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IRS Publishes New Guidance On Renewable Energy Tax Credits.

In December 2015, the U.S. Congress passed a multi-year extension of renewable energy tax credits, including credits for wind, solar, geothermal, hydropower and biomass facilities. Many of the deadlines for credit qualification in the new law involve the starting date of renewable energy projects, although the time of completion is also significant. Previously, the IRS provided guidance for the "beginning of construction" period. The IRS has now issued additional guidance with respect to the newly passed schedule of credits.

The new guidance, which generally is viewed as favorable to renewable energy project development, is in the form of "safe harbors." If a taxpayer meets the requirements of either of two safe harbors (the "Physical Work Test" or the "Five Percent Safe Harbor"), then it is deemed to have complied with the requirements of the new law that concern when construction commences. After construction has begun, it becomes necessary to show that the work is continuing, which is the purpose of the "Continuity Safe Harbor."

By its recent action, the IRS extended and modified the Continuity Safe Harbor for the third time and provided additional guidance regarding the application of the Continuity Safe Harbor and the Physical Work Test. Additionally, the IRS clarified the application of the Five Percent Safe Harbor to retrofitted renewable energy facilities.

Specifically, the IRS explained that if a taxpayer places a facility in service during a calendar year that occurs no more than four calendar years after the calendar year during which the construction of the facility began, then that facility will be considered to have satisfied the Continuity Safe Harbor requirement. The IRS also noted that a taxpayer may not rely on the Physical Work Test or the Five Percent Safe Harbor in alternating calendar years in order to satisfy the beginning of construction requirement or the Continuity Requirement. The IRS guidance outlines the following factors (among others): (i) "excusable disruptions" to Continuous Construction, or Continuous Efforts Tests, and (ii) the conditions of qualification for the Physical Work Test.

Finally, the IRS emphasized that a facility may qualify as originally placed in service even though it also may contain some used property, as long as the fair-market value of the used property is not more than 20% of the facility's total value (i.e., the cost of the new property plus the value of the used property) (the "80/20 Rule"). Because the Five Percent Harbor is applied only with respect to the cost of new property that is used to retrofit an existing facility, the IRS explained, only expenditures paid or incurred that relate to new construction should be taken into account for purposes of the Five Percent Safe Harbor.

The IRS stated that this guidance clarifies and modifies Notices 2013-29, 2013-60, 2014-46 and 2015-25.

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