

Notice 2010-37**Credit for Renewable Electricity Production, Refined Coal Production, and Indian Coal Production, and Publication of Inflation Adjustment Factors and Reference Prices for Calendar Year 2010**

This notice publishes the inflation adjustment factors and reference prices for calendar year 2010 for the renewable electricity production credit, the refined coal production credit, and the Indian coal production credit under § 45 of the Internal Revenue Code. The 2010 inflation adjustment factors and reference prices are used in determining the availability of the credits. The 2010 inflation adjustment factors and reference prices apply to calendar year 2010 sales of kilowatt-hours of electricity produced in the United States or a possession thereof from qualified energy resources and to calendar year 2010 sales of refined coal and Indian coal produced in the United States or a possession thereof.

BACKGROUND

Section 45(a) provides that the renewable electricity production credit for any tax year is an amount equal to the product of 1.5 cents multiplied by the kilowatt hours of specified electricity produced by the taxpayer and sold to an unrelated person during the tax year. This electricity must be produced from qualified energy resources and at a qualified facility during the 10-year period beginning on the date the facility was originally placed in service.

Section 45(b)(1) provides that the amount of the credit determined under § 45(a) is reduced by an amount which bears the same ratio to the amount of the credit as (A) the amount by which the reference price for the calendar year in which the sale occurs exceeds 8 cents, bears to (B) 3 cents. Under § 45(b)(2), the 1.5 cent amount in § 45(a), the 8 cent amount in § 45(b)(1), the \$4.375 amount in § 45(e)(8)(A), and in § 45(e)(8)(B)(i), the \$2.00 amount in § 45(e)(8)(D)(ii)(I), the reference price of fuel used as feedstock (within the meaning of § 45(c)(7)(A)) in 2002 are each adjusted by multiplying the amount by the inflation adjustment factor for the calendar year in which the sale occurs. If any amount as increased under the preceding sentence is not a multiple of 0.1 cent, the amount is rounded to the nearest multiple of 0.1 cent.

Section 45(c)(1) defines qualified energy resources as wind, closed-loop biomass, open-loop biomass, geothermal energy, solar energy, small irrigation power, municipal solid waste, qualified hydropower production, marine and hydrokinetic renewable energy.

Section 45(d)(1) defines a qualified facility using wind to produce electricity as any facility owned by the taxpayer that is originally placed in service after December 31, 1993, and before January 1, 2013. See § 45(e)(7) for rules relating to the inapplicability of the credit to electricity sold to utilities under certain contracts.

Section 45(d)(2)(A) defines a qualified facility using closed-loop biomass to produce electricity as any facility (i) owned by the taxpayer that is originally placed in service after December 31, 1992, and before January 1, 2014, or (ii) owned by the taxpayer

which before January 1, 2014, is originally placed in service and modified to use closed-loop biomass to co-fire with coal, with other biomass, or with both, but only if the modification is approved under the Biomass Power for Rural Development Programs or is part of a pilot project of the Commodity Credit Corporation as described in 65 Fed. Reg. 63052. Section 45(d)(2)(C) provides that in the case of a qualified facility described in § 45(d)(2)(A)(ii), (i) the 10-year period referred to in § 45(a) is treated as beginning no earlier than the date of enactment of § 45(d)(2)(B)(i); and (ii) if the owner of the facility is not the producer of the electricity, the person eligible for the credit allowable under § 45(a) is the lessee or the operator of the facility.

Section 45(d)(3)(A) defines a qualified facility using open-loop biomass to produce electricity as any facility owned by the taxpayer which (i) in the case of a facility using agricultural livestock waste nutrients, (I) is originally placed in service after the date of enactment of § 45(d)(3)(A)(i)(I) and before January 1, 2014, and (II) the nameplate capacity rating of which is not less than 150 kilowatts; and (ii) in the case of any other facility, is originally placed in service before January 1, 2014. In the case of any facility described in § 45(d)(3)(A), if the owner of the facility is not the producer of the electricity, § 45(d)(3)(C) provides that the person eligible for the credit allowable under § 45(a) is the lessee or the operator of the facility.

Section 45(d)(4) defines a qualified facility using geothermal or solar energy to produce electricity as any facility owned by the taxpayer which is originally placed in service after the date of enactment of § 45(d)(4) and before January 1, 2014 (January 1, 2006, in the case of a facility using solar energy). A qualified facility using geothermal or solar energy does not include any property described in § 48(a)(3) the basis of which is taken into account by the taxpayer for purposes of determining the energy credit under § 48.

Section 45(d)(5) defines a qualified facility using small irrigation power to produce electricity as any facility owned by the taxpayer which is originally placed in service after the date of enactment of § 45(d)(5) and before October 3, 2008.

