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Trends in COVID-Era Renewables Tax Credit Proposals

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As the 2020 Democratic National Convention recently drew to its socially distanced close, minds might have wandered to the two sentences in the **Biden Plan**—released July 14, 2020—that refer explicitly to renewables tax credits. In that document, Joe Biden, the Democratic presidential nominee for the 2020 election, expresses an intent to "[r]eform and extend the tax incentives we know generate energy efficiency and clean energy jobs," as well as to "scale up best practices from state-level clean energy standards, which are being implemented in a way that provides renewable credits to developers that follow high labor standards, including through Project Labor and Community Labor Agreements and paying prevailing wages." The specter of unspecified "reform" gives the Biden Plan an aura of mystery. What—aside from labor practices—needs to be reformed in the renewables tax credits space? Can we see any clues in the newest proposals that have appeared since COVID-19 changed the legislative landscape?

This article summarizes the most recent pandemic-era proposals for wind, solar, and carbon capture federal tax incentives and attempts to discern potential trends for the future.

The Frontrunner

While overall sentiment about any renewables tax legislation being passed before November is not particularly optimistic, the most prominent renewables tax proposal on the table today is probably the **Growing Renewable Energy and Efficiency Now Act of 2020** (H.R. 7330) (the "GREEN Act"), which was introduced on June 25, 2020 by Rep. Mike Thompson (D-CA) and subsequently incorporated into the **Moving Forward Act** (H.R. 2), which in turn was introduced by Rep. Peter DeFazio (D-OR) on June 11, 2020 and is notable for having passed a House vote on July 20, 2020. As incorporated into the Moving Forward Act, the GREEN Act of 2020 contains a wide range of proposals to support both new and existing renewables tax incentives, including the following:

- Extension of section 45 wind production credit ("PTC") to a beginning of construction deadline of January 1, 2026 (formerly January 1, 2021). This five-year extension only provides for a 60% PTC for facilities for which construction begins after December 31, 2019.[1]
- Extension of 30% section 48 solar investment tax credit ("ITC") to a beginning of construction deadline of January 1, 2028 (formerly January 1, 2022). The solar ITC is phased down to 26% for projects beginning construction in 2026 (formerly 2020) and 22% for projects beginning construction in 2027 (formerly 2021); if construction begins before January 1, 2022 and is not placed in service before January 1, 2030 (formerly January 1, 2024), the ITC drops to 10%.[2] The ITC for wind facilities, i.e. where the ITC is elected in lieu of the PTC, is also extended for five years to a beginning of construction deadline of January 1, 2026, but is phased down to 60% for facilities for which construction begins after December 31, 2019.[3]
- Addition of 30% ITC for qualifying energy storage technologies with a beginning of construction deadline of January 1, 2028.[4]
- Extension of section 45Q carbon capture tax credit to a beginning of construction deadline of January 1, 2026 (from January 1, 2024).[5]
- Addition of new section 6431 to allow a taxpayer to elect, in lieu of claiming a section 45 PTC, a section 48 ITC, or a section 45Q carbon capture credit, to be considered to have paid taxes equal to 85% of such credit (100% if the taxpayer is an Indian tribal government).[6] The taxpayer, assuming it is timely paying its taxes, would thus be eligible for a corresponding refund. The section 6431 election may be made with respect to all or part of the taxpayer's credit. For purposes of the election, state and local governments, as well as Indian tribal governments, are considered taxpayers. For purposes of determining the deemed payment in the event of a section 6431 election, the rules in section 50(b)(3) and (4)(i)—that decrease the section 48 ITC in cases where the property is used by a tax-exempt entity or certain governmental bodies—do not apply.
- Indefinite extension of 30% section 48 ITC for offshore wind facilities (i.e., wind facilities located in the "inland navigable waters" or "coastal waters" of the United States) until the later of 2025, or the first

year in which the Secretary of the Treasury, in consultation with the Secretary of Energy, determines that the United States has increased its offshore wind capacity by not less than 3,000 megawatts relative to January 1, 2021.[7]
- Expansion of the publicly-traded partnership ("PTP") carve-out in section 7704(d)(1)(E) to allow certain renewables-focused PTPs to avoid being taxed as corporations. Under the existing rule, if 90% of a PTP's gross income falls into certain categories of qualifying income, the PTP is not taxed as a corporation. The proposed legislation would treat as qualifying income numerous renewables-based sources of income and gains, including from the generation of electricity exclusively using a "qualified energy resource" for purposes of the section 45 PTC, such as wind; the operation of energy property that qualifies for the section 48 ITC, including solar projects; and, in certain cases, from the generation or storage of electrical power at, or carbon dioxide capture by, a qualified facility under section 45Q.[8]

