

# Congress Extends Renewable Energy Tax Credits

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On December 18, 2015, President Barack Obama signed into law the Consolidated Appropriations Act, 2016 (Act), which extends and modifies the investment tax credit for solar energy property, the production tax credit for wind and other renewable resources, and bonus depreciation in respect of each of the foregoing. The Act also extends the election to claim the investment tax credit in lieu of the production tax credit for wind facilities and other renewable resources. The Act provides relatively lengthy extensions of these credits, thereby providing greater certainty to developers and investors seeking to rely on the credits to justify new investments in solar and wind projects. However, the scheduled reductions in the credits established in the Act provide a clear signal that Congress is not likely to extend these incentives again.

## Investment Tax Credit for Solar Energy Property

The Act provides a three-year extension of the 30 percent investment tax credit for solar energy property. Under prior law, the credit was scheduled to step down to 10 percent for property first placed in service after December 31, 2016.

In addition to providing a three-year extension, the Act permits solar projects to qualify for the 30 percent investment tax credit if construction begins on or before December 31, 2019, even if the projects are not placed in service until after that date. However, to maintain the benefit of the preferential construction-year credit percentage, the project must be placed in service before January 1, 2024. Projects placed in service on or after that date would be entitled to only a 10 percent credit.

This change to a “commencement of construction” standard provides projects seeking qualification for the solar energy credit with largely the same preferential qualification threshold as applies to wind facilities seeking qualification for the production tax credit. Presumably the Internal Revenue Service (IRS) will issue guidance extending the safe harbors for establishing commencement of construction for wind facilities to solar energy projects.<sup>1</sup>

Signaling that the tax incentive to develop solar energy projects will not be further extended, the Act provides a three-stage step-down in the credit:

- For projects for which construction begins in 2020, the energy credit would be reduced to 26 percent.
- For projects for which construction begins in 2021, the energy credit would be reduced to 22 percent.
- For projects for which construction begins after 2021, the energy credit would be reduced to 10 percent.

The extension of the credit, as well as the change to a “commencement of construction” standard, provides a more gentle glide path to the reduction of the credit. This should be welcomed by developers and investors, and should provide the market ample time to continue to develop alternative financing structures, including securitization vehicles, to support continued growth in solar energy investment.<sup>2</sup>

<sup>1</sup> See I.R.S. Notice 2013-29, 2013-20 I.R.B. 1085, as clarified by I.R.S. Notice 2013-60, 2013-42 I.R.B. 431, as clarified and modified by I.R.S. Notice 2014-46, 2014-35 I.R.B. 520, and as updated by I.R.S. Notice 2015-25, 2015-13 I.R.B.

<sup>2</sup> In addition to the extension of the general business credit for solar energy property, the Act also provides a mirrored extension of the nonrefundable personal credit for residential energy efficient property.

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## Production Tax Credit for Wind Facilities

The Act provides a two-year extension of the production tax credit for wind facilities, retroactive to January 1, 2015. Accordingly, wind projects with respect to which construction begins on or before December 31, 2016, will be entitled to claim the full production tax credit. The full production tax credit for 2015 was \$.023 per kilowatt hour of electricity produced, reflecting the most recent adjustment for inflation.<sup>3</sup>

Just as with the solar credit, however, the Act puts the wind production tax credit on a path to oblivion, with a three-year phase out of the credit:

- For facilities for which construction begins in 2017, the production tax credit would be reduced by 20 percent.
- For facilities for which construction begins in 2018, the production tax credit would be reduced by 40 percent.
- For facilities for which construction begins in 2019, the production tax credit would be reduced by 60 percent.

Barring further action from Congress, the production tax credit would not be available for projects for which construction commences on or after January 1, 2020.

## Election to Claim Energy Credit for Wind Facilities

Consistent with the extension and phase-out of the production tax credit for wind facilities, the Act also extends and modifies the election to claim the energy investment tax credit in lieu of the production tax credit for wind facilities. First, the election would be extended in full for two years, such that the 30 percent energy credit will be available for wind facilities with respect to which construction begins on or before December 31, 2016. Second, the election is then phased-out over three years:

- For facilities for which construction begins in 2017, the energy credit would be reduced by 20 percent.
- For facilities for which construction begins in 2018, the energy credit would be reduced by 40 percent.
- For facilities for which construction begins in 2019, the energy credit would be reduced by 60 percent.

Barring further action from Congress, the election to claim the investment tax credit in lieu of the production tax credit would not be available for wind facilities for which construction commences on or after January 1, 2020.

<sup>3</sup> I.R.S. Notice 2015-32, 2015-20 I.R.B. 967.

## Credits for Other Renewable Energy Properties

In addition to wind facilities and solar projects, the Act also extended for two years (i.e., for facilities with respect to which construction commenced in 2015 and 2016) the production tax credit and the election to receive the investment tax credit in lieu thereof for closed-loop biomass facilities, open-loop biomass facilities, geothermal energy facilities, landfill gas facilities, trash facilities, qualified hydropower facilities, and marine and hydrokinetic renewable energy facilities.

The Act did not extend, however, the 30 percent investment tax credit for qualified fuel cell property and other technologies, which is scheduled to step down to 10 percent after December 31, 2016. Statements made on December 18th by the House minority leader and Senate minority leader indicate that they had expected the legislation to provide similar extensions for all technologies for which the Section 48 credit presently is available, and that they had reached an understanding — at least with the Senate majority leader — that an effort will be made in early 2016 to find an appropriate legislative vehicle through which such an extension can be enacted.

## Bonus Depreciation

The Act also extends the allowance for bonus depreciation through 2019, subject to the following adjustments:

- For qualified property placed in service on or before December 31, 2017, the allowance equals 50 percent.
- For qualified property placed in service in 2018, the allowance equals 40 percent.
- For qualified property placed in service in 2019, the allowance equals 30 percent.

## Observations

The extension of the tax incentives to support development of wind and solar renewable energy projects demonstrates that Congress still does not believe that the market can support development of these projects without a federal subsidy. But the step-downs and phase-outs of these credits over the next several years is a clear signal that Congress believes that the solar and wind industries are maturing sufficiently such that the subsidies will not be needed forever.