Supporters of clean energy incentives, Opportunity Zone reporting requirements vie for spots in year-end bill

House Democratic supporters of clean energy tax incentives and bipartisan advocates of enacting reporting requirements for Qualified Opportunity Funds this week angled to get their priorities attached to any must-pass bill – presumably tied to government funding for fiscal year 2020 – that moves through Congress in the final months of 2019. But whether any such legislative vehicle will materialize to move these policies, along with proposals to renew a broader set of expired and expiring tax provisions, is still unclear.

House Democrats push for clean energy

A letter spearheaded by the House Sustainable Energy and Environment Coalition calling for the “inclusion of critical clean energy tax policies in negotiations around must-pass legislation this year” – and delivered to House Speaker Nancy Pelosi, D-Calif., and House Majority Leader Steny Hoyer, D-Md., on October 30 – attracted the signatures of 166 House Democrats, a number that amounts to more than 70 percent of the caucus.


The signatory list would have been even longer if it included more Ways and Means Committee Democrats, who have been holding talks around a potential fall mark-up of an energy-focused tax package – generally understood to be
aimed at addressing expired and expiring incentives for renewable energy and energy efficiency and expanding the current-law credit for electric vehicles. (Two Ways and Means Democrats, Jimmy Gomez of California and Steven Horsford of Nevada, did sign the letter.)

Though the letter notes that the "Ways and Means Committee will be taking action on a clean energy tax package" this fall, no such mark-up has yet been scheduled and the practicality of committee action could diminish as a November 21 deadline rapidly approaches for lawmakers to agree on appropriations legislation to prevent a government shutdown. (More on this "must-pass" legislative deadline below.)

The letter makes a general call for "inclusion of as many clean energy tax policies as possible” in a must-pass bill, but also cites a handful of specific policies as being particularly important to the group, including:

- Making energy storage eligible for the Investment Tax Credit (ITC) and extending the ITC for all qualified technologies at the current 30 percent rate;
- Extending the 30 percent ITC for offshore wind facilities through 2025;
- Extending and expanding the credit for plug-in electric vehicles and extending the credit for fuel cell vehicles; and
- Extending the current-law deduction under section 179D for energy-efficient commercial and multifamily buildings, as well as the credits that incentivize homeowner efficiency improvements (section 25C) and the building of energy-efficient new homes (section 45L).

With the exception of the ITC for offshore wind, the letter does not suggest a specific length of time for extending other policies – or whether they should be made permanent.

**Ways and Means members discuss Opportunity Zone reporting**

Other legislation discussed this week as a possible rider on a must-pass spending vehicle later this year was a bill (H.R. 2593) introduced by House taxwriters Ron Kind, D-Wis., and Mike Kelly, R-Pa., this past May that would require the Treasury Department to collect data on Qualified Opportunity Funds (QOFs) and their underlying investments and make such information publicly available to assist in determining whether the Opportunity Zone program is meeting its stated objectives. Identical companion legislation (S. 1344) was introduced in the Senate by Republican taxwriter Tim Scott of South Carolina and Democratic presidential hopeful Sen. Cory Booker of New Jersey.

Kind told reporters October 29 that "[t]here seems to be a lot of bipartisan support for” requiring data reporting by QOFs. Kind’s comments came after Democrats and Republicans on the House Ways and Means Oversight and Select Revenue Measures subcommittees had met behind closed doors to discuss the Opportunity Zone program. (See separate coverage in this issue for more on that private meeting, as well as details on a proposed tax form released by Treasury on October 31 that would require certain information reporting by QOFs.)

**The tax wish list keeps growing…**

Most stakeholders with an interest in clean energy incentives and Opportunity Zone reporting rules have been eyeing November 21 – when the "continuing resolution" currently funding the federal government is set to lapse – as the next opportunity to hitch a ride on the next “must-pass” appropriations measure.

