



## ML Strategies Legislative Update

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## Congress Considers Clean Energy “Tax Extenders”

### Senate Finance Committee to Mark Up Extenders Package

Three months after dozens of individual and business tax provisions expired, the Senate Finance Committee is poised to mark-up a bill tomorrow that would extend 42 expired provisions--along with two provisions expiring in 2014--through the end of 2015.

Senate Finance Committee Chairman Ron Wyden (D-OR) and Ranking Member Orrin Hatch (R-UT) released a [bipartisan draft bill](#) on April 1. Because it is a bipartisan draft, and Ranking Member Hatch favored extension of targeted measures rather than a blanket extension, the “Expiring Provisions Improvement Reform and Efficiency (EXPIRE) Act” leaves out several controversial measures opposed by some Republicans, notably the Production Tax Credit (PTC) for renewable energy, as well as several less-controversial but lesser-known energy efficiency provisions. Bonus depreciation and several advanced biofuels and clean energy provisions are included.

A full list from the Congressional Research Service of extender provisions that expired in 2013 is listed at the bottom of this update. The following twelve provisions were not included in the mark released on April 1:

- Credit for certain nonbusiness energy property (sec. 25C(g)).
- Credit for health insurance costs of eligible individuals (sec. 35(a)).
- Credit for energy efficient appliances (sec. 45M(b)).
- Beginning of construction date for renewable power facilities eligible to claim the electricity production credit or investment credit (secs. 45(d) and 48(a)(5)).
- Seven year recovery period for motorsports (sec. 168(i)(15)).
- Special rules for contributions of capital gain real property made for conservation purposes (secs 170(b)(1)(E) and 170 (b)(2)(B)).
- Placed in service date for certain refinery property (sec. 179C(c)(1)).
- Energy efficient commercial buildings deduction (sec. 179D(h)).
- Special expensing rules for film and television productions (sec. 181(f)).
- Special rule for sales or dispositions to implement FERC or state restructuring policy (sec. 451(i)).
- Empowerment zone tax incentives
- CFC look through (sec. 954(c)(6)).

Notably, the bill extends through 2015 both currently expired provisions and two expiring in 2014. This is a break from the usual practice of one-year extensions. Congress previously has extended all but one of the provisions that expired at the end of 2013 at least once.

Finance Committee members submitted [amendments](#) before the mark-up. In response to the draft, a number of senators are preparing energy-related amendments, some of which may be incorporated in a revised Chairman's mark released just before the mark-up on Thursday, or introduced at the mark-up itself.

- Sen. Michael Bennet (D-CO) is preparing an amendment allowing projects that commence construction—rather than those placed in service—before 2017 to be eligible for the Sec. 48 (solar) Investment Tax Credit (ITC). Other senators, including Sens. Tom Carper (D-DE), Maria Cantwell (D-WA), Sherrod Brown (D-OH), Bill Nelson (D-FL), Debbie Stabenow (D-MI) and Robert Menendez (D-NJ) may co-sponsor.
- Sen. Chuck Grassley (R-NE) may introduce an amendment extending the Sec. 45 PTC and ITC in lieu of the PTC. Sens. Ben Cardin (D-MD), Cantwell, Carper, Stabenow, Bennet, Brown, Nelson, Menendez are cosponsoring, and the effort probably has majority support on the committee, despite vocal opposition from some Republican members.
- Sen. John Thune (R-SD) may introduce an amendment to phase out the Sec. 45 PTC.
- Sens. Carper, Cardin, Brown, and Menendez will introduce an amendment establishing an offshore wind ITC for the first 3,000 MW.
- Sen. Cardin may lead efforts on energy efficiency amendments, including efforts to modify and extend the 179D deduction for commercial building efficiency.
- Sen. Rob Portman (R-OH) may also offer an amendment to extend 179D.
- Sens. Cardin and Carper may introduce an amendment allowing ITC eligibility for waste heat to power.
- Sen. Mike Enzi (R-WY) may introduce an amendment to incentivize new supercritical coal fired power plants.
- Sen. Pat Toomey (R-PA) may introduce an amendment to eliminate “crony capitalist” energy tax credits (the PTC and ITC in lieu of the PTC).

Amendments not related to expired tax provisions will not be considered germane, but even if they were, they would need to be paid for. Thus, some of the amendments may be introduced and withdrawn without a vote. Given Democratic support and Republican champions like Sen. Grassley, the PTC provisions stand a good chance of being included in the bill by the time it passes out of committee.

Senators hoping to open up master limited partnerships (MLPs) to renewable energy or to adopt “commence construction” language for the solar ITC—if unsuccessful in mark-up—may have a chance to amend the bill again when the bill reaches the Senate floor. The amendment process cuts both ways, however: if the PTC extension is added to the bill in mark-up, it may have to survive an amendment stripping it out when the bill reaches the full Senate for a vote.

As of last week, Majority Leader Harry Reid (D-NV) wanted to bring the bill to the floor quickly, and there is no indication yet that the one-day delay of the mark-up has changed his intention.

### **Where Does Congress Go From Here?**

Even if the full Senate were to approve the tax extender package shortly after it passes out of the committee, as expected, the outlook in the House is far from certain. For months, Ways and Means Chairman Dave Camp (R-MI), who announced his retirement on Monday, has suppressed any talk of tax extenders so that his committee can focus on tax reform. Now that his own leadership has shown little appetite for tax reform before the election, he recently announced upcoming hearings evaluating the merits of extenders, but on a slower timeframe than the Senate. Like Ranking Member Hatch, Chairman Camp seems more inclined to evaluate the merits of certain extenders and let certain ones expire permanently.