A Precursor to the GREEN Act

One can compare the GREEN Act, which was introduced in June, with a less ambitious analogue that was introduced shortly before the start of the pandemic. An **amendment** (S. Amdt. 1397) to the **Advanced Geothermal Innovation Leadership Act of 2019** (S. 2657), proposed by Sen. Ron Wyden (D-OR) on March 9, 2020, includes several items that would later reappear in the GREEN Act:

- Indefinite extension of 30% section 48 ITC for offshore wind facilities, similar to that proposed in the Moving Forward Act and the GREEN Act (described above).[9]
- Extension of section 45 wind PTC to a beginning of construction deadline of January 1, 2024 (formerly January 1, 2021). This extension only provides for a 60% PTC for facilities for which construction begins after December 31, 2019.[10]
- Extension of 30% section 48 solar ITC to a beginning of construction deadline of January 1, 2025 (formerly January 1, 2022). The solar ITC is phased down to 26% for projects beginning construction in 2023 (formerly 2020) and 22% for projects beginning construction in 2024 (formerly 2021); if construction begins before January 1, 2025 and is not placed in service before January 1, 2027 (formerly January 1, 2024), the ITC drops to 10%.[11] The ITC for wind facilities is extended to a beginning of construction deadline of January 1, 2024, but is phased down to 60% for facilities for which construction begins after December 31, 2019.[12]
- Addition of ITC for qualifying energy storage technologies.[13]
- Expansion of the publicly-traded partnership ("PTP") carve-out in section 7704(d)(1)(E) to allow certain renewables-focused PTPs to avoid being taxed as corporations, similar to that proposed in the Moving Forward Act and the GREEN Act (described above).[14]

The Rise of Transferability?

The **Clean Energy Innovation and Deployment Act of 2020** (H.R. 7516), introduced on July 9, 2020 by Rep. Diana DeGette (D-CO), provides a conceptually similar, but not identical framework to those proposed above. Notably, the DeGette proposal seeks to make the PTC and the ITC transferable to a broad range of persons, as discussed below.

- Extension of section 45 wind PTC to a beginning of construction deadline of January 1, 2028 (formerly January 1, 2021). This extension only provides for a 60% PTC for facilities for which construction begins after December 31, 2019.[15]
- Extension of 30% section 48 solar ITC to a beginning of construction deadline of January 1, 2028 (formerly January 1, 2022).[16] While the language of the bill is unclear, one possible reading is that the solar ITC is phased down to 26% for projects beginning construction in 2021 (formerly 2020), phased down again to 22% for projects beginning construction in 2022-2026 (formerly 2021), and perhaps increased to 30% for projects beginning construction in 2027; if construction begins before January 1, 2028 and is not placed in service before January 1, 2030 (formerly January 1, 2024), the ITC drops to 10%.[17] The ITC for wind facilities is also extended to a beginning of construction deadline of January 1, 2028, but is phased down to 60% for facilities for which construction begins after December 31, 2019.[18]
- Addition of 30% section 48 ITC specifically for offshore wind facilities, with a beginning of construction deadline of January 1, 2028.[19] The offshore wind ITC appears to follow the same phase-down schedule that applies to solar energy property, discussed above. To the extent that offshore property that was placed in service after December 31, 2016 already received an ITC under section 48(a)(5) (i.e., in lieu of the PTC) by the time of enactment, the taxpayer can elect to claim the full 30% ITC for such property, including (if necessary) by filing an amended return.
- Introduction of a "transferability" concept for certain types of projects (including wind and solar projects), whereby a taxpayer can transfer all or part of its ITC or PTC to a specific "eligible project partner," which term includes not only persons with ownership interests in the energy property or facility, but also construction services or equipment providers, electric transmission or distribution services providers, power purchase agreement offtakers, and lenders. Only one transfer of an ITC or PTC, not later than the due date for the electing taxpayer's tax return for the year of placed in service, is permitted. The proposal also provides for automatic termination of section 45 and section 48 after 2049.[20]
- Addition of new section 6431 to allow a taxpayer to elect, in lieu of claiming a section 45 PTC or a section ITC, to be considered to have paid taxes equal to 85% of such credit, similar to the proposal in the Moving Forward Act and the GREEN Act (described above). Unlike the Moving Forward Act and the GREEN Act, this proposal does not permit for 100% monetization for Indian tribal governments; applies