But they join an already-long line of lawmakers and stakeholders who are seeking to move their own tax priorities and many others hoping to advance nontax proposals. Notable items on the tax side include:

- Extensions of temporary deductions, credits, and incentives that expired at the end of 2017 and 2018 and another set scheduled to lapse after this year (i.e., the “extenders”);
- Technical corrections to (and fixes for assorted glitches in) the 2017 GOP tax overhaul (P.L. 115-97);
- Further suspensions of certain taxes enacted as part of the Patient Protection and Affordable Care Act of 2010 which are slated to come into force next year; and
- House-passed retirement tax legislation (the SECURE Act, H.R. 1994) that is currently stuck in the Senate.
Negotiations around these issues have been strained, and continuing to add more provisions into the mix creates the risk that any eventual tax title becomes so bulky that it either falls under its own budgetary (or political) weight or must be stripped down to a handful of lowest-common-denominator provisions that can maintain bipartisan support.

On the extenders front, negotiations are said to be ongoing among the “four corners” of the taxwriting committees – i.e., House Ways and Means Committee Chairman Richard Neal, D-Mass., and ranking member Kevin Brady, R-Texas, and Senate Finance Committee Chairman Charles Grassley, R-Iowa, and ranking member Ron Wyden, D-Ore. – and their staffs as to the contours of a potential year-end package, but no apparent progress has been made in recent days.

Rep. Brady attributed the sluggish pace of negotiations to a push by some Democrats to expand refundable credits such as the Earned Income Tax Credit and Child Tax Credit, blunt the impact of the 2017 cap on the federal deduction for state and local taxes, and provide funding relief for cash-strapped multiemployer pension plans as conditions for making other tax changes.

"I think it will be difficult to reach a year-end conclusion because, you know, the demands by some of the Democrats for up to a trillion dollars of new spending in return for the tax extenders is just, you know, not real world," Brady told reporters on October 31. “When they're ready to come down to earth, we'd like to have a constructive discussion.”

For his part, Finance Chairman Grassley recently cited a lack of Democratic "interest" in the extenders as a roadblock to progress. (For previous coverage, see Tax News & Views, Vol. 20, No. 34, Oct. 25, 2019.)

Another continuing resolution looks likely

As the tax policy debate continues, the Senate is still working to finish its version of the 12 spending bills needed to fund government agencies and will have to conference those bills with competing measures that have cleared the House. Most observers believe that process is unlikely to be completed before the current continuing resolution keeping the government’s doors open expires on November 21 and that lawmakers will have to adopt yet another short-term fix that extends funding at fiscal year 2019 levels.

Senate Appropriations Committee Chairman Richard Shelby, R-Ga., acknowledged the prospect of another continuing resolution in comments to reporters on October 23 and noted that he would prefer a “clean” bill – that is, without any extraneous provisions such as tax extenders – that would last into February or March of next year. Much of this stems from a concern that should the House approve articles of impeachment against President Trump later this fall, an ensuing Senate trial could dominate the agenda for the upper chamber during the last weeks of 2019 and possibly even into early 2020.

"I think looming over all of it is what the House might do on impeachment, and if they do, and when they do it,” Shelby recently told reporters. “When it comes over here, it becomes the order of the day.” (The House approved a resolution on October 31 that lays out procedures for the public phase of its impeachment inquiry; but how long that process will take and when any resulting articles of impeachment would be sent over to the Senate remain unclear.)

A funding scenario like the one Shelby laid out would delay action on extenders and other tax priorities until 2020 – something that is not out of the question, but as it is a presidential election year (with the Iowa caucuses scheduled for February 3) many deem it unlikely that Congress would attempt to legislate on anything but relatively noncontroversial bills.

However, the notion of finalizing a spending agreement in 2019 remains a possibility based on the apparent conversations between congressional leaders this week.

According to reports, House Speaker Nancy Pelosi and Senate Majority Leader Mitch McConnell, R-Ky., spoke by phone on October 30 and agreed that “the goal” was to finish appropriations for the remainder of fiscal year 2020 by December 31 of this year.

That would likely entail passing a continuing resolution to fund the government past November 21 and then a follow-on appropriations package toward the end of the year that provides funding at programmatic levels through September 30, 2020. (Despite enactment of the Bipartisan Budget Act of 2019 earlier this year that lifted the statutory
"sequester" caps on discretionary spending for fiscal years 2020 and 2021, Democrats and Republicans have been at odds over how that new top-line spending figure should be subdivided among the 12 underlying appropriations bills that fund government departments and agencies.)

