AMERICAN PUBLIC POWER ASSOCIATION
Powering Strong Communities

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Sequestration of Bond And Tax Credit Payments

- The American Public Power Association (APPA) strongly supports legislation to end the threat of sequestration of federal payments related to Build America Bonds (BABs) and refundable elective payment energy tax credits.
- APPA believes that sequestration of payments to BAB issuers and other direct payments bonds is tantamount to a breach of contract for financial deals negotiated more than a decade ago.
- APPA believes that the threat of sequestration of refundable elective payment tax credits needlessly clouds investment decisions for public power utilities and rural electric cooperatives, which collectively serve nearly 30 percent of the nation's retail customers.

Background

During the 2008 credit crisis, traditional municipal bond investors pulled out of the market and interest rates soared. To provide liquidity to these markets—and in turn encourage the sorts of infrastructure investments that municipal bonds finance—the American Recovery and Reinvestment Act (ARRA) of 2009 created the BAB. A BAB meets the same requirements as any other government-purpose municipal bond, but instead of the interest being tax-exempt, the bond issuer receives a credit payment from the Treasury Department equal to 35 percent of the interest paid. Of the $181 billion in BABs issued, 108 BABs worth $16 billion financed power-related projects.[1] New Clean Renewable Energy Bonds (New CREBs) are another form of "direct payment" bonds intended as an alternative to energy tax credits for which public power utilities were not eligible. APPA estimates that roughly $300 million in New CREBs were issued by public power utilities. BABs were authorized to be issued in 2009 and 2010 only, and the ability to issue New CREBs was repealed in 2017.

Additionally, for years Congress has incentivized energy investments by providing tax credits for certain investments and energy production. This approach—rather than a direct grant payment or subsidized loan—excluded entities with little to no tax liability, including public power utilities and rural electric cooperatives, which are exempt from federal tax and collectively serve nearly 30 percent of U.S. retail customers. To level this playing field, Congress in the Inflation Reduction Act (P.L. 117-169) allowed certain energy tax credits to be claimed as refundable elective payment tax credits, making them directly available to public power utilities and rural electric cooperatives.

A failure to meet deficit reduction targets under the Budget Control Act of 2011 (BCA) triggered the Department of Treasury to implement automatic cuts to federal mandatory (entitlement) spending programs beginning March 1, 2013, through a process called sequestration. Ignoring earlier statements by the Treasury Department[2] and congressional intent,[3] the White House Office of Management and Budget (OMB) decided in 2012 that BAB and New CREB credit payments to BAB and New CREB issuers were subject to sequestration.[4] BCA sequestration cuts were originally supposed to end after 2021, but Congress has repeatedly extended

1. U.S. Department of Treasury, Treasury Analysis of Build America Bond Issuances and Savings, at 2 (May 16, 2011).
2. Tax Exempt and Taxable Government Bonds: Hearing before the H. Subcomm. on Select Revenues of the H. Comm. on Ways & Means, 111th Cong. 12 (2009) (Serial No. 111-22) (Statement of Alan B. Krueger, Assistant Sec'y. of Treasury of the United States).
3. John Buckley, Remarks at the Urban-Brookings Tax Policy Center and George Mason Center for State and Local Government Leadership panel discussion Fallout from Federal Tax Reform: Implications for State and Local Revenues (Sept. 21, 2012) (Buckley, who as chief tax counsel for the House Ways and Means Committee helped write the BAB provision in ARRA, called OMB's decision "extraordinary and strange").
4. Office of Mgmt. & Budget, Exec. Office of the President, OMB Report Pursuant to the Sequestration Transparency Act of 2012 (P.L. 112-155), at 157 (Sept. 24, 2012).

the period and annual cuts of 5.7 percent will now last through fiscal year (FY) 2031. According to OMB, BAB and New CREB credit payments have been cut by approximately $2.4 billion since 2013. APPA estimates that these payments will be cut by another roughly $1 billion before sequestration ends at the end of FY 2031.

Additionally, under the Statutory Pay-as-You-Go Act of 2010 (PAYGO), any increase in the deficit caused by new tax or entitlement spending laws also triggers sequestration cuts to eliminate those deficits. These cuts are automatic unless PAYGO is waived, either as part of the new law or in subsequent legislation. The American Rescue Plan Act of 2021 added $1.9 trillion in deficit spending to the PAYGO "scorecard." Congress has twice postponed the sequestration cuts that would have ensued in January 2022, but absent further action, PAYGO sequestration will take effect in January 2025 and last through September 2031. In fact, given the size of the deficit increase caused by the American Rescue Plan Act, the Congressional Budget Office estimates that PAYGO sequestration will eliminate spending for all but a handful of programs. Accounts for which spending would be eliminated include payments to BAB and New CREB issuers and refundable elective payment tax credits.

PAYGO sequestration would eliminate an estimated $12.7 billion in payments to state and local issuers of direct payment bonds, including public power utilities. These cuts would be financially devastating to public power utilities that issued BABs and New CREBS. The threat of PAYGO sequestration likewise is needlessly clouding investment decisions by public power utilities seeking to take advantage of refundable direct pay tax credits.

Congressional Action

In June, President Biden signed into law the Fiscal Responsibility Act of 2023 (Pub. Law 118-5), budget legislation that would cut certain federal spending and suspend the federal debt limit until 2025. As discussed above, Congress has routinely used "budget" legislation to extend the expiration date for BCA sequestration. While APPA appreciates that the Fiscal Responsibility Act did not further extend BCA sequestration, the association is disappointed that Congress failed to use the budget bill to fix the threat of PAYGO sequestration that will begin in 2025.

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