Section 45(d)(6) defines a qualified facility using gas derived from the biodegradation of municipal solid waste to produce electricity as any facility owned by the taxpayer which is originally placed in service after the date of enactment of § 45(d)(6) and before January 1, 2014.

Section 45(d)(7) defines a qualified facility (other than a facility described in paragraph (6)) that burns municipal solid waste to produce electricity as any facility owned by the taxpayer which is originally placed in service after the date of enactment of § 45(d)(7) and before January 1, 2014. A qualified facility burning municipal solid waste includes a new unit placed in service in connection with a facility placed in service on or before the date of enactment of § 45(d)(7), but only to the extent of the increased amount of electricity produced at the facility by reason of such new unit.

Section 45(d)(8) provides in the case of a facility that produces refined coal, the term “refined coal production facility” means (i) with respect to a facility producing steel

industry fuel, any facility (or any modification to a facility) which is placed in service before January 1, 2010, and (ii) with respect to any other facility producing refined coal, and facility placed in service after the date of the enactment of the American Jobs Creation Act of 2004 and before January 1, 2010.

Section 45(d)(9) defines a qualified facility producing qualified hydroelectric production described in § 45(c)(8) as (A) any facility producing incremental hydropower production, but only to the extent of its incremental hydropower production attributable to efficiency improvements or additions to capacity described in § 45(c)(8)(B) placed in service after the date of enactment of § 45(d)(9) and before January 1, 2014, and (B) any other facility placed in service after the date of enactment of § 45(d)(9) and before January 1, 2014. Section 45(d)(9)(C) provides that in the case of a qualified facility described in § 45(d)(9)(A), the 10-year period referred to in § 45(a) is treated as beginning on the date the efficiency improvements or additions to capacity are placed in service.

Section 45(d)(10) provides in the case of a facility that produces Indian coal, the term “Indian coal production facility” means a facility which is placed in service before January 1, 2009.

Section 45(d)(11) provides in the case of a facility producing electricity from marine and hydrokinetic renewable energy, the term “qualified facility” means any facility owned by the taxpayer which (i) has a nameplate capacity rating of at least 150 kilowatts, and (ii) which is originally placed in service on or after the date of the enactment of this paragraph and before January 1, 2012.

Section 45(e)(8)(A) provides that the refined coal production credit is an amount equal to \$4.375 per ton of qualified refined coal (i) produced by the taxpayer at a refined coal production facility during the 10-year period beginning on the date the facility was originally placed in service, and (ii) sold by the taxpayer (I) to an unrelated person and (II) during the 10-year period and the tax year. Section 45(e)(8)(B) provides that the amount of credit determined under § 45(e)(8)(A) is reduced by an amount which bears the same ratio to the amount of the increase as (i) the amount by which the reference price of fuel used as feedstock (within the meaning of § 45(c)(7)(A)) for the calendar year in which the sale occurs exceeds an amount equal to 1.7 multiplied by the reference price for such fuel in 2002, bears to (ii) \$8.75. Section 45(e)(8)(D)(ii)(I) provides that in the case of a taxpayer who produces steel industry fuel, subparagraph (A) shall be applied by substituting “2.00 per barrel-of-oil equivalent” for \$4.375 per ton.” Section 45(e)(8)(D)(ii)(II) provides that in lieu of the 10-year period referred to in clauses (i) and (ii)(II) of subparagraph (A), the credit period shall be the period beginning in the later of the date such facility was originally placed-in-service, or October 1, 2008, and ending on the later of December 31, 2009, or the date which is 1 year after the date such facility or the modifications described in clause (iii) were placed in service. Section 45(e)(8)(D)(ii)(III) provides that subparagraph (B) (dealing with the phaseout of the credit) will not apply.

Section 45(e)(10)(A) provides in the case of a producer of Indian coal, the credit determined under section 45 for any taxable year shall be increased by an amount equal to the applicable dollar amount per ton of Indian coal (i) produced by the taxpayer at an Indian coal production facility during the 7-year period beginning on January 1, 2006, and (ii) sold by the taxpayer (I) to an unrelated person, and (II) during such 7-year period and such taxable year.

Section 45(e)(10)(B)(i) defines “applicable dollar amount” for any taxable year as (I) \$1.50 in the case of calendar years 2006 through 2009, and (II) \$2.00 in the case of calendar years beginning after 2009.

Section 45(e)(2)(A) requires the Secretary to determine and publish in the Federal Register each calendar year the inflation adjustment factor and the reference price for the calendar year. The inflation adjustment factors and the reference prices for the 2010 calendar year were published in the Federal Register on April 1, 2010 (75 Fed. Reg.16576).

