other enhancements if a project pays prevailing wages, employs an apprenticeship program, meets domestic content standards or benefits low income or "energy" communities or Indian land. An energy community is a brownfield, an area with above average unemployment and high fossil fuel-based economic activity or the site of a former coal-fired power plant or coal mine.

## Investments in climate priorities

The IRA also calls for grants and loans designed to further the same decarbonization priorities as the tax credits described above. Some of the more significant grant amounts include:

- The creation of a $27 billion Greenhouse Gas Reduction Fund to disburse funding for clean energy technologies, of which a significant portion will go to low-income and disadvantaged communities
- $20 billion for agricultural conservation programs that reduce GHG emissions such as methane and increase storage of carbon in soil and trees
- $5 billion for wildfire protections and climate-smart forestry
- $5 billion for state planning and implementation of GHG reduction programs
- $3.375 billion to the General Services Administration to acquire and install low-embodied carbon materials and products for use in the construction or alteration of its buildings, invest in emerging and sustainable technologies and convert and construct high-performance green buildings
- $3 billion to reduce air pollution at ports through installation of zero-emission equipment and technology
- $3 billion to improve multimodal transportation access and to mitigate pollution from transportation facilities
- $3 billion to convert the U.S. Postal Service's vehicle fleet to electric vehicles
- $2 billion towards retooling existing automobile manufacturing facilities into clean vehicle manufacturing facilities and up to $20 billion in loans to construct new clean vehicle manufacturing facilities
- $2 billion to the Federal Highway Administration to promote the use of innovative low-carbon construction materials on Federal-aid highways
- $2 billion to National Laboratories to accelerate energy research in nuclear, fusion and other emerging technologies
- $1.55 billion to industry to help monitor and reduce methane emissions and address legacy air pollution from petroleum and natural gas systems

- $1.27 billion to various federal agencies designed to accelerate the permitting process, with a focus on permitting for energy and infrastructure projects
- $1 billion for clean heavy-duty vehicles, such as school buses and garbage trucks

Consistent with the Biden administration's stated commitment to environmental justice concerns, the IRA also directs several billion dollars in spending to support underserved communities and communities vulnerable to climate change impacts.

## Establishment of the Methane Emissions Reduction Program to cut methane pollution

In addition to tax credits and spending to promote clean energy, the IRA also aims to cut GHG emissions by creating the Methane Emissions Reduction Program, which would amend the Clean Air Act to impose fees on methane emissions from onshore and offshore oil and natural gas facilities that exceed certain defined thresholds. The fee is set by multiplying the number of metric tons of excess methane emissions by $900 starting in 2024 and ramping up to $1,200 and $1,500 in 2025 and 2026, respectively. This program would include many of the same categories of facilities that will be subject to forthcoming EPA standards on methane emissions from oil and gas facilities, which we discussed in our prior client update. Notably, facilities that comply with these forthcoming standards will be exempt from paying fees under this program as long as they meet the same or greater levels of emissions reductions as the standards set forth in the draft rule discussed in our client update.

## Promoting fossil fuel and renewable energy development on onshore and offshore federal property

The IRA authorizes the Department of Interior to grant leases and rights of way for offshore and onshore wind and solar energy. However, the IRA requires the Department of Interior to offer certain annual oil and gas lease sales (2 million acres onshore and 60 million offshore) prior to offering any future onshore or offshore wind and solar leases on federal land. In addition, the IRA reinstates lease sales in the Gulf of Mexico and the Cook Inlet in Alaska for oil and gas exploration, which were vacated by a federal judge in 2021. These provisions represent an notable divergence from the climate policies previously put forth by the Biden administration that sought to limit fossil fuel development on federal property.

## Companion bill regarding permitting of federal projects expected soon

Although the IRA contains certain provisions aimed at increasing the efficiency and speed of federal agency reviews for proposed projects, as part of the compromise leading to the passage of the IRA, Senator Joe Manchin of West Virginia and congressional leadership agreed to consider future legislation to ease federal permitting of energy-related projects by the end of September 2022. The content of the legislation is currently unclear, with drafts of legislative text and summaries containing differing provisions, but it appears that the legislation may include, among other things:

- Streamlined permitting for at least 25 "priority" energy projects (as determined by the President);
- Maximum timelines for permitting reviews, including two years for certain significant projects and one year for other projects for reviews under the National Environmental Policy Act;
- Amending Section 401 of the Clean Water Act to require states and tribes to make certification decisions regarding projects that could discharge into waterbodies within one year and narrow the scope of review;
- Requiring random assignment of judges for all federal circuit courts in cases seeking judicial review of any federal authorization for projects; and
- Requiring relevant agencies to take all necessary action to permit the construction and operation of the Mountain Valley Pipeline.

Notably, certain environmental groups have expressed opposition to the legislation, and Senate Republican support will be required for the legislation as it, unlike the IRA, will be subject to the traditional Senate rules that effectively require 60 votes in support. Accordingly, the content of this legislation, as well as its prospects for passage, remain unclear at this point.

# Takeaways

- **A significant boost to the clean energy industry.** The most direct and immediate beneficiary of the IRA's energy-related provisions is the clean energy industry. This includes established sources of renewable energy such as wind and solar, which will benefit from the extension and modification of the ITC and PTC, as well as emerging technologies such as clean hydrogen. Electric and fuel cell based transportation and the domestic supply chain critical to that sector will benefit as well. And while fossil fuel-based energy is not the focus of the IRA, the provisions regarding federal leasing for oil and gas development represents a more favorable stance towards that industry compared to the policies previously advocated by the Biden administration. Finally, the IRA's extension and expansion of the tax credit for carbon capture and sequestration may increase the lifespan of fossil fuel-based power plants (and thereby boost the fossil fuel industry more broadly) if these programs succeed in making carbon capture economically deployable on a wide basis.
- **A politically and legally viable approach to climate change regulation.** While the size and scope of the IRA's clean energy provisions are impressive, the IRA comes in the wake of the failure of many other, more ambitious attempts by the federal government to address climate change. As noted above, the clean energy provisions of the IRA are a more modest version of the Build Back Better Act, which included $550 billion in clean energy spending and at one point, a proposal to progressively increase the percentage of renewable fuel sources used by power companies via penalties and grants. However, the Build Back Better Act's more expansive provisions failed to muster sufficient support in Congress, and the prospects of other proposed federal legislation, such as a cap and trade program or a carbon tax, would appear to be even more remote. As a practical matter, therefore, the IRA may be the only viable path to address climate change legislatively at the federal level. In addition, the Clean Power Plan, the EPA's most ambitious attempt to limit GHG emissions through regulation under the Clean Air Act, was recently stymied by the Supreme Court's decision in *West Virginia v. EPA*, which will further hamper planned future climate change rulemaking by EPA.

**If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.**


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[1] This represents the total cost of Subtitle D of the IRA other than Parts 6 and 9 (which do not contain energy-related tax incentives) as estimated by the Joint Committee on Taxation.

[2] Under the program, an "advanced energy project" is defined to cover a wide variety of renewable energy manufacturing facilities or facilities that incorporate GHG reduction technologies.