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Energy Provisions in the Bipartisan Budget Act of 2018

By Christie R. Galinski and Sameer A. Ghaznavi*

The Bipartisan Budget Act of 2018 includes energy-related provisions and also provides for the retroactive, one-year extensions of certain tax credits, deductions, and other special rules. This article explains the provisions and extensions.

President Trump has signed into law the Bipartisan Budget Act of 2018 (the "Act"), which retroactively extended some temporary tax breaks and includes some additional provisions which were left out of the Tax Cuts and Jobs Act of 2017.[1]

Other than several one-year extensions of credits and deductions, as listed below, the Act included the following energy-related provisions:

ENERGY-RELATED PROVISIONS OF THE BIPARTISAN BUDGET ACT OF 2018

- *Five-year extension of Investment Tax Credit* ("ITC") *for certain property.* The Act extends the 30 percent ITC for the following types of property if construction begins before January 1, 2022: fiber optic solar equipment, thermal energy property, qualified fuel cell property, qualified microturbine property, combined heat and power system property and qualified small wind energy property. Those credits had previously expired for periods ending before January 1, 2017. These extensions are effective for periods after December 31, 2016.
- *Phase out of ITC for fiber-optic solar, qualified fuel cell and qualified small wind energy property.* The normally 30 percent ITC for fiber-optic solar, qualified fuel cell and qualified small wind energy property will now be 26 percent if construction begins in 2020 and 22 percent if construction begins in 2021. In addition, those types of property must be placed in service before January 1, 2024 to qualify for the ITC.

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[1] References to "Code Section" are to the Internal Revenue Code of 1986, as amended.

- *Five-year extension of residential energy efficient property* ("REEP") *credit.* The REEP credit, under Code Section 25D, is a 30 percent credit for expenditures for qualified solar electric, solar water heating, fuel cell, small wind energy and geothermal heat pump property. The Act extends the REEP credit for five years, to property placed in service through December 31, 2021. In addition, the REEP credit will be phased out to equal the sum of the applicable percentages of the following expenditures made by the taxpayer during the taxable year: qualified solar electric property expenditures, qualified solar water heating property expenditures, qualified fuel cell property expenditures, qualified small wind energy property expenditures, and qualified geothermal heat pump property expenditures.
- *Modification of Credit for Production from Advanced Nuclear Power Facilities.* Under Code Section 45J, there is a credit for electricity produced at qualifying advanced nuclear facilities. The Act requires the Secretary of the Treasury to allocate any unutilized national megawatt capacity as rapidly as possible after December 31, 2020. The Act also allows certain public entity credit recipients to make an election to transfer advanced nuclear production tax credits to other project participants, effective February 9, 2018.

RETROACTIVE EXTENSIONS OF TAX CREDITS, DEDUCTIONS, AND OTHER SPECIAL RULES

In addition, the Act also provides for the retroactive, one-year extensions of the following tax credits, deductions, and other special rules through the end of 2017:

- *Nonbusiness energy property credit.* Code Section 25C allows individuals to collect a 10 percent nonrefundable personal tax credit for improvements to their principal residence that meet certain energy efficiency standards. Before the Act, the credit did not apply to property placed in service after December 31, 2016, but the Act extended the rule one year to property placed in service before December 31, 2017.
- *Qualified fuel cell motor vehicle credit.* The alternative motor vehicle credit under Code Section 30B includes the amount of the qualified fuel cell motor vehicle credit, which provides a $4,000 to $40,000 credit for purchases of new qualified fuel cell motor vehicles such as hydrogen fuel-cell vehicles. The qualified fuel cell motor vehicle credit has been extended one year to include property purchased in 2017.
- *Alternative fuel vehicle refueling property credit.* Code Section 30C allows a credit for 30 percent of the cost of any qualified alternative fuel

vehicle, such as electric cars, up to $30,000 for nondepreciable property. The Act extends this credit for one year to property placed in service in 2017.

- *Credit for two-wheeled plug-in electric vehicles.* Code Section 30D allows a credit of 10 percent of amounts paid for qualified plug-in electric vehicles. The Act extends the credit for one year to vehicles that were acquired before January 1, 2018.
- *Second-generation biofuel producer credit.* Code Section 40 provides for a $1.01 per gallon credit for alcohol used as fuel, including a credit for producing second generation biofuel (which generally is derived from qualified feedstocks). The Act extended the credit one year to include second generation biofuel produced before January 1, 2018.
- *Credit for the biodiesel and renewable diesel fuel.* The Act extends (1) the $1.00 per gallon credit for biodiesel and renewable diesel fuel under Code Section 6426 and (2) the alcohol fuel, biodiesel and alternative fuel mixture credit under Code Section 6427(e) to fuel sold or used through December 31, 2017.
- *Indian coal facilities credit.* The credit under Code Section 45 for electricity produced from certain renewable resources includes electricity produced at an Indian coal production facility. The Act extends the credit of $2.387 per ton credit to electricity produced at an Indian coal production facility through December 31, 2017.
- *Credit available from certain kinds of renewable resource facilities.* The Act extends for one year the production credits (generally 2.4 cents per kilowatt hour) available under Code Section 45 for the following: closed-loop biomass facilities, open loop biomass facilities, geothermal energy facilities, landfill gas facilities, trash facilities, qualified hydropower facilities, and marine and hydrokinetic renewable energy facilities. It is now applicable to those facilities above which began construction before January 1, 2018.
- *Credit to treaty qualified facilities as energy property.* The Act extends for one year the election to treaty qualified facilities as energy property. Therefore, they may be able to qualify for the ITC if construction began before January 1, 2018. Wind property may continue to qualify as long as construction begins before January 1, 2020.
- *Credit for energy-efficient new homes.* The Act extends the $1,000 to $2,000 credit for energy-efficient new homes under Code Section 45L to homes acquired in 2017.

- *Bonus depreciation for second generation biofuel plant property.* The 50 percent bonus depreciation for second generation biofuel plant property (which does not otherwise qualify for bonus depreciation) now applies to property placed in service in 2017.
- *Energy efficient commercial building deduction.* The deduction for the cost of energy-efficient commercial building property (up to $1.80 per square foot) is extended for one year through December 31, 2017.
- *Special rule for sales to implement FERC or state electric restructuring policies for qualified electric utilities.* Under Code Section 451(k), the taxpayer may elect to recognize gains over an eight-year period on sales of electric transmission services property to independent transmission companies, except to the extent the taxpayer purchased certain utility property during the preceding four-year period. For qualified electric utilities, the special rule is extended to sales occurring before January 1, 2018.
- *Excise tax credits relating to alternative fuels and alternative fuel mixtures.* The Act extends the excise tax credit under Code Section 6426 of 50 cents per gallon for alternative fuel and alternative fuel mixtures, such as liquefied petroleum gas, natural gas, hydrogen, or gas or fuel derived from biomass used or sold by the taxpayer. In addition, a special rule will now apply for credits applicable to payments made in 2017, which will require the Secretary of the Treasury to pay interest on claims not paid within a certain time.