

Beginning of Construction for Sections 45 and 48; Extension of Continuity Safe Harbor for Offshore Projects and Federal Land Projects

Notice 2021-05

SECTION 1. PURPOSE

This notice clarifies and modifies the prior notices¹ published by the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) that address the beginning of construction requirement for qualified facility and energy property projects under §§ 45 and 48, respectively, of the Internal Revenue Code (Code). Specifically, section 4.01 of this notice provides that a qualified facility or energy property construction project that is an Offshore Project or a Federal Land Project (each as defined in section 4.02 of this notice) satisfies the Continuity Safe Harbor (as defined in section 2.04(3) of this notice) if a taxpayer places the qualified facility or energy property that is the subject of the project into service within 10 calendar years after the calendar year during which construction of the project began.

SECTION 2. BACKGROUND

.01 Renewable Electricity Production and Investment Tax Credits. Section 38 of the Code allows certain business credits against the tax imposed by chapter 1 of subtitle

¹ Notice 2013-29, 2013-20 I.R.B. 1085; Notice 2013-60, 2013-44 I.R.B. 431; Notice 2014-46, 2014-36 I.R.B. 520; Notice 2015-25, 2015-13 I.R.B. 814; Notice 2016-31, 2016-23 I.R.B. 1025; Notice 2017-04, 2017-4 I.R.B. 541; Notice 2018-59, 2018-28 I.R.B. 196; Notice 2019-43, 2019-31 I.R.B. 487; and Notice 2020-41, 2020-25 I.R.B. 954 (collectively, the prior notices).

A of the Code. Among the credits allowed by § 38 are (i) the renewable electricity production tax credit under § 45 of the Code (PTC), and (ii) the investment tax credit determined under § 46 of the Code (ITC). The ITC includes the energy credit under § 48. See § 46(2).

.02 Qualification and Calculation of PTC and ITC. To qualify for the PTC, electricity must, among other things, be produced by the taxpayer at a qualified facility described in § 45(d). See § 45(a)(2)(A)(ii). The PTC for any taxable year is calculated by multiplying an inflation-adjusted credit rate by kilowatt hours of electricity produced and sold by the taxpayer to an unrelated person. See § 45(a). The ITC is calculated as a percentage of the basis of energy property (as defined in § 48(a)(3)) placed in service during the taxable year. See § 48(a)(1). Additionally, under § 48(a)(5), a taxpayer may elect to claim the ITC in lieu of the PTC with respect to qualified property that is part of certain qualified facilities. Both the PTC and the ITC have beginning of construction requirements.

.03 Recent amendments to PTC and ITC statutes. The Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Act), enacted as Division EE of the Consolidated Appropriations Act, 2021, Public Law 116-260 (Dec. 27, 2020), amended §§ 45 and 48 with regard to the PTC and the ITC. Section 131(a) of the Act extended the deadlines for the beginning of construction requirements for certain qualified facilities to December 31, 2021 (in other words, before January 1, 2022). Section 131(b) of the Act extended the beginning of construction deadline applicable to the election to claim the ITC in lieu

of the PTC by one year with respect to certain qualified facilities if construction of such facilities begins before January 1, 2022. Section 132(a) of the Act extended the deadlines for the beginning of construction requirements for certain ITC energy property to December 31, 2023 (in other words, before January 1, 2024). In addition, sections 131(c) and 132(b) of the Act extended beginning of construction deadlines for the phaseout provisions applicable to the PTC and the ITC. Finally, section 204 of the Act amends § 48(a)(5) of the Code to provide special rules for “qualified offshore wind facilities.”

.04 Physical Work Test, Five Percent Safe Harbor, and Continuity Requirement for Qualified Facilities. Notice 2013-29 provides two methods to establish the beginning of construction for a qualified facility: (i) the “Physical Work Test” and (ii) the “Five Percent Safe Harbor.” Each method requires a taxpayer to make continuous progress towards completion once construction of the qualified facility project has begun (Continuity Requirement).

(1) Physical Work Test. Section 4 of Notice 2013-29 sets forth the Physical Work Test. Section 4.01 of the notice provides the following, which requires a facts-and-circumstances analysis:

Construction of a qualified facility begins when physical work of a significant nature begins. . . . Whether a taxpayer has begun construction of a facility before [the statutory deadline], will depend on the relevant facts and circumstances. The [IRS] will closely scrutinize a facility, and

may determine that construction has not begun on a facility before [the statutory deadline], if a taxpayer does not maintain a continuous program of construction as determined under section 4.06 [(Continuous Construction Test)]. (Emphasis added.)

