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IRS Modifies Safe Harbor Guidance and Deadlines for Section 45 and 48 Energy Credits: Grant Thornton

The IRS has issued new guidance (Notice 2017-04) updating and modifying deadlines and rules for the safe harbors for establishing that construction has begun and is continuous on projects qualifying for the renewable electricity production tax credit (PTC) under Section 45 and the energy investment tax credit (ITC) under Section 48.

The guidance extends the date by which a project can be placed in service and qualify for the continuity safe harbor, adds an effective date to a restriction on combining begin-construction safe harbor methods, and clarifies which expenses from a retrofitted facility are included in the 5% safe harbor calculation.

The Protecting Americans from Tax Hikes (PATH) Act of 2015 extended both the PTC and ITC credits. Under the bill, construction on qualified PTC projects must now have begun before the end of 2016 to be eligible for the full credit. The PTC will also be available at reduced rates for wind facilities if construction begins in 2017 (80% of normal credit), 2018 (60%) or 2019 (40%). Taxpayers may also elect to take the ITC in lieu of the PTC, but any PTC rate reductions will apply to the ITC.

In addition, the 30% ITC for commercial solar projects was extended. The rate was set to fall to 10% if construction began after 2016, but the full 30% rate will now be available if construction begins by the end of 2019. A 26% credit is available if construction begins in 2020, and a 22% credit is available if construction begins in 2021 and the facility is placed in service by the end of 2023. The credit is otherwise 10%.

Under guidance issued previously (Notices 2013-29, 2013-60, 2014-46, and 2016-31) the IRS said that taxpayers can establish that construction has begun by either satisfying a test showing "physical work of a significant nature" has begun or by incurring 5% or more of the total cost of the facility under a safe harbor. Taxpayers can aggregate multiple facilities based on the relevant facts and circumstances, but then disaggregate them for applying the placed-in-service deadline for the continuity safe harbor.

However, Notice 2016-31, issued last year, does not allow taxpayers to use two different beginning construction tests in alternate years to establish construction has begun in different years for the purpose of the separate begin-construction and continuity deadlines. Newly issued Notice 2017-04 limits this restriction only to projects that began after June 6, 2016 (the day Notice 2016-31 was issued).

Notice 2016-31 also provided that a retrofitted energy project can qualify if the used property represents less than 20% of the value. Notice 2017-04 clarifies that only costs related to new construction in these projects are included in the calculation for the 5% safe harbor.

Once construction is considered to have begun, taxpayers must make continual progress toward completion. The IRS created a continuity safe harbor to satisfy this standard, last modifying it under

Notice 2016-31. Taxpayers are generally considered to have made continual progress toward completion if a facility is placed in service within four calendar years of the calendar year in which construction began. Notice 2017-04 now provides that a taxpayer will also fall under this safe harbor if the project is completed before Dec. 31, 2018, even if this more than four years after construction began.

Taxpayers who don't use the continuity safe harbor must generally use a facts-and-circumstances analysis to determine if construction is continual. Notice 2017-04 does not update the nonexclusive list of allowable disruptions. The following disruptions remain excusable:

- Severe weather conditions
- Natural disasters
- Certain licensing and permitting delays
- Delays at the written request of government for safety, security or similar concerns
- Transmission interconnection issues
- Labor stoppages
- Supply shortages
- Delays in manufacturing custom components
- Inability to obtain specialized equipment
- Financing delays
- The presence of endangered species

Notice 2017-04 also does not update the list of preliminary activities under Notices 2013-29 and 2016-31 that don't qualify as physical work of a significant nature. The following preliminary activities do not qualify:

- Planning or designing
- Securing financing
- Exploring
- Researching
- Conducting geologic mapping and modeling
- Obtaining permits and licenses
- Conducting geophysical, gravity, magnetic, seismic and resistivity surveys
- Conducing environmental and engineering studies
- Performing activities to develop a geothermal deposit prior to discovery
- Clearing a site
- Test drilling of a geothermal deposit
- Test drilling to determine soil condition
- Excavation to change the contour of the land (as distinguished from excavation for footings and foundations)
- Removing existing turbines, towers, panels or other components

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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