In this issue:

‘Clean’ short-term spending bill signed into law........................................................................................................... 1
Ways and Means Democrats release green energy discussion draft .............................................................................. 3
A note on our publication schedule.............................................................................................................................. 6

‘Clean’ short-term spending bill signed into law

The House and Senate this week approved and President Trump signed a stopgap spending measure – without extraneous tax provisions – that extends government spending authority at fiscal year 2019 levels until December 20.

The funding bill (H.R. 3055) cleared the House on November 19 by a vote of 231-192 and won Senate approval on November 21 by a vote of 74-20. President Trump signed the measure into law on November 21, averting a government shutdown that otherwise would have occurred when the previous continuing resolution keeping the government’s doors open expired at midnight.

Little progress on larger spending deal

With another temporary funding patch in place, the goal now is for lawmakers to complete work in the next few weeks on a package of appropriations bills to fund the government for the remainder of fiscal year 2020, which began on October 1. (House Speaker Nancy Pelosi, D-Calif., and Senate Majority Leader Mitch McConnell, R-Ky., have made clear their preference that Congress avoid another short-term continuing resolution and instead nail down fiscal 2020 funding legislation next month.)
Not everyone is confident, however, that Democrats and the GOP will be able to agree by the new deadline on how to bridge the policy divides that so far have stymied Congress’s ability to pass any full-length appropriations bills for fiscal year 2020 – namely, how to allocate among the 12 appropriations subcommittees the top-line spending number agreed to earlier this year (as part of the Bipartisan Budget Act of 2019) and how to address the president’s stated desire to pursue policy priorities such as wall construction along the southern US border.

Negotiations on a final fiscal year 2020 spending package continue between Sen. Richard Shelby, R-Ala., and top Senate Democratic appropriator Patrick Leahy of Vermont, along with House Appropriations Committee Chairwoman Nita Lowey, D-N.Y., and ranking member Kay Granger, R-Texas – the so-called “four corners” of the congressional Appropriations committees – in hopes of striking a bipartisan accord that the president will accept.

But despite some recent reports that negotiators were “very close” to a deal on subcommittee allocations, Sen. Shelby told reporters November 20 that there has been little concrete progress.

“The tenor has been good. The tone of negotiations [has] been good. The results are puny,” he said.

It’s also worth noting that even if appropriators resolve their differences, efforts to move a final funding bill through Congress by December 20 could be complicated by the politically contentious impeachment process currently unfolding in the House. One forecast of the impeachment timeline has the House voting on articles of impeachment of President Trump during the week of December 16 – the same week that government funding would run out under the just-announced stopgap agreement – with a potential Senate trial commencing in January.

**Tax bill negotiations continue**

As the spending talks proceed, taxwriting committee leaders – 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 respective staffs are still negotiating on a separate track to cobble together a tax package that they hope to move with the “must pass” late December funding bill. Such a package could include some combination of provisions to address expired and expiring tax “extenders,” technical corrections to the 2017 tax bill informally dubbed the Tax Cuts and Jobs Act (TCJA), a House-passed retirement security bill that has been stalled in the Senate, and green energy tax incentives.

However, opinions continue to differ on what kind of a deal will emerge from these negotiations – or if any deal can be reached at all. Some observers are concerned that compromise will remain elusive and others are worried that a potential tax title could become so bloated 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.

Although the four principal negotiators provided few hints this week about how much progress they have – or haven’t – made, Rep. Brady offered some insights into what he would like to see included in a final tax package.

Specifically, Brady called for the inclusion of a technical correction to fix the so-called “retail glitch” in the Tax Cuts and Jobs Act by clarifying the cost recovery period for qualified improvement property.

“My hope is that it will be part of the extenders package because there is such broad support” for it, he told reporters November 20.

Brady made his comments after House Democrats blocked an attempt by Republicans to attach a freestanding measure to address the retail glitch (H.R. 1869) to a separate bill – the Workplace Violence Prevention for Health Care and Social Service Workers Act (H.R. 1309) – that was moving through the chamber. (H.R. 1309 was approved on November 21.)

Brady also commented that if Democrats are willing to accept technical corrections for the retail glitch and certain other TCJA drafting errors as part of a year-end tax deal, he might back the inclusion of some of the tax incentives in the green energy discussion draft that was released earlier this week by Ways and Means Select Revenue Measures Subcommittee Chairman Mike Thompson, D-Calif. (See separate coverage in this issue for more details on the Growing Renewable Energy and Efficiency Now Act.)
But despite his openness to potential policy trade-offs, Brady argued that negotiators stand the best chance of success in crafting a deal if they keep the scope of their hoped-for tax package relatively narrow.