only to credits from property placed in service from 2020-2024 and to credit carryforwards for taxable years ending during that window; and does not apply to the section 45Q carbon capture credit.[21]
- Addition of ITC for qualifying energy storage technologies.[22]
- Removal of restrictions on obtaining ITC for public utility property if taxpayer makes an election and such election is not prohibited or required by the government or public utility commission.[23]
- Extension of section 45Q carbon capture tax credit to a beginning of construction deadline of December 31, 2029 (from January 1, 2024).[24]

Back from the Dead: The Return of Section 1603

The **Energy Tax Credit Direct Payment Act of 2020** (H.R. 7491), introduced on July 6, 2020 by Rep. Sean Casten (D-IL), aims solely to revive the grant provided by Section 1603 of the American Recovery and Reinvestment Tax Act of 2009 (the "Section 1603 Grant"), which provided, *inter alia*, for a cash grant equal to 30% of the basis of qualifying wind and solar "energy property."[25] The original Section 1603 Grant applied only to energy property that either (1) was placed in service in 2009 or 2010, or (2) was placed in service after 2010 but before January 1, 2013 (for wind projects) or January 1, 2017 (for solar projects), and had a 2009 or 2010 beginning of construction.[26] The revived Section 1603 Grant would apply to energy property that either (1) is placed in service in 2020, or (2) in the case of solar projects, is placed in service in 2021 and has a 2020 or 2021 beginning of construction; the application must be received before October 1, 2022.[27]

	CURRENT	THOMPSON/DEFAZIO (H.R. 7330, H.R. 2)	WYDEN (S. 2657)	DEGETTE (H.R. 7516)	CASTEN (H.R. 7491)
WIND PTC EXTENSION	1/1/2021 (at 60%)	1/1/2026 (at 60%)	1/1/2024 (at 60%)	1/1/2028 (at 60%)	
SOLAR ITC EXTENSION	1/1/2022 (at 22%)	1/1/2028 (26% for 2026, 22% for 2027)	1/1/2025 (26% for 2023, 22% for 2024)	1/1/2028 (26% for 2021, 22% for 2022-2026; 2027 unclear)	
WIND ITC EXTENSION	1/1/2021 (at 60%)	1/1/2026 (at 60%)	1/1/2024 (at 60%)	1/1/2028 (at 60%)	
CARBON CAPTURE CREDIT EXTENSION	1/1/2024	1/1/2026		12/31/2029	
OFFSHORE	1/1/2021 (at 60%)	Floating; at least 1/1/2025	Floating; at least 1/1/2025	1/1/2028 (100%, then phaseout under solar ITC schedule)	
BATTERY		Yes	Yes	Yes	

REFUNDABILITY		85% tax refund for ITC/PTC and section 45Q credit (100% for Indian tribes)		85% tax refund for ITC/PTC if PIS/carryforward for 2020-2024	Treasury grant for 2020 PIS (wind and solar) or (for solar) 2021 PIS with BOC in 2020 or 2021
TRANSFERABILITY				Yes	
PTP EXCEPTION		Yes	Yes		

Possible Trends

While trends in proposed legislation are mainly meaningful in the context of gauging the broader collective consciousness, it is still worth observing which concepts are viewed with more or less favor.

