

## Renewable Energy Incentives In Light Of Election Results

*Law360, New York (November 27, 2012, 3:01 PM ET)* -- Here are our views on what the election results mean for various renewable energy tax incentives and a review of personnel changes among the ranks of tax policymakers.

### Renewable Energy Tax Incentives

#### *Production Tax Credit*

We believe it is likely that the production tax credit (PTC) will be extended for at least one year, which faced opposition from the Romney campaign. That stance may have harmed the Romney campaign in Colorado, a battleground state that Romney lost. The extension is widely supported by Democrats. Further, approximately 80 percent of wind farms are located in districts represented by Republicans in the current Congress.[1]

The extension may occur during the lame-duck session of Congress in which it is anticipated that Congress will catch up on much of the work that has been neglected for the past two years. However, there is a historical precedent for a retroactive extension enacted following a lapse, which would not be surprising.

It has been suggested that the current PTC deadline, "placed in service" (i.e., fully constructed and selling power), be changed to "start of construction." This standard is used in the renewable energy cash grant rules and has been interpreted by the Treasury to require spending only 5 percent of the ultimate cost. Therefore, if the PTC is extended for one year with this change, wind farms could qualify if they were placed in service after 2013 so long as 5 percent of their cost was incurred in 2013. Such a change may raise technical questions, and it is not clear how the House Republicans will react to it.

#### *Investment Tax Credit*

The investment tax credit (ITC) is in effect for solar projects placed in service on or by Dec. 31, 2016. Given that runway, an extension of it is unlikely to be a priority for anyone in the near future. Nonetheless, the solar industry is never one to sit on the sidelines. If the PTC deadline is changed from "placed in service" to "start of construction," then the solar industry will request that a similar change be made to the ITC statute. In that case, the solar industry would have until the end of 2016 to start construction in order to have projects qualify for the 30 percent ITC.

## ***Cash Grant***

The 30 percent cash grant for renewable energy has effectively lapsed, unless both (i) 5 percent of the cost of the project was incurred prior to 2012 and (ii) a preliminary cash grant application was filed with the Treasury prior to Oct. 1, 2012. Although Congress encourages more renewable energy for each dollar expended on the cash grant program than it does with tax credits, it is highly unlikely that the cash grant program will be extended. The reason is that the cash grant program was part of the 2009 economic stimulus legislation that is widely disliked by House Republicans. Therefore, in the interest of compromise, President Obama is likely to trade it for cooperation on the PTC.

The other issue facing the cash grant program is the “sequestration” as a result of the fiscal cliff. In September, the Office of Management and Budget issued a report providing that, if the fiscal cliff occurred, the cash grant program would be subject to a 7.6 percent reduction starting in 2013. Given that both parties claim to have learned from the campaign and the election that they need to build bipartisan coalitions, we can only hope that they come to their senses before the country goes over the fiscal cliff.

## ***Bonus Depreciation***

Generally, to qualify for 50 percent bonus depreciation, assets must be placed in service by the end of 2012. There is a schism within the renewable energy issue as to support for the extension of bonus depreciation. For the most part, developers would like to see it extended, because it is another tax incentive that can lower their cost of capital, if they can find a tax equity investor willing to monetize it. In contrast, many tax equity investors would prefer it to lapse, either because their institutions do not have sufficient tax appetite for it or because they prefer to earn their returns from tax credits and cash (rather than from “timing” benefits like bonus depreciation).

Within the utility community, there is another split. Some utilities support bonus depreciation; others dislike it due to their state regulators forcing them to elect it, even if the utility’s management would prefer to reduce its tax bill with tax credits. For such utilities, bonus depreciation deductions result in the carry forward of tax credits that management would prefer to use to offset the current year’s tax liability. Outside of the energy industry, telecommunication companies and the small-business lobby are fervent supporters of bonus depreciation. We think that 100 percent bonus depreciation has little chance of being reinstated, but it is even odds that 50 percent bonus depreciation would be extended.

## ***Tax Reform***

In light of the attention given to the tax reform during the campaign and the need to address the fiscal cliff, there is a fair chance that there will be some flavor of tax reform enacted. It is difficult to predict the specifics of tax reform. However, since the United States has one of the highest corporate tax rates in the world, there is general agreement that the corporate tax rate needs to be lowered; that requires broadening the corporate tax base, but it is not clear how that would be achieved. In any event, a lower corporate tax rate will mean that depreciation and interest deductions are less valuable to tax equity investors, and investors will pay developers less to monetize them.

## ***Tax Policy Personnel Changes***

### ***Executive Branch***

Secretary Timothy Geithner has made it clear that he intends to leave the Treasury at the end of President Obama’s first term. There have not been any public statements yet as to his potential successor.

In addition, Internal Revenue Service Commissioner Douglas Shulman is in the process of exiting. His successor has not been identified yet. Steven Miller, a career IRS employee, will serve as acting commissioner.

### ***House Ways and Means Committee***

Dave Camp, R-Mich., will return as chairman, and his Michigan delegation colleague Sander Levin, D-Mich., will return as ranking member. The only Ways and Means member who was defeated was long-time member Pete Stark, D-Calif. However, the outcome of Charles Boustany's, R-La., race will not be known until a runoff in December.

On the topic of the House, there are rumors that Nancy Pelosi, D-Calif., may step aside as minority leader and allow Steny Hoyer, D-Md., to ascend to that post. Both are good friends of the renewable energy industry.

### ***Senate Finance Committee***

Max Baucus, D-Mont., will continue as chairman, with Orrin Hatch, R-Utah, as the ranking member. It is expected that the composition of the Senate Finance Committee will shift from 13 Democrats and 11 Republicans to 13 Democrats and 10 Republicans. None of the members of the Senate Finance Committee lost in the 2012 election, but two from each party are retiring. They include the renewable energy industry's allies Jeff Bingaman, D-N.M., and Olympia Snowe, R-Maine. There are signs that Snowe's replacement, Angus King, I-Maine, will be an ally of the industry: he worked as a wind developer before seeking election to the Senate and has expressed support for solar energy.

John Kerry, D-Mass., will have his choice to be chairman of the taxation subcommittee or the energy subcommittee. We expect Kerry to choose the taxation subcommittee, which would result in Maria Cantwell, D-Wash., ascending to the chair of the energy subcommittee. The renewable energy industry has many supporters in Congress, but Senator Cantwell could claim the title of the most dedicated.

--By David K. Burton and Jeffrey D. McMillen, Akin Gump Strauss Hauer & Feld LLP

*David Burton is a partner with Akin Gump in the firm's New York office. Jeffrey McMillen is a partner with the firm in the Washington, D.C., office.*

*The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Natter, Ari. Obama Re-Election Boosts Chances for Wind Credit Extension, Daily Tax Rep., Nov. 8, 2012 (p. G-9) (quoting P. Kelley of the American Wind Energy Association).