Even if two appropriations measures do move this year, however, it is important to note that they may not be equally suited to carrying unrelated policies. For example, a simple punt of spending authority into December may not be conducive to supporting a tax title, while a more far-reaching “omnibus” spending bill may have a bit more capacity to carry extraneous measures. A prime example of the latter is the Consolidated Appropriations Act, 2016, which carried – as Division Q of the bill – the Protecting Americans from Tax Hikes Act of 2015 (PATH Act) which, among other things, extended or made permanent dozens of expired or expiring tax provisions.

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Treasury announces Opportunity Zone reporting requirements as House taxwriters mull tighter scrutiny

The Treasury Department announced plans October 31 for new reporting requirements for investments made in the Opportunity Zone (OZ) program established by the 2017 tax overhaul known informally as the Tax Cuts and Jobs Act (TCJA, P.L. 115-97), but the move is unlikely to end a push by some in Congress for legislation calling for a more detailed level of scrutiny.

Gain deferral for investments in economically distressed areas

The OZ program, designed to boost investment in economically underdeveloped areas, allows for the deferral of capital gains tax until 2026 on gains reinvested and held in an Opportunity Zone fund. In addition, if the taxpayer holds the fund shares for at least seven years, the reinvested capital gain income will be reduced by 15 percent; and if the taxpayer holds the fund shares for at least 10 years, the shares will receive a step-up in basis to their fair market value on the date of the sale or exchange (and thus entirely avoid capital gains tax on any additional appreciation since the date of reinvestment).

Working as intended?

Legislation sponsored by Sens. Tim Scott, R-S.C., and Cory Booker, D-N.J., that was a forerunner to the OZ program included various reporting requirements, but those measures had to be deleted from the final version of the Tax Cuts and Jobs Act due to the arcane rules of budget reconciliation under which the bill was moved. Since the TCJA was enacted, taxwriters and others in Congress have said Treasury should be collecting granular data to enable assessment of whether the program is working as intended.

Treasury v. legislative approaches: Sens. Scott and Booker introduced legislation (S. 1344) in May that would require Treasury to track and report various metrics of the OZ program such as fund investments and their effects on job creation, poverty reduction, and new business starts. Reps. Ron Kind, D-Ore., and Mike Kelly, R-Pa., who both serve on the House Ways and Means Committee, are the lead sponsors of House companion legislation (H.R. 2593).

URL: https://www.congress.gov/bill/116th-congress/senate-bill/1344/text?q=%7B%22search%22%3A%5B%22s.+1344%22%5D%7D&r=1&s=1
URL: https://www.congress.gov/bill/116th-congress/house-bill/2593/text?q=%7B%22search%22%3A%5B%22h.r.+2593%22%5D%7D&r=1&s=1

The draft tax form – the four-page Form 8996 – Treasury released this week would have OZ funds report the employer identification number of each business in which it is invested, the census tract location of any tangible property of the business, the value of the investment, and the value and location of any qualified business property the fund owns or leases.

“This is an important step towards a thorough evaluation of the Opportunity Zone tax incentive,” Treasury Secretary Steven Mnuchin said in a statement. “We want to understand where Opportunity Zone investments are going and strengthening the economy so that investors and communities can learn from the successes of this bipartisan, pro-growth policy.”

However, Treasury’s move would not go as far as the proposed legislation, which requires a broader universe of information and public disclosure of some of the information collected. And although a news release from Treasury stated that “[c]ombining this investment information with data on employment and incomes will help policymakers and the public to evaluate the effects of this tax incentive and to understand why some locations may be more successful than others in attracting investment,” supporters of the proposed bills say the reporting requirement is not as focused as the House and Senate legislation on measuring economic outcomes.

### Ways and Means meeting

Earlier in the week, on October 29, a number of Ways and Means members held a bipartisan closed-door meeting with OZ stakeholders and critics to discuss the need for reporting requirements and other potential measures to ensure the program is funding projects in disadvantaged areas rather than in those that are not economically distressed (and would arguably have attracted investment without the tax incentive). The meeting was prompted at least in part by press reports suggesting that unmerited Opportunity Zone designations have been awarded to projects funded by certain prominent, wealthy investors.

