ML Strategies Legislative Update

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The Fiscal Cliff Deal's Impact on Clean Energy

Contains key tax provisions for renewable energy but funding for USDA energy programs is left out

Capping weeks of intense negotiations between the Obama Administration and Congressional leaders to avert the fiscal cliff, the House of Representatives late on the night of Jan. 1 passed HR 8, the American Taxpayer Relief Act, on vote of 257-167. The Act was passed by the Senate, 89-8, in a similar late night vote on Dec. 31, so it now goes to President Obama for his signature.

The Act is not a "grand bargain" or a comprehensive solution: sequestration—the automatic spending cuts Congress imposed on itself--has been postponed for only two months to give time for further negotiations. The Act allows federal tax rates to rise on those making over $400,000 ($450,000 for married couples) but also limits the impact of the Alternative Minimum Tax on 4 million taxpayers. The Act also includes a one-year extension of emergency unemployment benefits and a one-year extension of provisions to prevent doctors' payments from Medicare from being cut.

The Act is a mixed bag for the clean energy industry but contains some significant wins on tax policy. The Act extends $46 billion in tax cuts for individuals and businesses—the so called tax extenders. Many of these tax extenders target the renewable energy and energy efficiency industries. For example, a tweak to the Section 45 production tax credit will allow projects that begin construction before Jan. 1, 2014 to take advantage of the credit. However, the Act is a disappointment for those depending on USDA Energy Title Programs as no mandatory funding was contained in the nine-month reauthorization of Farm Bill programs included as part of the package.

Below is a summary of key clean energy provisions in the American Taxpayer Relief Act.

Tax extenders

- **Extension and modification of incentives for Sec. 45 renewable electricity property production tax credit.** Under current law, taxpayers can claim either a 1.1 or 2.2 cent per kilowatt hour tax credit for electricity produced for a 10-year period from eligible facilities placed-in-service by the end of 2012 (wind) or 2013 (closed-loop biomass, open-loop biomass, landfill gas, or municipal solid waste facilities). The provision modifies section 45 to allow eligible renewable energy facilities that begin construction before the end of 2013 to claim the 10-year credit.

- **Extension of investment tax credit in lieu of production tax credit.** The Act would allow facilities qualifying for the section 45 production tax credit to elect to take a 30% investment tax credit in lieu of the production tax credit for facilities that begin construction by the end of 2013.

- **Extension of alternative fuel vehicle refueling property credit (non-hydrogen refueling property).** The Act extends for two years, through 2013, the 30% investment tax credit for alternative vehicle refueling property.

- **Extension of incentives for alternative fuel and alternative fuel mixtures (other than liquefied hydrogen)**. The Act extends through 2013 the $0.50 per gallon alternative fuel tax credit and alternative fuel mixture tax credit. This credit can be claimed as a nonrefundable excise tax credit or a refundable income tax credit. Due to claims of abuse in the alternative mixture tax credit, taxpayers can no longer claim the refundable portion of the alternative fuel mixture tax credit.

- **25C Credit for certain nonbusiness energy property**. The Section 25C credit for energy-efficient improvements to existing homes is extended for two years, through 2013. This reinstates the credit as it existed before passage of the American Recovery and Reinvestment Act.

- **Plug-in electric motorcycles and highway vehicles.** The Act reforms and extends for two years, through 2013, the individual income tax credit for highway-capable plug-in motorcycles and 3-wheeled vehicles. It also makes golf carts and other low-speed vehicles ineligible for the credit.

- **Cellulosic biofuels producer tax credit**. The Act extends the $1.01 per gallon production tax credit on cellulosic biofuel produced before the end of 2013. The definition of qualified cellulosic biofuel production is expanded to include algae-based fuel.

- **Biodiesel and renewable diesel credits.** The Act extends through 2013 the $1.00 per gallon tax credit for biodiesel, as well as the $.10 per gallon small agri-biodiesel producer credit. The Act also renews through 2013 the $1.00 per gallon tax credit for diesel fuel created from biomass.

- **Credit for construction of new energy efficient homes**. The tax credit for the construction of energy-efficient new homes that achieve a 30% or 50% reduction in heating and cooling energy consumption is extended for two years, through 2013.

- **Energy efficient appliance credit.** The Act extends for two years, through 2013, a tax credit to US-based companies that manufacture energy-efficient clothes washers, dishwashers and refrigerators.

- **Cellulosic biofuels bonus depreciation.** The 2008 Farm Bill allowed cellulosic biofuel facilities placed-in-service before the end of 2012 to expense half of their eligible capital costs in the first year of operation. The Act extends this bonus depreciation for one additional year for facilities placed-in-service before the end of 2013 and allows algae-based fuel to qualify for bonus depreciation.

- **Special rule for sales of transmission property.** The Act extends the present law deferral of gain on sales of transmission property by vertically integrated electric utilities to FERC-approved independent transmission companies. The Act allows gain on such sales prior to January 1, 2014 to be recognized ratably over an eight-year period.

- **Extension of New Markets Tax Credit**. The federal government leverages New Markets Tax Credits (NMTCs) to encourage significant private investment in businesses in low-income communities. The program provides a 39 percent tax credit spread over 7 years. The Act extends NMTCs for two years, permitting a maximum annual amount of qualified equity investments of $3.5 billion each year.

- **Extension of bonus depreciation.** Businesses are allowed to recover the cost of capital expenditures over time according to a depreciation schedule. Starting in 2008, Congress allowed businesses to take an additional depreciation deduction allowance in the first year. The Act extends the 50 percent accelerated expensing provision for qualifying property purchased and placed in service before January 1, 2014 (before January 1, 2015 for certain longer-lived and transportation assets).

Bioenergy funding

The Act also extends the 2008 Farm Act for nine-months (until the end of fiscal year 2013). A short term extension was necessary after the House refused to vote on a five-year reauthorization. The Act reauthorizes funding for US Department of Agriculture (USDA) Energy Title programs but does not provide mandatory funding. Despite hopeful signals that mandatory funding was included in an agreement between the Agriculture Committees' leadership, it was not included in the final deal between Senate Minority Leader McConnell and the Obama Administration.

By comparison, the Senate Farm Bill passed last year contained approximately $800 billion over 10 years for USDA energy programs. It also would have expanded eligibility under certain programs to renewable chemicals. These USDA programs provide grants, loans, and loan guarantees to renewable energy and advanced biofuel projects; promote cultivation of cellulosic feedstocks; and provide research funding. Work on a new five-year Farm Act will now have to start again, though much of the groundwork has already been done by the committees.

If you have any questions about the American Taxpayer Relief Act and its impact on the clean energy industry, please feel free to contact us.

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