

Energy Tax Incentives: Outlook in A Lame-Duck Congress

By Matthew P. Haskins,
Scott McCandless, and
Lisa Wamboldt

Matthew P. Haskins is an international tax principal with the Washington National Tax Services office of PwC LLP, where he leads the firm's sustainable business solutions tax practice. Scott McCandless is a director in the legislative and regulatory services practice with the Washington National Tax Services office of PwC, where he advises clients on energy tax policy. Lisa Wamboldt is a senior associate in the Washington National Tax Services office of PwC and works with clients on alternative and renewable energy tax issues.

This article discusses the various energy tax legislative proposals that might be considered in a lame-duck Congress or that could be part of new energy legislation that may be proposed in 2011. Among the proposals likely to be considered are the tax provisions included in business tax extenders, climate change, and national renewable energy standards legislation.

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After a flurry of legislative activity on energy and climate issues in 2009, including House passage of the Waxman-Markey American Clean Energy and Security Act of 2009 climate change bill (H.R. 2454), there has been limited congressional action on energy or climate issues in 2010. Nonetheless, there are several energy issues that may yet arise in the current session of Congress, and because these issues may serve as the basis for energy legislation in 2011 even absent action this year, they bear attention from tax professionals.

For instance, although comprehensive energy and climate legislation took a back seat in 2010, a proposal from Senate Finance Committee member John F. Kerry, D-Mass., and Sen. Joseph I. Lieberman, I-Conn., may illustrate a potential approach to that legislation should Congress return to it next year. A variety of other energy bills, including some focusing on a national renewable energy standard, similarly could help shape the debate next year.

Meanwhile, the administration has pursued a number of executive branch initiatives to advance its energy and climate agenda. In January the administration announced a federal government goal to reduce its own carbon footprint 28 percent by 2020. Federal agencies are now developing plans to achieve this goal through changes in their operations and procurement that likely will be going into effect as early as 2011.

Also in January, the SEC released interpretive guidance on disclosures of climate-related risks in corporate financial statements. That guidance could eventually lead to coordination between corporate social responsibility reporting and SEC disclosure, but it is already affecting shareholder-board relations, proxy issues, and corporate public statements.

Finally, the Environmental Protection Agency's regulations on greenhouse gas emissions under the Clean Air Act are due to go into effect in 2011, which would include reporting for 2010 emissions. To date, attempts by some in Congress to limit those regulations have not been successful.

Potential Agenda for the Lame-Duck Session

Congress adjourned on September 30 without completing action on major energy-related legislation. Members plan to return November 15 for a post-election session, which is expected to last until sometime in December (with a break for Thanksgiving).

During this post-election lame-duck session, Congress is expected to focus on several tax and nontax issues, including several items considered "must do" legislation, such as renewal of a spending measure to fund government operations known as a "continuing resolution" that currently is due to expire December 3. Congress also will spend time during this period on internal organizational matters following the November elections, such as orientation meetings for newly elected members, leaving limited time for considering any new legislative proposals.

Note that, as a technical matter, any pending bills that are not enacted by the conclusion of the lame-duck session do not carry over into the new congressional session beginning in 2011. Those bills would have to be reintroduced, whether in identical or modified form.

Energy Tax Incentives

Energy legislation is conspicuously absent from the expected priority list for the lame-duck session, but some energy provisions could be considered in the context of other tax legislation. Both acting House Ways and Means Committee Chair Sander M. Levin, D-Mich., and Senate Majority Leader Harry Reid, D-Nev., have proposed energy bills,¹ but it is not clear that either would be a priority for consideration during a limited lame-duck session. One option for enacting some energy provisions during the lame-duck period would be to attach them to the business extenders bill, but Finance Committee Chair Max Baucus, D-Mont., has indicated that he would prefer to have energy legislation move separately. Since an independently moving energy bill appears unlikely, and the Levin and Reid drafts are only proposals and differ substantially from one another (discussed below), the only way forward for any energy provisions would appear to be if individual provisions or a small set of provisions were added to a larger, non-energy-specific bill that may move during the lame-duck session.

While the Levin draft included proposed statutory language, it has not been formally introduced as a bill. The proposal does not include revenue offsets for its projected \$25 billion cost of providing renewable energy tax incentives, such as an extension of the section 1603 grant-in-lieu-of-tax-credits program and the section 48C manufacturing tax credit. The Reid version focuses on oil spill issues such as increased liability caps and claims processing procedures, and it includes an increase to the oil spill liability trust fund excise tax as a revenue offset. Reid's proposal does not include renewable tax credit extensions such as the grant-in-lieu program, although it does include some funding for alternative vehicles and alternative fuels and consumer-based incentives for energy efficiency home improvements. It is unlikely that a broad-based energy tax incentives package could move through Congress in the compressed time of a lame-duck session.

