



ALERTS

IRS Further Extends Continuity Safe Harbor For Renewable Energy Projects

July 2, 2021

Highlights

For renewable energy facilities that began construction in 2016 through 2019, IRS Notice 2021-41 provides for a 6-year Continuity Safe Harbor

For renewable energy facilities that began construction in 2020, IRS Notice 2021-41 provides for a 5-year Continuity Safe Harbor

IRS Notice 2021-41 also provides more flexibility in satisfying the continuity requirement if a taxpayer is unable to satisfy the Continuity Safe Harbor

To address continuing delays caused by the COVID-19 pandemic, the IRS [issued Notice 2021-41](#) on June 29 extending the “continuity requirement” for satisfying the beginning of construction requirement for renewable energy facilities that qualify for either production tax credits (PTCs) or investment tax credits (ITCs).

In May 2020, the IRS issued Notice 2020-41, which extended the “continuity requirement” and “3 ½ month” rule for certain projects to address delays caused by the pandemic. A copy of our previous firm alert regarding the previous extension can be found [here](#).

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The amount of PTCs or ITCs that an owner of a renewable energy facility may claim depends on the calendar year when construction of the facility begins. The IRS has previously issued guidance for wind, solar and other renewable energy projects for satisfying the beginning of construction requirement. Our previous firm alert regarding the beginning of construction requirement for solar and other renewable projects can be found [here](#).

In general, there are two methods for satisfying the beginning of construction requirement: 1) starting physical work of significant nature, i.e. the Physical Work Test, or 2) having paid or incurred 5% or more of the total cost of the energy property, i.e. the 5% Safe Harbor. Both methods require taxpayers to make continuous progress towards completion once construction has begun (the Continuity Requirement). The IRS previously provided a safe harbor that a taxpayer would automatically satisfy the Continuity Requirement if the taxpayer completes construction of the facility within four calendar years after the calendar year when construction of the facility began (the Continuity Safe Harbor).

Extension of Continuity Safe Harbor Period

The extension's parameters are:

- Construction began during 2016-2019 Calendar Years. For any qualified facility or energy property that began construction during the calendar years 2016 through 2019 (under either the Physical Work Test or the 5% Safe Harbor), IRS Notice 2021-41 extends the Continuity Safe Harbor period to six years. For example, if a taxpayer began construction of a solar facility during 2019, the Continuity Safe Harbor will be satisfied if the solar facility is placed in service by the end of 2025.
- Construction began during 2020 Calendar Year. For any qualified facility or energy property that began construction during the 2020 calendar year (under either the Physical Work Test or 5% Safe Harbor), IRS Notice 2021-41 extends the Continuity Safe Harbor period to five years. Accordingly, if a taxpayer begins construction of a solar facility during 2020, the Continuity Safe Harbor will be satisfied if the facility is placed in service by the end of 2025.

Clarification of Methods to Satisfy Continuity Requirement

If the Continuity Safe Harbor does not apply, the prior IRS guidance provided that satisfaction of the Continuity Requirement depended on the relevant facts and circumstances. Specifically, under the prior guidance, if a taxpayer relied on the Physical Work Test, the taxpayer was required to maintain a continuous program of construction, which involved continuing physical work of significant nature (known as the Continuous Construction Test). Conversely, if a taxpayer relied on the 5% Safe Harbor, the taxpayer had to make continuous efforts to advance towards completion of the facility (known as the Continuous Efforts Test).

If the Continuity Safe Harbor does not apply, IRS Notice 2021-41 provides

that the Continuity Requirement will be satisfied if the taxpayer demonstrates satisfaction of either the Continuous Construction Test or the Continuous Efforts Test regardless of whether a taxpayer relies on the Physical Work Test or 5% Safe Harbor in satisfying the beginning of construction requirement.

Notice 2021-41 provides welcome guidance and more certainty for taxpayers in satisfying the beginning of construction requirement with delivery and construction delays associated with the COVID-19 pandemic.

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