**Bipartisan support:** Following the October 29 meeting, Rep. Kind told reporters that "there seems to be a lot of bipartisan support" among the House taxwriters for H.R. 2593 to improve transparency in the OZ program. Ways and Means members Kelly and Lloyd Doggett, D-Texas, who also attended the meeting, indicated to reporters that the bill’s provisions could be attached to a year-end spending vehicle. (There are numerous tax measures in the mix for such a vehicle, but it is far from certain whether there will be such a bill before the end of this year or if it will include a tax title. See separate coverage in this issue for further discussion.)

Sen. Scott also said this week that he hopes to get the legislation added wherever possible before the end of the year.

"We’re interested in seeing it happen," Sen. Scott told Politico October 30. “The only question really is what’s possible, and we’re still engaged in that conversation.”

**Other proposed OZ changes:** In addition to adding reporting requirements for qualified opportunity funds, some taxwriters at the meeting discussed ways to tweak the OZ program to provide a better distribution of incentives.

Ways and Means Republican Drew Ferguson of Georgia told reporters that he “would like to see a balancing [of benefits] between rural America versus urban America.”

For his part, Ways and Means Democrat Dan Kildee of Michigan suggested that incentives under the program should be weighted based on a community’s level of economic distress.

“An Opportunity Zone in Myrtle Beach [South Carolina] gets the same advantage as an Opportunity Zone in the heart of Flint, Michigan, and I don’t think that was the intent of the policy,” Kildee said, adding that his goal is “to supercharge the incentives in the most distressed places.”

### Scope, timing of bill to dilute SALT deduction cap remain unclear

In other TCJA-related news, House Democratic taxwriters met October 30 to discuss their ongoing efforts to weaken or repeal the $10,000 cap on the deduction for state and local taxes (SALT) enacted as part of that measure, and while they gave no clear signal of exactly what an eventual legislative proposal will look like or when it will be released, they did indicate that they still expect the committee to mark up a bill before the end of this year.

Options under discussion include temporarily repealing the cap, increasing the deduction limit (perhaps to $25,000 or $30,000), and eliminating the “marriage penalty” that exists under the cap as enacted. (The $10,000 cap on the deduction currently applies to single taxpayers and married couples alike.)
The proposal is expected to be offset and, according to taxwriter Ron Kind, an increase in the top individual income tax rate remains under consideration as a pay-for. (For more on recent developments related to the SALT deduction cap, see Tax News & Views, Vol. 20, No. 34, Oct. 25, 2019.)

URL: http://newsletters.usdbriefs.com/2019/Tax/TNV/191025_1.html

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JCT releases ‘Blue Book’ for non-TCJA legislation enacted in the 115th Congress

The Joint Committee on Taxation (JCT) staff on October 31 released a “Blue Book” providing a general explanation of provisions in the seven tax bills – other than the 2017 tax overhaul known informally as the Tax Cuts and Jobs Act or TCJA – that were enacted into law in the 115th Congress.

URL: https://www.jct.gov/publications.html?func=startdown&id=5233

The massive Tax Cuts and Jobs Act is addressed in a separate Blue Book that was released late last year.

URL: https://www.jct.gov/publications.html?func=startdown&id=5152

Among the more notable tax laws enacted in the previous Congress and described in the current publication are:

- The Bipartisan Budget Act of 2018 (P.L. 115-123), an appropriations bill that also extended dozens of expired temporary tax provisions for businesses and individuals, provided tax relief for victims of various natural disasters, and tweaked certain TCJA provisions;
- The Consolidated Appropriations Act, 2018 (P.L. 115-141), another appropriations bill that also provided a fix for the so-called “grain glitch” in the TCJA, expanded the low-income housing tax credit, and made technical corrections to the Protecting Americans from Tax Hikes Act of 2015, the partnership audit rules, and other pre-2017 tax laws; and
- The Fourth Continuing Appropriations for Fiscal Year 2018 (P.L. 115-120), which delayed or further suspended the imposition of several taxes that were enacted as part of the Patient Protection and Affordable Care Act of 2010.

The explanations were prepared in consultation with the staffs of the House Ways and Means Committee and the Senate Finance Committee. For each provision in a given law, the Blue Book provides a description of the law in effect immediately prior to enactment, an explanation of the provision, and its effective date. The explanations do not reflect any legislative changes made after the enactment of any given provision.

The publication also includes revenue estimates for the provisions in each enacted law.

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