Although he did not go into specifics in his November 20 comments, Brady has contended in recent weeks that Democrats have made what he considers unreasonable and expensive demands in their negotiations with the GOP, including expanding programs such as the refundable portion of the Child Tax Credit and Earned Income Tax Credit, lifting the TCJA’s cap on state and local tax deductions, and providing funding relief for cash-strapped multiemployer pension plans as conditions for making other tax law changes. (Across the Capitol, Senate Finance Committee Chairman Charles Grassley and Health, Education, Labor and Pensions Committee Chairman Lamar Alexander, R-Tenn., this week released their own white paper and technical explanation of a plan to shore up troubled multiemployer plans, but it is unclear if Grassley intends to make this an issue in year-end tax negotiations.)

Brady cautioned that “[a]s long as the whole galaxy is being considered for the extenders package, not much will get done.” If negotiators stay focused “on the extenders, technicals, and perhaps, some renewable policies, then I think you’ve got the makings of an agreement,” he said.

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Ways and Means Democrats release green energy discussion draft

House Ways and Means Select Revenue Measures Subcommittee Chairman Mike Thompson, D-Calif., on November 19 released a discussion draft of legislation that calls for extending – and in some cases expanding – expired and expiring tax incentives intended to promote energy efficiency, renewable energy, and a reduction in carbon emissions, as well as implementing new provisions to encourage the development and use of green energy technologies.

But the Growing Renewable Energy and Efficiency Now (GREEN) Act discussion draft does not include a cost estimate nor does it identify revenue offsets to pay for the ambitious slate of proposals.

Overview

Here are highlights of some notable provisions in the GREEN Act discussion draft. The full text of the draft and a section-by-section summary are available from the Ways and Means Committee Democratic staff.

Renewable electricity: The GREEN Act would retroactively extend through 2024 the now-expired production tax credit for energy produced from closed loop biomass, open loop biomass, landfill gas, trash, qualified hydropower, and marine and hydrokinetic renewable energy facilities. The credit for geothermal energy would be extended through 2019. The credit for wind energy would be extended through 2024 under a modified phase-out schedule.

The discussion draft generally would extend the 30 percent investment tax credit for qualified energy property at its full value for property for which construction begins by the end of 2024, with a phased-down credit available in 2025 and 2026. (The credit is currently set to expire at the end of 2021.) The credit also would be expanded beginning in 2020 to apply to energy storage technology, waste energy recovery property, biogas property, and linear generators. Geothermal energy also would be eligible for the credit beginning in 2020.

A new provision would expand the definition of qualified income for publicly traded partnerships from certain income derived from minerals and natural resources to include income derived from certain activities related to green and renewable energy.
Renewable fuels: The GREEN Act would retroactively extend through 2024 several incentives for alternative and renewable fuels that expired at the end of 2017. These include the income and excise tax credits for biodiesel and biodiesel mixtures; the small agribiodiesel producer credit; excise tax credits for alternative fuels and alternative fuel mixtures; and the second-generation biofuel income tax credit and special allowance for depreciation of second-generation biofuel plant property.

The income and excise tax credits for biodiesel and biodiesel mixtures and the excise tax credits for alternative fuels and alternative fuel mixtures would phase down beginning in 2022 and would terminate after 2024.

Commercial and residential property: The GREEN Act also would retroactively extend through 2024 several now-expired incentives for energy-efficient commercial and residential property, including the:

- Credit for nonbusiness energy property. For property placed in service starting in 2020, the draft calls for, among other things, increasing the credit amount and the lifetime cap on allowable credit amounts, updating various standards for qualifying property to reflect advances in energy efficiency, and updating the list of products and services eligible for the credit.
- Energy-efficient commercial buildings deduction. Beginning in 2020, the proposal calls for modifying the formula for calculating the maximum deduction and updating the requirements for eligible property.
- New energy-efficient home credit. Beginning in 2020, the credit would be modified to increase the credit amount and update certain eligibility requirements.

The discussion draft also would extend the credit for residential energy-efficient property such as solar electric, solar water heating, fuel cell, small wind energy, and geothermal heat pumps, which is currently set to expire at the end of 2021. The credit would apply at a rate of 30 percent through the end of 2024, phase down in 2025 and 2026, and terminate after the end of 2026. It also would be modified to expand the list of eligible property.

A new provision would provide a gross income exclusion for water conservation and storm water management subsidies provided by public utilities, state or local governments, and storm water management providers.

Alternative fuel vehicles: The GREEN Act would expand the availability of the current-law tax credit for purchasers of new plug-in electric drive motor vehicles.

Under current law, taxpayers who purchase a qualified plug-in electric drive motor vehicle are eligible for a tax credit of up to $7,500, which begins to phase out once a manufacturer sells 200,000 qualified vehicles. The GREEN Act provides that an additional 400,000 vehicles per manufacturer would be eligible for a credit of up to $7,000 before the credit begins to phase out.

The GREEN Act also would retroactively extend through 2024 the two-wheeled plug-in vehicle credit, which expired at the end of 2017. And beginning in 2020, it would renew the now-expired credit for three-wheeled electric plug-in vehicles through 2024.

