

# Legal Update

## 2019 Tax Extenders Include Longer Wind Phase-Down, Other Renewable Extensions

On December 20, 2019, President Trump signed into law legislation containing a package of “tax extenders” (the “Extenders Bill”), including several provisions on renewable energy incentives. These include a partial extension of the production tax credit (the “PTC”) for wind facilities and extensions of certain other incentives.<sup>1</sup> The Extenders Bill was passed by the US House of Representatives on December 17, 2019, and by the Senate on December 19, 2019. This Legal Update provides a brief overview of the provisions affecting renewable energy.

### Wind Incentives

The Extenders Bill included a one-year extension of tax credit incentives for wind facilities for which construction begins in 2020.

Section 45 of the Internal Revenue Code of 1986 (the “Code”) allows a PTC against federal income tax for electricity produced by a taxpayer at a “qualified facility” during the 10-year period beginning on the date that facility was originally placed in service. The PTC rate is 1.5 cents per kilowatt hour of electricity, adjusted for inflation.<sup>2</sup> This credit is phased down for a facility using wind to produce electricity, with the PTC reduced by 20% for facilities for which construction began in 2017, 40% for facilities for which construction began in 2018 and 60% for facilities for which construction begins in 2019. Under previous law, the PTC was only available for wind facilities for which construction begins before January 1, 2020. The Extenders Bill allows the PTC with a 40% reduction for wind facilities for which construction begins in 2020.

Section 48 of the Code allows an investment tax credit (the “ITC”) against federal income tax for “energy property” that is placed in service during a taxable year, with the ITC rate being 30% of the tax basis of that property. In the case of wind facilities, a taxpayer may elect to treat these facilities as “energy property” and thereby claim the ITC in lieu of the PTC. The ITC for wind facilities is similarly phased down, with a 20% reduction for facilities for which construction began in 2017; 40%, for facilities for which construction began in 2018; and 60%, for facilities for which construction begins in 2019. Under previous law, this election was only available for wind facilities for which construction begins before January 1, 2020. The Extenders Bill allows taxpayers to elect to receive the ITC with a 40% reduction for wind facilities for which construction begins in 2020.

The availability of the PTC for wind facilities has been extended a number of times in previous years, most recently in 2015. The following table summarizes the availability of the PTC and ITC (elected in lieu of the PTC) for wind projects before and after the enactment of the Extenders Bill:

Construction Started:	Previous Law		With Extenders	
	PTC Level <sup>3</sup>	ITC Level	PTC Level	ITC Level
2016	100% (1.5¢/kWh)	100% (30% of basis)	100% (1.5¢/kWh)	100% (30% of basis)
2017	80% (1.2¢/kWh)	80% (24% of basis)	80% (1.2¢/kWh)	80% (24% of basis)
2018	60% (0.9¢/kWh)	60% (18% of basis)	60% (0.9¢/kWh)	60% (18% of basis)
2019	40% (0.6¢/kWh)	40% (12% of basis)	40% (0.6¢/kWh)	40% (12% of basis)
2020	0% (0¢/kWh)	0% (0% of basis)	60% (0.9¢/kWh)	60% (18% of basis)
2021	0% (0¢/kWh)	0% (0% of basis)	0% (0¢/kWh)	0% (0% of basis)

Note that this table does not apply to solar, which differs especially with respect to the 10% ITC after the phase-down.

The extension may present some interesting opportunities for developers of wind projects for which construction began in 2019. Depending on the method used to start construction, it may be possible to disaggregate the project or rework existing construction contracts so that the project (or a portion of the project) qualifies for the PTC (or is eligible to elect to claim the ITC) at a 60% level rather than a 40% level.

## Other Renewable Incentives

The Extenders Bill also extended a number of other renewable energy-related incentives, including:

- The PTC under Section 45 of the Code for closed-loop biomass facilities, open-loop biomass facilities, geothermal energy facilities, landfill gas and trash facilities, qualified hydropower facilities and marine and hydrokinetic energy facilities, which were in each case extended to apply to facilities whose construction begins before January 1, 2021
- The biodiesel and renewable diesel credit under Section 40A of the Code, which was extended through December 31, 2022
- The second generation biofuel producer credit under Section 40(b)(6) of the Code, which was extended through December 31, 2020
- The nonbusiness energy property credit under Section 25C of the Code, which was extended for property placed in service through December 31, 2020
- The credit for qualified fuel cell motor vehicles under Section 30B of the Code, which was extended through December 31, 2020
- The credit for qualified alternative fuel vehicle refueling property under Section 30C of the Code, which was extended through December 31, 2020
- The credit for two-wheeled plug-in electric vehicles under Section 30D(g) of the Code, which was extended through December 31, 2020
- The energy efficient homes credit under Section 45L of the Code, which was extended through December 31, 2020

- The energy efficient commercial buildings deduction under Section 179D(h) of the Code, which was extended through December 31, 2020

A number of these credits had already expired at the end of 2017 and were retroactively restored.

## Provisions Absent from the Extenders Bill

A number of renewable energy provisions under consideration by Congress ultimately were left out of the Extenders Bill, including an extension of the ITC for solar energy property, which will begin phasing out in 2020. Also left out were tax credits for electric vehicles,<sup>4</sup> standalone energy storage and offshore wind facilities.

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## Endnotes

<sup>1</sup> The full text of the legislation is available at

<https://www.congress.gov/bill/116th-congress/house-bill/1865/text>.

<sup>2</sup> For 2019, adjusted for inflation, the PTC rate is 2.5 cents per kilowatt hour of electricity.

<sup>3</sup> PTC rates shown in this table are prior to adjustment for inflation.

<sup>4</sup> Other than two-wheeled and three-wheeled plug-in electric vehicles eligible for the credit under Section 30D(g) of the Code.

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