If a Senate-passed extender package increases pressure on the House to act, renewable energy

credits may not fare as favorably in the House as they are predicted to do in the Senate, particularly because in his own tax reform bill, Camp proposed letting all renewable energy credits expire and retroactively reducing PTC payments for projects that had already qualified. House Ways and Means Ranking Member Sandy Levin (D-MI) recently told renewable energy advocates that an extension of the PTC is not “automatically a given.” Advocates can hope that the presumed full extension through 2015 in a Senate bill will strengthen the bargaining position with the House.

Still, Ways and Means Committee members express optimism that Congress will pass an extenders package this year. One senior committee member said that the Senate’s expected passage of extenders in the near future will put more pressure on the House to act. Whether the House will take up extenders before the election is an open question, with the odds more likely that such a House vote occurs after the election. On the one hand, the Ways and Means member speculated that House leadership would want to show that they could do something before the election; on the other hand, if past is precedent, the post-election “lame duck” session might be more likely given House leadership’s reluctance to vote on such an expensive package before the election. The only thing clear is that if energy extenders are extended this year, it will be because they were able to successfully ride the coattails of other, widely supported business tax provisions like the research and development credit. A list of those other provisions is included below.

### **List of Tax Provisions Expired in 2013, from the Congressional Research Service**

The full report is available [HERE](#).

#### **Individual Provisions**

Above-the-Line Deduction for Certain Expenses of Elementary and Secondary School Teachers

Deduction for State and Local Sales Taxes

Above-the-Line Deduction for Qualified Tuition and Related Expenses

Premiums for Mortgage Insurance Deductible as Qualified Interest

Parity for Exclusion for Employer-Provided Mass Transit and Parking Benefits

Exclusion of Discharge of Principal Residence Indebtedness from Gross Income for Individuals

Credit for Health Insurance Costs of Eligible Individuals

#### **Business Provisions**

Tax Credit for Research and Experimentation Expenses

Temporary Increase in Limit on Cover Over of Rum Excise Tax Revenues to Puerto Rico and the Virgin Islands

Work Opportunity Tax Credit

Indian Employment Tax Credit

Accelerated Depreciation for Business Property on Indian Reservations

Exceptions under Subpart F for Active Financing Income

Look-Through Treatment of Payments Between Controlled Foreign Corporations under the Foreign Personal Holding Company Rules

Credit for Railroad Track Maintenance

15-Year Straight-Line Cost Recovery for Qualified Leasehold, Restaurant, and Retail Improvements

7-Year Recovery for Motorsport Racing Facilities

Deduction Allowable with Respect to Income Attributable to Domestic Production Activities in Puerto Rico

Modification of Tax Treatment of Certain Payments to Controlling Exempt Organizations

Treatment of Certain Dividends of Regulated Investment Companies ("RICs")

Employer Wage Credit for Activated Military Reservists

Special Expensing Rules for Film and Television Production

RIC Qualified Investment Entity Treatment under FIRPTA

Special Rules for Qualified Small Business Stock

Increase in Expensing to \$500,000 / \$2,000,000 and Expansion of Definition of Section 179 Property

Bonus Depreciation<sup>h</sup>

Reduction in S Corporation Recognition Period for Built-In Gains Tax

Election to Accelerate AMT Credits in Lieu of Additional First-Year Depreciation

Low-Income Housing Tax Credit (LIHTC) Rate

Treatment of Military Basic Housing Allowances under Low-Income Housing Credit<sup>i</sup>

Three-Year Depreciation for Race Horses Two Years or Younger<sup>k</sup>

### **Charitable Provisions**

Enhanced Charitable Deduction for Contributions of Food Inventory

Tax-Free Distributions From Individual Retirement Accounts for Charitable Purposes

Basis Adjustment to Stock of S Corporations Making Charitable Contributions of Property

Special Rules for Contributions of Capital Gain Real Property for Conservation Purposes

## **Energy Provisions**

Construction Date for Eligible Facilities (Including Wind) to Claim the Production Tax Credit (PTC) or the Investment Tax Credit (ITC) in Lieu of the PTC<sup>n</sup>

Special Rule to Implement Electric Transmission Restructuring

Credit for Construction of Energy Efficient New Homes

Energy Efficient Commercial Building Deduction

Mine Rescue Team Training Credit

Election to Expense Mine-Safety Equipment

Credit for Energy Efficient Appliances

Credit for Nonbusiness Energy Property

Alternative Fuel Vehicle Refueling Property

Incentives for Alternative Fuel and Alternative Fuel Mixtures

Incentives for Biodiesel and Renewable Diesel<sup>e</sup>

Placed-in-Service Date for Partial Expensing of Certain Refinery Property<sup>u</sup>

Credit for Electric Drive Motorcycles and Three-Wheeled Vehicles

Second Generation (Cellulosic) Biofuel Producer Credit

Credit for Production of Indian Coal

Special Depreciation Allowance for Second Generation (Cellulosic) Biofuel Plant Property<sup>v</sup>

## **Community Assistance Provisions**

Qualified Zone Academy Bonds - Allocation of Bond Limitation

New Markets Tax Credit

American Samoa Economic Development Credit

Empowerment Zone Tax Incentives<sup>w</sup>

## **Disaster Relief Provisions**

New York Liberty Zone – Tax Exempt Bond Financing

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