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The “FUTURE” is Now: Responses due July 4, 2019, to IRC 45Q Carbon Oxide Sequestration Tax Credit “Request for Comments”

By Ellen Friedman and Shariff Barakat

More than a year after passage of the Furthering carbon capture, Utilization, Technology, Underground storage, and Reduced Emissions Act (the “FUTURE Act”), the U.S. Treasury and the Internal Revenue Service have issued a formal Request for Comments on Credit for Carbon Oxide Sequestration ([Notice 2019-32, 2019-21 I.R.B. 1187 \(May 20, 2019\)](#)) and Correction Announcement 2019-06) in connection with promulgation of regulations and other guidance necessary to implement IRC Section 45Q. Comments are due on July 4, 2019.

The FUTURE Act, supported by a broad coalition of climate change advocates, ethanol producers, organized labor, environmental groups, industrial and technology companies, oil and gas companies and others, was passed as part of the Bipartisan Budget Act on February 9, 2018, with the intent to greatly expand carbon capture utilization and storage (“CCUS”) as an additional means to reduce carbon oxides in the air. IRC Section 45Q was originally enacted in 2008, and the FUTURE Act amended and improved the subsidy offered by IRC Section 45Q. As amended, IRC Section 45Q, as more fully described in the [attached slide presentation](#), increases credit amounts; for new projects, removes the aggregate cap to the entire IRC Section 45Q subsidy that existed under the original IRC Section 45Q; allows qualified projects to claim the credit for 12 years; adds new industrial or direct air capture facilities to qualify; establishes separate capture thresholds for different types of facilities and allows the credit to be transferred from the entity that owns the capture equipment and ensures the sequestration to the entity that sequesters the carbon oxide. The credit under the new legislation only applies to carbon capture equipment if “construction begins” prior to January 1, 2024, underscoring the urgent need for implementing regulations.

Regulations relating to IRC Section 45Q, essential to encourage investment in the nascent CCUS sector by tax investors, will need to address such issues such as recapture; credit transferability; partnership structures; credit and credit recapture allocations; the nature and the key terms of contractual arrangements that investors may utilize with parties who capture, dispose or utilize qualified CO; and to provide definitions to key terms such as “secure geologic storage” and “beginning construction.” Notice 2019-32 seeks responses to these and other fundamental questions.

As CCUS projects are anticipated to be quite varied—encompassing a broad range of CCUS technologies, credit values and measurement methodology, with some to be built to receive carbon from existing facilities and others to be built in connection with newly constructed facilities, each presenting a unique investment and risk profile with differing levels of required capital, operating costs, revenue streams, third-party arrangements, permitting and overall economics—regulations will need to be drafted to provide ample flexibility across the entire asset class. While there may be some useful precedents from existing IRS guidance pertaining to the solar investment tax credit regime and the wind and refined coal production tax credit regimes, amended IRC Section 45Q, which contemplates credit transferability and a two-tier credit value to address the more challenging economics of a pure carbon storage facility vs. carbon storage through enhanced oil recovery, may serve as a basis for regulations which allow for structures that are more accommodating to tax investors than the typical wind and solar partnership and leasing structures.

Please reach out to us if you have any questions or would like to be part of an informal IRC Section 45Q working group.

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