The discussion draft likewise calls for a retroactive extension (through 2024) of the credit for the purchase of qualified fuel cell vehicles and the credit for alternative fuel vehicle refueling property, both of which expired at the end of 2017. (The alternative fuel vehicle refueling property credit would be expanded to apply to expenses beyond the current $100,000 cap under certain conditions.)

New proposals call for the creation of:

- A manufacturer credit for the sale of zero-emission commercial vehicles and zero-emission buses and
- A credit for certain purchasers of previously owned plug-in electric drive vehicles.

Both of these new proposed credits would be available through 2024.

Advanced energy project credit: The GREEN Act calls for reauthorizing the qualified advanced energy property credit, allowing the Treasury Secretary to allocate an additional $2.5 billion in credits for each year beginning in 2020 and continuing through 2024. Eligible property would have to be placed in service within four years after the credit is allocated. Projects would be given priority if the manufacturing is not for assembly of parts.
Environmental justice program credit: The discussion draft proposes new capped refundable competitive credit of $1 billion for each year from 2020 through 2024 that would be available to colleges and universities for environmental justice programs. The base credit would be 20 percent of costs, which a receiving institution would have to spend within five years. A 30 percent credit would be available to programs with material participation from Historically Black Colleges and Universities and Minority Serving Institutions.

Laying the groundwork for a carbon tax?: Although it does not offer a specific proposal, the GREEN Act discussion draft suggests that Democratic taxwriters are exploring the possibility of proposing a carbon tax at some point in the future.

The draft includes a provision that would require the Treasury Secretary to "assess and report on the utility of the data from [the Environmental Protection Agency’s] Greenhouse Gas Reporting Program for determining the amount of greenhouse gases emitted by each taxpayer for the purpose of imposing a fee on such taxpayers with respect to such emissions." The report would be required to include "a detailed description and analysis of any administrative or other challenges associated with using such data for such purpose."

Revenue raisers left out – for now

The GREEN Act discussion draft does not include a cost estimate for the proposed incentives nor does it propose any revenue-raising provisions that could serve as potential offsets. Instead, the revenue title simply indicates that pay-fors are "to be provided."

Democratic leaders on the Ways and Means Committee have thus far been tight-lipped on exactly how they intend to offset the legislation and when they intend to provide those details. For his part, though, Ways and Means ranking member Kevin Brady, R-Texas, has said he expects Democrats will target oil and gas tax incentives – an outcome that would be consistent with prior discussions among House Democratic taxwriters but that would surely present an obstacle to bipartisan negotiations.

Path forward unclear

Ways and Means Select Revenue Measures Subcommittee Chairman Mike Thompson called the discussion draft "a starting point" and told reporters November 19 that he is awaiting comments on the package from his House colleagues and from outside stakeholders.

But Thompson did not indicate whether the draft will be formally introduced in the House and marked up as freestanding legislation in the Ways and Means Committee or whether House Democratic leaders will instead attempt to include it – or portions of it – in the still-developing tax package that House and Senate taxwriting leaders would like to attach to a "must pass" fiscal year 2020 spending bill next month. (See separate coverage for additional details on those developments.)

Thompson told Tax Notes that he "would like something to happen this year," noting that there is some overlap between the energy extenders provisions in the discussion draft and those in the broader extenders bill the Ways and Means Committee approved this past June. A sizeable chunk of Thompson's Democratic colleagues in the House also back swift action on green energy legislation, as evidenced by a recent letter sent to Speaker Nancy Pelosi, D-Calif., and Majority Leader Steny Hoyer, D-Md., in which 166 House Democrats called for the "inclusion of critical clean energy tax policies in negotiations around must-pass legislation this year."


Politico, however, reported that action on the package could be delayed, citing a Ways and Means Committee aide who said that "timing on next steps will be clearer once we have next year's congressional calendar."

Prospects for the moving the green energy proposals in a year-end tax bill are likely to hinge on what kind of deal Democratic taxwriters are able to make with their Republican counterparts in the House and Senate.
part of a year-end tax bill if Democrats in turn allow some technical corrections to address drafting errors and other glitches in the GOP’s 2017 tax code overhaul.

For his part, Ways and Means Committee member Dan Kildee, D-Mich., predicted November 19 that the proposal could give Democrats some leverage in the Senate as Finance Committee Chairman Charles Grassley, R-Iowa, negotiates for his own priorities.

“[Grassley’s] priorities might not be aligned with ours, but his interests will be because he’s going to have a hard time getting what he wants unless we get something that balances the ledger,” Kildee said. “And I very much feel like this could be a way to do that – especially the [electric vehicle credit], but the green energy piece in general.”

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A note on our publication schedule

The House and Senate are adjourned the week of November 25 for their Thanksgiving recess. The Senate will be back in session on December 2 and House lawmakers return to Capitol Hill on December 3.

Barring unexpected developments on the tax policy front, the next issue of Tax News & Views will be published after the legislative session resumes.

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