

IRS Further Extends Continuity Safe Harbor and Clarifies Methods for Satisfying the Continuity Requirement for Renewable Energy Projects

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On June 29, the IRS issued Notice 2021-41, which provides further relief for delays caused by the COVID-19 pandemic with respect to the “beginning of construction” requirements for renewable energy projects eligible for the production tax credit (PTC) or investment tax credit (ITC). Notice 2021-41 also clarifies the methods for satisfying the Continuity Requirement with respect to such projects.

Notice 2020-41 modifies the guidance provided in Notices 2013-29, [2013-60](#), 2014-46, 2015-25, 2016-31, 2017-04, [2018-59](#), 2019-43, 2020-41, and [2021-05](#) (the “Prior Notices”) by (i) extending the Continuity Safe Harbor to six years for projects on which construction began in 2016, 2017, 2018, or 2019, and to five years for projects on which construction began in 2020; and (ii) clarifying that in cases where the Continuity Safe Harbor does not apply, the Continuity Requirement may be satisfied by either a continuous program of construction or continuous efforts toward completion, regardless of whether construction began via the Physical Work Test or the Five Percent Safe Harbor.

The remainder of this advisory provides additional background about the Continuity Requirement and further analysis of the changes made pursuant to Notice 2021-41.

Continuity Safe Harbor

The Prior Notices provide two methods by which a taxpayer can satisfy the applicable beginning of construction requirement: (i) starting physical work of a significant nature (the “Physical Work Test”) or (ii) incurring 5% or more of the costs of the project (the “Five Percent Safe Harbor”). Both methods require that a taxpayer make continuous progress toward completion once construction has begun (the “Continuity Requirement”). The Prior Notices also provide a safe harbor (the “Continuity Safe Harbor”) pursuant to which the Continuity Requirement is deemed to be satisfied if a taxpayer places the project in service by the end of a calendar year that is no more than four calendar years after the calendar year during which construction began. This four-year window was subsequently extended to five years for projects that began construction in 2016 or 2017, and to 10 years for certain offshore projects and projects on federal land. For prior coverage on the Continuity Safe Harbor, please see our analysis of Notice 2017-04, Notice 2020-41, and Notice 2021-05.

Notice 2021-41 extends the Continuity Safe Harbor to six years for projects on which construction began in 2016, 2017, 2018, or 2019, and to five years for projects on which construction began in 2020. As with the earlier

extension accorded by Notice 2020-41, the 2021 extensions of the Continuity Safe Harbor continue to alleviate the serious structuring issues and necessary mitigants (tax opinions on the facts-and-circumstances test in the Continuity Requirement (as further described below), tax insurance to cover off the risk, etc.) presented by the possibility of a placed-in-service date that is outside of the Continuity Safe Harbor.

Continuity Requirement

Whether the Continuity Requirement is satisfied depends on the relevant facts and circumstances. Under the Prior Notices, where a taxpayer had satisfied the Physical Work Test, the Continuity Requirement required that the taxpayer maintain a continuous program of construction, which involved continuing physical work of a significant nature (the “Continuous Construction Test”). Conversely, where a taxpayer had satisfied the Five Percent Safe Harbor, the Continuity Requirement required that the taxpayer make continuous efforts to advance toward completion of the qualified facility or energy property, as the case may be (the “Continuous Efforts Test”).

In a departure from the language of the Prior Notices, Notice 2021-41 clarifies that for any qualified facility or energy property to which the Continuity Safe Harbor does not apply, the Continuity Requirement is satisfied if the taxpayer demonstrates satisfaction of either the Continuous Construction Test or the Continuous Efforts Test, regardless of whether the Physical Work Test or the Five Percent Safe Harbor was used to establish the beginning of construction.

Observations

As with Notice 2020-41, the further extension of the Continuity Safe Harbor is an important development for the renewable energy industry generally, and in particular for wind projects, which frequently take a significant period of time to develop and construct and which have continued to suffer delays due to the COVID-19 pandemic. For 2019 and 2020 solar projects, the Continuity Safe Harbor is now coterminous with the statutory deadline to be placed in service by the end of 2025, after which the ITC is reduced to 10%.

The clarification of the Continuity Requirement provides much-needed conformity in the application of the Continuity Requirement to projects that began construction under the Physical Work Test and projects that began construction under the Five Percent Safe Harbor. Tax practitioners have long questioned the policy rationale (or lack thereof) supporting the application of a much more stringent version of the Continuity Requirement to projects that began construction under the Physical Work Test, which incentivizes taxpayers to begin construction by incurring project costs rather than by performing physical work. The latest change to the Continuity Requirement removes this distorting effect on the development process by applying the Continuity Requirement uniformly to both methods of beginning construction.

For more information, please contact any of the attorneys listed in this advisory.

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