However, there are energy provisions embedded in a larger non-energy-specific bill that could move forward. The pending business tax extenders legislation would extend 11 energy provisions, including biodiesel and other alternative fuels credits, the credit for electricity produced from open-loop biomass, steel industry fuel and coke gas credits, and the new energy-efficient home credit, and it would

also provide an elective grant in lieu of the credit for energy-efficient appliances. In addition, the package would extend the suspension on the taxable income limit for purposes of depreciating a marginal oil or gas well through 2010. As of this writing, a business tax extenders package is expected to be considered during the lame-duck session, although passage is uncertain.

Observations: If additional energy provisions beyond those in the extenders package were to be considered, there does not appear to be sufficient appetite in Congress for consideration of any new proposals, so the only items that might receive broad support may be a simple extension of existing provisions such as a reset on the section 48C manufacturing tax credit or the section 1603 grant-in-lieu programs without modifications.

Other Proposed Energy Legislation

Several other energy bills could also receive attention during a lame-duck session. On September 29 Senate Energy and Natural Resources Committee Chair Jeff Bingaman, D-N.M., and Sen. Olympia J. Snowe, R-Maine, proposed legislation (S. 3935) that would reinvigorate the section 48C credit by providing \$2.5 billion in funds for manufacturers of energy property plus another \$1 billion for energy-efficient property. That bill resembles the Levin draft bill noted above, although the Bingaman-Snowe proposal does not include an extension of the grants-in-lieu-of-tax-credits program.

Before adjourning for the midterm elections, the House passed the Rare Earths and Critical Materials Revitalization Act of 2010 (H.R. 6160), which would establish an Energy Department program tasked with ensuring a long-term domestic supply of rare earth minerals (scandium, yttrium, and cerium) considered essential for a variety of renewable and defense technologies. The bill also would expand a loan guarantee program for commercial applications of new or improved technologies using those minerals. The Senate could consider this legislation in the lame-duck session, but given the time constraints, it would not likely serve as a vehicle for additional energy provisions.

Climate Change Legislation

Congress is not expected to take further action this year on broad climate change legislation such as the Kerry-Lieberman proposal noted above. Rather, any congressional attention in this area during the lame-duck session could focus on the EPA's regulations due to go into effect January 2, 2011, affecting stationary sources of greenhouse gas emissions. Sen. John D. Rockefeller IV, D-W.Va., has proposed legislation that would impose a two-year

¹For Levin's draft bill, see *Doc 2010-16629* or *2010 TNT 143-23*. For Reid's draft bill, see *Doc 2010-16797* or *2010 TNT 145-27*.

moratorium on these regulations.² The Rockefeller bill was proposed as an amendment to a Senate Appropriations Committee EPA funding measure; that vote was postponed in September but could be revisited in the lame-duck session. In June Sen. Lisa Murkowski, R-Alaska, proposed a similar measure that would have permanently blocked the EPA, but that proposal failed by a vote of 47 to 53. If no action is taken this year, and if several pending court cases filed against the EPA stationary source regulation remain unresolved, the issue of EPA regulatory authority is expected to remain of high interest in Congress in 2011.

National Renewable Energy Standards

Two differing bills have been introduced in the Senate to enact a national renewable energy standard. A bill (S. 3813) introduced by Sens. Bingaman and Sam Brownback, R-Kan., calls for a national renewable energy standard, requiring power plants to derive 4 percent of their electricity from renewable resources by 2012 and 15 percent by 2021. The bill allows utilities to purchase renewable energy credits or make alternative compliance payments estimated at a value of 2.1 cents per kilowatt hour (commensurate with the current inflation-adjusted rate allowed as an electricity production tax credit under section 45). The bill would exempt power plants that sell less than 4 million megawatt hours. Sen. Lindsey Graham, R-S.C., proposed a bill that would include nuclear and clean coal production as eligible resources toward meeting the renewable electricity production standards.

While there seems to be some support for a new renewable energy standard in the Senate, it appears unlikely that Congress will act on it during the lame-duck session.

Final Observations

Although there has been little movement this year on broad energy and climate proposals, several targeted energy tax provisions remain possible candidates for consideration during the lame-duck session of Congress. The most likely include extensions of several popular energy incentives programs, such as the section 48C credits and section 1603 grants-in-lieu programs, but even those popular provisions may struggle to receive attention this year. Congress likely will return to these and other issues in 2011 as part of a renewed debate on wider energy policy. Of course, the results of the midterm elections likely will have a significant impact on energy policy in the next Congress.

²The Stationary Source Regulations Delay Act (Mar. 10, 2010).

Companies and their advisers should continue to monitor the Obama administration's efforts to advance its energy agenda through executive branch action. Initiatives through federal procurement, the EPA, and the SEC may cause companies to accelerate adoption of renewable energy and energy efficiency measures, and could lead to related tax-planning opportunities.