Finance Committee sends Wyden's 'Clean Energy for America Act' to full Senate

Senate Finance Committee Democrats on May 26 voted along party lines to send to the full Senate legislation from Chairman Ron Wyden, D-Ore., that would consolidate roughly 40 current-law energy-related tax provisions into just a handful of "technology-neutral" incentives, while repealing a number of tax provisions benefiting fossil fuel producers; but the bill's fate is presently unclear, including whether it may be folded into a potential forthcoming infrastructure package or taken up on its own.

Clean Energy for America Act

Chairman Wyden's legislation – dubbed the Clean Energy for America Act – cleared the committee with only Democratic support on a 14-14 vote. (The power sharing agreement between Senate Majority Leader Charles Schumer, D-N.Y., and Minority Leader Mitch McConnell, R-Ky., allows Democrats, who control the majority in the evenly divided chamber with the tie-breaking vote of Vice President Harris, to advance bills out of committee and to the full Senate when the committee vote is tied.)

Final passage came after panel Democrats swatted away a number of Republican amendments that took aim at the bill's proposed changes to – among other things – tax incentives for electric vehicles and fossil fuel producers. (The power sharing agreement also gives Democrats veto power over amendments votes that result in a tie.)

In his opening statement at the mark-up, Wyden stressed themes he has mentioned frequently since he rolled out his energy tax proposal in April. (For prior coverage of the plan's initial roll-out, see *Tax News & Views*, Vol. 22, No. 21, Apr. 23, 2021.)
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210423_2.html

"On the federal books today is a hodgepodge of 44 different energy tax breaks for a host of fuel sources and technologies," Wyden said. "…The system is anti-competitive and anti-innovation. It puts the government in the role of picking winners and losers by giving some fuels and technologies big, permanent tax breaks while others have short-term, temporary extensions."

Wyden said his proposal "throws the old system in the waste bin" and "replaces the old rules with a free-market, technology-neutral system in which reducing carbon emissions becomes the lodestar of America's energy future."

In preparation for the mark-up, the nonpartisan Joint Committee on Taxation (JCT) staff released a detailed summary of the provisions included in the bill. That summary was later supplemented by a description of various modifications and additions to the chairman's mark, including the addition of a production credit for clean hydrogen. Finally, the JCT published a revenue estimate that indicates the modified chairman's mark would, on net, reduce federal revenues by more than $259 billion over the next decade.
URL: https://www.jct.gov/publications/2021/jcx-26-21/
URL: https://www.jct.gov/publications/2021/jcx-28-21/

URL: https://www.jct.gov/publications/2021/jcx-29-21/

Clean electricity: According to the JCT summary, the Clean Energy for America Act would establish a clean electricity production tax credit (PTC) equal to 1.5 cents per kilowatt hour of electricity produced and sold in the 10-year period after a qualified facility is placed in service or a clean electricity business investment tax credit (ITC) equal to 30 percent of qualified investments with respect to qualified facilities and grid improvement property. The new credits would generally apply to qualified facilities placed in service, and qualified investments made after December 31, 2022.

In order to qualify for either the PTC or ITC, facilities and investments generally could not have a greenhouse gas emissions rate, as defined, greater than zero.

In a change from previous versions of Wyden's energy tax legislation, other conditions would apply in order to claim the credits, such as a requirement to pay wages of at least the local prevailing rates and to utilize registered apprenticeship programs (so-called "Davis-Bacon Act" requirements).

Additionally, taxpayers could elect to receive the tax credits as direct refunds – but to do so, they must inform the Treasury Department prior to the date on which the facility begins construction.

In order to transition to the new system, a slate of current temporary clean energy tax incentives would reset to phase out or expire over the coming years.

Clean transportation: With respect to transportation-related tax incentives, Wyden's proposal would create a technology-neutral "clean fuel production credit" – applicable to qualifying fuel produced after December 31, 2022 – that is designed to incentivize the production of transportation-grade fuels that are at least 25 cleaner in terms of their lifecycle emissions (that is, from production through use in a vehicle) than the current US nationwide average. Qualifying fuels would have to become increasingly cleaner between now and 2030 in order to be eligible for the credit, which would begin to phase out when certain emissions targets – as certified by the Environmental Protection Agency and the Department of Energy – are achieved.

Additionally, Wyden's proposal would remove the per-manufacturer cap on the plug-in electric vehicle (EV) tax credit, make the credit refundable for individuals, and create a 30 percent nonrefundable credit for commercial operators purchasing EVs.

Similar to existing temporary incentives in the clean electricity space, the proposal would grant short-term extensions to the current-law second generation biofuel producer credit and to the credit for alternative fuel and alternative fuel mixtures as a way to transition to the new system.

Energy efficiency and conservation: According to the JCT summary, the plan would reform the current tax incentive under section 45L for energy-efficient new homes – setting the credit's value at either $2,500 for homes meeting the latest requirements of the Energy Star program, or $5,000 for homes meeting the Department of Energy's Zero Energy Ready program. As with the clean electricity incentives discussed above, contractors would have to comply with prevailing wage requirements and utilize registered apprenticeship programs.

