

2018 Bipartisan Budget Act Extends Tax Credits

TO the amazement of some and confusion of others, on February 9 — only six weeks after the Tax Cuts and Jobs Act (see “Will the Tax Cuts Act Cut Back AD,” February 2018) — Congress passed another controversial bill. Nominally a cross-the-aisle effort to avert another government shutdown, the “Bipartisan Budget Act” (H.R. 1892) masked cavernous gaps between a divided Capitol Hill and the White House.

The Bipartisan Act began as the third continuing resolution since last fall seeking to keep the U.S. government open. But it did so only until March 23, when intractable matters such as immigration will have to be revisited. The Act both raised the debt ceiling and exploded spending caps in place since 2011, adding over half a trillion dollars in defense and domestic funding to the Tax Act’s estimated \$1.5 trillion in new deficits. In the midst of these giant developments, the Act extended a series of tax benefits for anaerobic digestion (AD) and other renewable energy projects — but not in ways the industry expected.

On December 17, the chair of the Senate tax writing committee introduced a bill (Hatch, S. 2256) that generally would have extended “expired” production and investment tax credits (PTCs/ITCs) for AD and other biomass-to-electricity projects for two years from 2016. That bill would have provided similar credit extensions for production of certain biofuels and would have revived so-called “orphan ITC credits” that Congress omitted from its 2015 extenders. Based on bicameral commitments it was seen as a blueprint for forthcoming action.

’Twas not to be. House tax writers disliked temporary extenders and the projected budget effects of the Hatch extenders, which would have totaled only \$30 billion over 10 years— less than 5

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percent of the legislation’s overall estimated cost. Given uncertain shutdown aftermaths, Senate negotiators compromised. When the Senate bill’s energy credits surfaced early in February, they provided only retroactive one-year extensions for “new” biogas-to-electricity facilities (plus “new” closed-loop biomass, landfill gas, municipal waste combustor, small hydro, marine energy, and geothermal electricity facilities) through the end of 2017.

Industry spokespeople initially cried foul, asserting that “By not extending the credit[s] for biogas into the future, the Act will virtually kill . . . new biogas-electricity projects by giving a 30 percent [ITC] advantage to many other renewable electricity projects” (e.g., microturbines, fuel cells and combined heat/power facilities (CHP), not to men-

tion conventional solar and wind; see below). But faced with a done deal, the industry endorsed half a loaf, noting “some silver linings” as well as “a new opportunity to secure . . . long-term extensions, since Congress will need to pass another spending bill by March 23 to keep the government open.” At least, spokespeople added, the short-term extensions “keep the credits alive” as platforms “to fight for longer-term extensions.”

WHAT’S IN THE HALF LOAF?

- **Biomass PTC/ITC.** The Act extended projects’ eligibility for the 10-year Section 45 “open-loop” biomass-to-electricity production tax credit for one year, from 2016 through 2017. It also extended eligible projects’ option to elect the lump sum 30 percent ITC instead. This means that any AD project which “began construction” before January 1, 2018 generally may qualify for the ITC.

Under current IRS “safe harbors,” a project defensibly may “begin construction” by either commencing reasonably continuous on-site physical work, or spending more than 5 percent of its total basis and reasonably pursuing completion. (See, e.g., “Biomass-to-Electricity Tax Credits Extended,” January 2016; “Getting Renewable Energy Projects Done in Still Tougher Times,” February 2015.) Unlike recent long-term extensions for solar and wind, there’s no explicit deadline for such biomass projects to be completed. Moreover, as with solar and wind, developers can “look back” to 2017 or before to show that construction “began” within the appropriate window and then was reasonably pursued. (The IRS’s “safe harbor” guidance technically applies only to wind projects, though it’s been relied on more generally. An update to include solar has been pending. It now will have to be updated again.)

- **“Orphan” ITC technologies.** The Act extended ITC eligibility for 5 years from 2016 through 2021 for microturbine, fuel cell and CHP projects that “began construction” after 2015, when the previous eligibility window closed. These were the only extensions expressly adopted for more than one year. Much like current extensions for solar, the ITCs phase down: from 30 percent for projects where construction “begins” before 2020, to 26 percent if construction begins during 2020, then to 22 percent in 2021, mostly disappearing thereafter. Fuel cells must be placed in service before 2023 to qualify, though there’s no outside date for the other technologies. Notably, microturbines — those under 2 megawatts capacity — whose output is used (e.g.) to compress AD or landfill gas into gaseous or liquid vehicle fuels, or to power biogas purification systems, generally should qualify, whether or not they are biogas-fueled.

- **Biofuels.** The Act also extended a suite of tax benefits for certain renewable fuel producers that had expired end of 2015. One is a deduction rather than a “credit”; others are year-to-year and usually would be discounted to zero in financial pro formas. Still, they’re potentially available to enhance real-world returns.

First, it’s worth noting that the open-loop biomass PTC (with its optional “jump” to the 30 percent ITC) itself may be available directly or through side agreements, at least where biomass-derived fuel is used to generate renewable electricity or recharge plug-in cars. Going beyond the electricity sphere would require Congress to adopt a “green gas” bill providing ITCs for stand-alone biogas production facilities (see, e.g., S. 988, introduced April 27, 2017) — a route repeatedly rejected on Capitol Hill. The industry apparently has deemphasized that approach in favor of long-term “Renewable Electricity Tax Credit Equalization” (see, e.g., H.R. 4137, introduced October 25, 2017).

Second, the Act retroactively extended through 2017 the volume-unlimited 60¢/gallon credit for production of second-generation or advanced cellulosic biofuels (including those derived from AD-analogous landfill gas); the volume-unlimited \$1/gallon credit for production of biodiesel or renewable diesel; and add-on “small producer” credits of 10¢/gallon for the first 15 million gallons produced by facilities with less than 60 million gallons capacity. It also extended refundable fuel excise-tax credits that producers may elect in lieu of these “direct” production credits. And it extended the stand-alone 50 percent “bonus” depreciation specifically applicable to new second-generation biofuel production facilities — a benefit Congress presumably would not have granted if it thought such depreciation was superseded by the Tax Cuts Act’s 100 percent “bonus” clause.

For AD or other facilities with qualifying biofuel production during 2016 or 2017, these credits generally may be carried back one year or carried forward two decades, representing significant tax assets. For qualifying facilities that were placed in service during 2016 or 2017, facility-specific special bonus depreciation could help sell better terms to tax equity, or in other ways.

Finally, whatever their limitations, confluence of the Bipartisan Act’s extenders with rising national RIN markets under the federal Renewable Fuels Standard, cross-border availability of California’s Low Carbon Fuel Standards (LCFS) credits, and the potential emergence of similar LCFS credits in some Northeast states, could create new opportunities for carefully structured projects. ■

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