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## Treasury Issues Final Regulations on Carbon Capture Tax Credits

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On January 6, 2021, the Treasury issued [Final Regulations](#) on the expanded carbon capture tax credit under Section 45Q of the Internal Revenue Code of 1986, as amended (the "Code"), clarifying and expanding the [Proposed Regulations](#) it issued last year.

The Bipartisan Budget Act of 2018 expanded Code Section 45Q to provide a tax credit of (a) up to \$50 per metric ton for carbon oxide sequestration for taxpayers who capture qualified carbon oxide with carbon capture equipment at a qualified facility and dispose of it in secure geological storage, and (b) up to \$35 per metric ton of qualified carbon oxide for taxpayers who capture qualified carbon oxide and use it for enhanced oil recovery purposes.

The Final Regulations incorporate the following key changes, which are generally investor-friendly, from the Proposed Regulations:

- *Tax Credit Recapture Period.* The Proposed Regulations included a five-year recapture period. The Final Regulations shorten this period to three years, noting that this the shortened period "sufficiently accounts for risk and reduces the compliance burden that would be imposed by a five-year recapture period."
- *Definition of Carbon Capture Equipment.* The definition of "carbon capture equipment" in the Proposed Regulations included an expansive list of "qualifying carbon capture components" that would be considered carbon capture equipment and a list of "excluded components" that would not. The Final Regulations simplify the "carbon capture equipment" definition by removing these lists in favor of a functionally based definition that provides flexibility. Under the Final Regulations, carbon capture equipment generally includes all components of property that are used to capture or process carbon oxide until the carbon oxide is transported for disposal, injection, or utilization. In addition, carbon capture equipment generally does not include components of property used for transporting qualified carbon oxide for disposal, injection, or utilization.
- *Required Contract Ensuring the Capture and Disposal, Injection, or Utilization of Qualified Carbon Oxide.* The Proposed Regulations set forth certain contract provisions necessary for a contract ensuring the capture and disposal, injection, or utilization of qualified carbon oxide to qualify as a "binding written contract." This conflicted with the definition of "binding written contract" in [IRS Notice 2020-12](#). The Final Regulations have adopted the definition of "binding

written contract” set forth in the IRS Notice and in Treasury Regulation Section 1.168(k)-1(b)(4)(ii)(A)-(D). In addition, the Final Regulations permit multiple binding written contracts.

- *Aggregation of Carbon Captured By Multiple Facilities.* The Final Regulations permit taxpayers to aggregate carbon captured by multiple facilities to meet the minimum capture requirements of Code Section 45Q(d), provided that the multiple facilities would be considered as operated as part of a single project under the “single project” factors set forth in Section 8.01 of [IRS Notice 2020-12](#).
- *Election to Pass Through or Transfer the Credit to Another Taxpayer.* The Proposed Regulations provided guidance regarding who may make and the time and manner for making an election under Code Section 45Q(f)(3)(B) to allow a third-party taxpayer who disposes of the qualified carbon oxide, utilizes the qualified carbon oxide, or uses the qualified carbon oxide as a tertiary injectant to claim the credit. The Final Regulations clarify that the disposer, injector, or utilizer that enters into the contract with the electing taxpayer for the disposal, injection, or utilization of the electing taxpayer’s qualified carbon oxide is the party that may qualify as a credit claimant. If that disposer, injector, or utilizer subcontracts with a third-party to carry out the disposal, injection, or utilization, the subcontractor may not be a credit claimant. Although the Final Regulations place minimum capture requirements on the owner of the carbon capture equipment that will be considered a qualified facility, they do not impose such minimum capture requirements on the credit claimant.
- *Extension of Credit Availability.* The Consolidated Appropriations Act, 2021 extended the commencement date for construction of facilities that the IRS will consider “qualified facilities” under Code Section 45Q from December 31, 2023 to December 31, 2025. The Final Regulations reflect this extension.

These Final Regulations, which address and clarify key technical and administrative issues regarding Code Section 45Q, provide additional certainty to taxpayers, allowing them to more confidently move forward with investments in carbon capture projects.

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