Additionally, the proposal would reform the section 25C credit for nonbusiness energy property, replacing it with an "energy-efficient home improvement credit" that would provide a credit of up to $500 per improvement, subject to an annual cap of $1,500 for all improvements. Sen. Wyden's plan would also expand the section 179D deduction for energy-efficient commercial buildings.

Clean energy bonds: Wyden's proposal would create a tax credit bond, or so-called "clean energy bond" – available to state, local, and tribal governments, along with public power providers and electric cooperatives – designed to incentivize the production of clean electricity and clean fuel. The maximum credit would equal 70 percent of the bond's interest (for zero-emission electricity or fuel) and a "direct pay" election would be available under which the Treasury Department would reimburse the issuer at up to 70 percent of the bond's interest cost.

The proposal would apply to applicable bonds issued after December 31, 2022.

Fossil fuel incentives repealed: According to the summary, the plan would repeal a number of current-law tax incentives that Wyden contends benefit fossil fuel producers, including expensing of intangible drilling costs, rules allowing for so-called "percentage depletion," the deduction for tertiary injectants, amortization of geophysical and geological costs, and credits for marginal oil wells and advanced coal projects, among others.

Further, Sen. Wyden's plan proposes to tighten the foreign tax credit rules applicable to so-called "dual capacity" taxpayers that are considered major integrated oil companies within the meaning of tax code section 167(h)(5).

GOP not on board

Finance Committee Republicans, for their part, couched their opposition to Chairman Wyden's plan using many of the same arguments they made during an April 27 hearing focused on energy tax policy. (For prior coverage of that hearing, see *Tax News & Views*, Vol. 22, No 23, Apr. 30, 2021.)
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210430_2.html

For example, the committee's ranking Republican, Sen. Mike Crapo of Idaho, stressed that while he agreed on the need to streamline energy tax incentives and acknowledged the merits of a technology-neutral system, he still questioned whether certain renewable energy projects still require taxpayer support.

"[I]n order to maximize taxpayer dollars, we have to take a close look at those technologies that are market mature and end their government subsidization," Crapo said.

Instead, Crapo spoke in favor of a bipartisan discussion draft he released April 26 with Finance Committee Democrat Sheldon Whitehouse of Rhode Island that would grant an "Energy Sector Innovation Credit" (ESIC) –

available as either a 40 percent ITC or 60 percent PTC – to “low market penetration” technologies across a wide range of energy sources. As a technology matures in the marketplace, the ESIC would phase out for that particular energy source.
URL: https://www.finance.senate.gov/ranking-members-news/crapo-whitehouse-release-energy-innovation-tax-credit-proposal

“My technology-inclusive bipartisan energy tax proposal, ESIC, would accomplish this by working with experts at the Department of Energy, national labs, and other stakeholders to target tax credits for innovative clean energy technologies,” Crapo said. “As these technologies become mature, the credits systematically decrease to ensure taxpayer dollars do not subsidize cost-competitive technologies.”

Committee Republicans also came out hard against proposals in Chairman Wyden’s bill that would repeal tax incentives that Wyden says unfairly benefit the fossil fuel industry.

Sen. John Barrasso of Wyoming, who also serves as ranking member of the Senate Energy and Natural Resources Committee, argued that many of those provisions support jobs in rural communities and help support a diversified energy portfolio.

“America needs all the energy, the oil, the gas, the coal, the uranium, the wind, the solar – we need all of it,” Barrasso said. “That is how we maintain our economic strength, and our energy independence. Picking winners and losers is not good tax policy, especially when the winners are America’s rivals.”

Several panel Republicans also expressed concerns about the Wyden proposal’s idea to link qualification for certain energy-related tax incentives to Davis-Bacon Act wage and apprenticeship requirements.

“…I cannot support attaching labor requirements to energy tax policy,” ranking member Crapo said. “Linking labor policy to energy-related tax credits is unprecedented, and I have concerns not only about the policy, but also about the dangerous precedent it sets for amending the tax code.”

Path forward unclear

Notwithstanding the Finance Committee’s successful mark up this week, the ultimate fate of the Clean Energy for America Act remains difficult to predict.

As a threshold matter, it seems unlikely – given the unanimous GOP opposition in committee – that Chairman Wyden’s plan could be included in any bipartisan infrastructure deal that may emerge from current discussions between President Biden and his administration and congressional Republicans. (For recent coverage of those negotiations, see *Tax News & Views*, Vol. 22, No. 26, May 21, 2021.)
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210521_1.html

The most likely avenue by which Wyden’s plan could advance, therefore, could be as part of a partisan effort by congressional Democrats to move an infrastructure package under the filibuster-proof budget reconciliation process that also has a climate change-mitigation focus, as favored by many progressive Democrats.

Even then, however, the price tag of Chairman Wyden's plan – nearly $260 billion over 10 years – could prove too steep to be included in full in even a Democrat-only legislative package.

Nonetheless, Sen. Wyden's proposal – along with the Growing Renewable Energy and Efficiency Now (GREEN) Act (text, section-by-section summary) introduced earlier this year and supported by all Democrats on the House Ways and Means Committee – will be key proposals to watch as the jobs and infrastructure debate unfolds this year.
URL: https://mikethompson.house.gov/sites/mikethompson.house.gov/files/GREEN%20Act%202021%20Bill%20Text.pdf
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