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IRS Notice Provides Relief for Renewable Energy Construction Projects

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As we discussed in [a previous article](#), the renewable energy industry is experiencing record growth. President Biden's current initiatives are also expected to provide an additional boost to accelerate future growth in clean energy industries. However, the ongoing COVID-19 pandemic and its effects have caused construction delays for these projects due in part to supply chain issues, rising material costs and workforce shortages. These factors can result in delays in completing energy projects and prevent a linear construction path.

Although scheduling delays are important on every project, they are of increased importance on renewable energy projects due, in part, to the renewable electricity production tax credit ("PTC") and the investment tax credit ("ITC") under the Internal Revenue Code which set forth certain deadlines for taxpayer eligibility. Given the current environment and likelihood of delays on projects going forward, it is important to understand IRS Notice 2021-41, which provides taxpayers with relief and extends certain deadlines for such eligibility.

Background

Owners of renewable energy facilities and energy property ("Energy Facilities") are entitled to the PTC or the ITC if certain requirements are met. One of the requirements to qualify for the PTC and the ITC is the beginning of construction requirement, which requires the taxpayer to begin construction on an Energy Facility by a certain date. The Taxpayer Certainty and Disaster Tax Relief Act of 2020, enacted as part of the Consolidated Appropriations Act, 2021, extended the deadline to begin construction for certain Energy Facilities beyond its current deadline (e.g., extended the deadline from January 1, 2021 to January 1, 2022).

Beginning of Construction and Continuity Requirement

Several IRS notices have been published that provide guidance with respect to the beginning of construction requirement. Pursuant to these notices, there are two methods to establish the beginning of construction requirement: (a) the Physical Work Test; and (b) the Five Percent Safe Harbor. The Physical Work Test is met when physical work of a significant nature begins on an Energy Facility and the Five Percent Safe Harbor is met when the taxpayer pays or incurs 5% or more of the total cost of the facility before the deadline.

Once either of these conditions have been met, the taxpayer must establish that continuous progress towards completion of the Energy Facility is made (the "Continuity Requirement"). For the Physical Work Test, the Continuity Requirement is met if a continuous program of construction is maintained (the "Continuous Construction Test"), and for the Five Percent Safe Harbor, the Continuity Requirement is met if the taxpayer makes continuous efforts to complete the Energy Facility ("Continuous Efforts Test").

Continuity Safe Harbor

Notice 2013-60 (as extended and modified by further notices) provides a continuity safe harbor ("Safe Harbor") that allows an Energy Facility to be deemed to have satisfied the Continuity Requirement. The Safe Harbor provides that the Continuity Requirement will be met if the taxpayer places the Energy Facility in service by the later of (a) a calendar year that is no more than four calendar years after the calendar year during which construction of the Energy Facility begins (or for construction which began in 2016 or 2017, the end of the calendar year that is no more than five calendar years after the calendar year during which construction began) or (2) December 31, 2018.

Notice 2021-41

Recognizing that the ongoing COVID-19 pandemic has continued to cause delays in constructing and bringing Energy Facilities into service, Notice 2021-41 further extends the Safe Harbor. This is of particular importance with projects that may be stopped and subsequently restarted, or for projects which experience construction delays, as the Safe Harbor allows for non-linear construction without the risk of losing applicable tax credits. Notice 2021-41 provides the following:

- For construction that began on an Energy Facility in calendar year 2016, 2017, 2018, or 2019, the Safe Harbor is met if the Energy Facility is placed in service by the end of the calendar year that is no more than six calendar years after the calendar year during which construction of the Energy Facility began; and
- For construction that began on an Energy Facility in calendar year 2020, the Safe Harbor is met if the Energy Facility is placed in service by the end of the calendar year that is no more than five calendar years after the calendar year during which construction of the Energy Facility began.

Notice 2021-41 further provides that when construction begins under the Physical Work Test or the Five Percent Safe Harbor, the Continuity Requirement is met if the taxpayer meets either the Continuous Construction Test or the Continuous Efforts Test, regardless of whether construction began under the Physical Work Test or the Five Percent Safe Harbor.

Given the current construction environment, the likelihood of delays has dramatically increased. Luckily, even if your project is not completed in a linear fashion, as was the case before the pandemic, or is delayed, Safe Harbors allow for non-linear construction scheduling without the risk of losing these tax credits.

For more information about any of the topics discussed in this article, please contact a member of Gould & Ratner's [Construction Practice](#) or [Tax Planning Practice](#).