- The extension of the wind PTC and the 30% ITC for both wind and solar is a key cornerstone of any renewables tax proposal. However, views differ as to exactly how long the extension should be and whether the wind PTC should terminate before the 30% solar ITC, and the proposals described above range from three to seven years. There is a sense that the solar ITC should be extended at its full 30% of eligible basis until the phasedown period, at which time it decreases (as under the current rules) to 26% and then 22%, whereas the wind PTC should be “frozen” at the current 60% of the default amount. There may also be support, though not universal, for extending the section 45Q carbon capture tax credit.
- There is a recognized need for a 30% ITC for both battery property and offshore wind property. Both the GREEN Act and the Wyden proposal suggest a floating deadline for the offshore wind ITC, based on the extent to which the United States has increased its offshore wind capacity.
- The monetization of the wind PTC and the solar ITC, and perhaps of the section 45Q carbon capture tax credit, is rapidly gaining traction among legislation proposed since the start of the pandemic. The proposals above present a choice as to the mechanism of such monetization. One path, following the Casten proposal, would be to allow Treasury to evaluate grant eligibility directly, as was the case in 2009. An alternative route would be to give the IRS control over the evaluation process, thus integrating the monetization of the credits into the IRS’ general audit and controversy mechanisms, and possibly into the body of IRS guidance (including nonbinding precedents and field advice). The two approaches could lead to drastically different litigation and settlement strategies by the government, especially in contentious situations such as disputes over eligible basis and the inclusion of developer fees in eligible basis.
- The DeGette proposal raises the possibility of an ITC or PTC that can be transferred to various persons without an ownership interest in the property, including providers of services and equipment. It does not appear that transferability is a generally contemplated addition to the renewables tax credit regime at this time. Should Congress adopt such an approach, extensive guidance would be needed from Treasury and the IRS as to when the credit transferee’s economic relationship with the credit transferor is considered too artificial or too *de minimis* to qualify; how the credit should be allocated between partners where the credit transferee is a partnership for tax purposes; and how such a rule might implicate the principles of Rev. Proc. 2007-65.

In any event, it is fair to conclude that the legislative environment created by COVID-19 has caused renewables tax proposals to be at least incrementally more robust and ambitious. What this development means in a practical sense remains to be seen.

[1] H.R. 2 (2020) at § 90401(c).

[2] *Id.* at § 90402(b), (c).

[3] *Id.* at § 90401(b).

[4] *Id.* at § 90402(d).

[5] *Id.* at § 90403.

[6] *Id.* at § 90404.

[7] *Id.* at § 90405.

[8] *Id.* at § 90406.

[9] S. Amdt. 1397 (2020) to S. 2657 (2019) at § 4003.

[10] *Id.* at § 4009(c)(1).

[11] *Id.* at § 4010.

[12] *Id.* at § 4009(c)(2).

[13] *Id.* at 4004.

[14] *Id.* at § 4014.

[15] H.R. 7516 (2020) at § 121(c)(1), (3).

[16] *Id.* at § 121(b).

[17] *Id.* at § 121(b)(3). Confusingly, the proposed revision to the phaseout rule in section 48(a)(6)(A) states that the solar ITC is 26% for property with a beginning of construction "after December 31, 2020, and before January 1, 2027" and that the solar ITC is 22% for property with a beginning of construction "after December 31, 2021, and before January 1, 2027."

[18] *Id.* at § 121(c)(4).

[19] H.R. 7516 (2020) at § 121(a).

[20] *Id.*

[21] *Id.* at § 122.

[22] *Id.* at § 124.

[23] *Id.* at § 125.

[24] *Id.* at § 126.

[25] P.L. 111-5 (2009) at § 1603(b). The Section 1603 Grant also provided grants for certain other types of renewable energy projects, which in some cases qualified for a grant of only 10% of the energy property basis.

[26] *Id.* at § 1603(a).

[27] The literal language of the proposal appears to permit a grant for wind projects placed in service after 2020, but as it seems that these projects also must be placed in service before the wind PTC "credit termination date" of January 1, 2021, a null set seems to result.

Authors