Section 45(e)(2)(B) defines the inflation adjustment factor for a calendar year as the fraction the numerator of which is the GDP implicit price deflator for the preceding calendar year and the denominator of which is the GDP implicit price deflator for the calendar year 1992. The term “GDP implicit price deflator” means the most recent revision of the implicit price deflator for the gross domestic product as computed and published by the Department of Commerce before March 15 of the calendar year.

Section 45(e)(2)(C) provides that the reference price is the Secretary’s determination of the annual average contract price per kilowatt hour of electricity generated from the same qualified energy resource and sold in the previous year in the United States. Only contracts entered into after December 31, 1989, are taken into account.

Under § 45(e)(8)(C), the determination of the reference price for fuel used as feedstock within the meaning of § 45(c)(7)(A) is made according to rules similar to the rules under § 45(e)(2)(C).

Under section 45(e)(10)(B)(ii), in the case of any calendar year after 2006, each of the dollar amounts under section 45(e)(10)(B)(i) shall be equal to the product of such dollar amount and the inflation adjustment factor determined under section 45(e)(2)(B) for the calendar year, except that section 45(e)(2)(B) shall be applied by substituting 2005 for 1992.

INFLATION ADJUSTMENT FACTORS AND REFERENCE PRICES

The inflation adjustment factor for calendar year 2010 for qualified energy resources and refined coal is 1.4342. The inflation adjustment factor for Indian coal is 1.0976. The reference price for calendar year 2010 for facilities producing electricity from wind (based upon information provided by the Department of Energy) is 4.22 cents per kilowatt hour. The reference prices for fuel used as feedstock within the meaning of § 45(c)(7)(A), relating to refined coal production (based upon information provided by

the Department of Energy) are \$31.90 per ton for calendar year 2002 and \$54.74 per ton for calendar year 2010. The reference prices for facilities producing electricity from closed-loop biomass, open-loop biomass, geothermal energy, solar energy, small irrigation power, municipal solid waste, qualified hydropower production, marine and hydrokinetic energy have not been determined for calendar year 2010.

PHASE-OUT CALCULATION

Because the 2010 reference price for electricity produced from wind does not exceed 8 cents multiplied by the inflation adjustment factor, the phaseout of the credit provided in § 45(b)(1) does not apply to such electricity sold during calendar year 2010. Because the 2010 reference price of fuel used as feedstock for refined coal does not exceed the \$31.90 reference price of such fuel in 2002 multiplied by the inflation adjustment factor and 1.7, the phaseout of credit provided in § 45(e)(8)(B) does not apply to refined coal sold during calendar year 2010. Further, for electricity produced from closed-loop biomass, open-loop biomass, geothermal energy, solar energy, small irrigation power, municipal solid waste, qualified hydropower production, marine and hydrokinetic energy, the phaseout of credit provided in § 45(b)(1) does not apply to such electricity sold during calendar year 2010.

CREDIT AMOUNT BY QUALIFIED ENERGY RESOURCE AND FACILITY, REFINED COAL, AND INDIAN COAL

As required by § 45(b)(2), the 1.5 cent amount in § 45(a)(1), the 8 cent amount in § 45(b)(1), the \$4.375 amount in § 45(e)(8)(A) and the \$2.00 amount in § 45(e)(8)(D) are each adjusted by multiplying such amount by the inflation adjustment factor for the calendar year in which the sale occurs. If any amount as increased under the preceding sentence is not a multiple of 0.1 cent, such amount is rounded to the nearest multiple of 0.1 cent. In the case of electricity produced in open-loop biomass facilities, small irrigation power facilities, landfill gas facilities, trash combustion facilities, qualified hydropower facilities, marine and hydrokinetic renewable energy, § 45(b)(4)(A) requires the amount in effect under § 45(a)(1) (before rounding to the nearest 0.1 cent) to be reduced by one-half. Under the calculation required by § 45(b)(2), the credit for renewable electricity production for calendar year 2010 under § 45(a) is 2.2 cents per kilowatt hour on the sale of electricity produced from the qualified energy resources of wind, closed-loop biomass, geothermal energy, and solar energy, and 1.1 cent per kilowatt hour on the sale of electricity produced in open-loop biomass facilities, small irrigation power facilities, landfill gas facilities, trash combustion facilities, qualified hydropower facilities, marine and hydrokinetic energy facilities. Under the calculation required by § 45(b)(2), the credit for refined coal production for calendar year 2010 under section 45(e)(8)(A) is \$6.27 per ton on the sale of qualified refined coal. The credit for steel industry fuel is \$2.87 per barrel-of-oil equivalent of steel industry fuel sold. The credit for Indian coal production for calendar year 2010 under § 45(e)(10)(B) is \$2.2 per ton on the sale of Indian coal.

DRAFTING AND CONTACT INFORMATION

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