Section 4.06(1) of Notice 2013-29 provides that a “continuous program of construction” involves continuing physical work of a significant nature. Further, section 4.06(1) provides that whether the taxpayer has maintained a continuous program of construction (and thus satisfied the Continuous Construction Test) will be determined by the relevant facts and circumstances.

(2) Five Percent Safe Harbor. Section 5 of Notice 2013-29 sets forth the Five Percent Safe Harbor. Section 5.01 of the notice provides the following general rule, which also requires a facts-and-circumstances analysis:

Construction of a facility will be considered as having begun before [the statutory deadline], if (1) a taxpayer pays or incurs (within the meaning of Treas. Reg. § 1.461-1(a)(1) and (2)) five percent or more of the total cost of the facility, except as provided in section 5.01(2), before [the statutory deadline], and (2) thereafter, the taxpayer makes continuous efforts to advance towards completion of the facility (as determined under section 5.02) [(Continuous Efforts Test)]. (Emphasis added.)

Section 5.02(1) of Notice 2013-29 provides that whether a taxpayer makes continuous efforts to advance towards completion of the facility (and thus satisfies the Continuous

Efforts Test) will be determined by the relevant facts and circumstances. Further, section 5.02(1) provides that facts and circumstances indicating continuous efforts to advance towards completion of the facility may include, but are not limited to: (i) paying or incurring additional amounts included in the total cost of the facility; (ii) entering into binding written contracts for components or future work on construction of the facility; (iii) obtaining necessary permits; and (iv) performing physical work of a significant nature (as described in section 4.02 of Notice 2013-29). See section 5.02(1)(a) through (d).

(3) Continuity Safe Harbor for determining satisfaction of the Continuity Requirement. Notice 2013-60 provides clarifications for determining whether a taxpayer satisfies the Physical Work Test or the Five Percent Safe Harbor with regard to a qualified facility. In particular, section 3.02 of Notice 2013-60 provides a “Continuity Safe Harbor” that allows a facility to be deemed to have satisfied the Continuity Requirement. Under the Continuity Safe Harbor, if a facility is placed in service before January 1, 2016, the facility will be considered to satisfy (i) the Continuous Construction Test, for purposes of satisfying the Physical Work Test, or (ii) the Continuous Efforts Test, for purposes of satisfying the Five Percent Safe Harbor. Section 3.02 of the notice also provides that, if a facility is not placed in service before January 1, 2016, whether the facility satisfies the Continuous Construction Test or Continuous Efforts Test will be determined by the relevant facts and circumstances, as described in sections 4.06 and 5.02 of Notice 2013-29, respectively.

.05 Additional notices further extending and modifying the Continuity Safe Harbor.

The Treasury Department and the IRS have published several notices to extend and otherwise modify the Continuity Safe Harbor, which include the following:

(1) Notice 2015-25, which extends the Continuity Safe Harbor for one year.

(2) Notice 2016-31, which modifies the Continuity Safe Harbor (as originally provided in section 3.02 of Notice 2013-60 and extended by Notice 2015-25) by providing that, if a taxpayer places a facility in service by the later of (i) a calendar year that is no more than four calendar years after the calendar year during which construction of the facility began, or (ii) December 31, 2016, the facility will be considered to satisfy the Continuity Safe Harbor.

(3) Notice 2017-04, which further extends and modifies the Continuity Safe Harbor by providing that, if a taxpayer places a facility in service by the later of (i) a calendar year that is no more than four calendar years after the calendar year during which construction of the facility began, or (ii) December 31, 2018, the facility will be considered to satisfy the Continuity Safe Harbor.

(4) Notice 2018-59, which provides methods to establish the beginning of construction of an energy property (that is, the Physical Work Test and Five Percent Safe Harbor), a Continuity Requirement for both methods, rules for transferring energy property, and additional rules applicable to the beginning of construction requirement for energy property projects for purposes of the ITC. Section 6.05 of Notice 2018-59 provides a Continuity Safe Harbor that mirrors the safe harbor provided for qualified

facilities in the prior notices:

Except as provided in this section, if a taxpayer places an energy property in service by the end of a calendar year that is no more than four calendar years after the calendar year during which construction of the energy property began (the Continuity Safe Harbor Deadline), the energy property will be considered to satisfy the Continuity Safe Harbor. The excusable disruption rules in section 6.03 do not apply for purposes of applying the Continuity Safe Harbor. However, if an energy property is not placed in service before the end of the fourth calendar year after the calendar year during which construction of the energy property began, whether the energy property satisfies the Continuity Requirement under either the Physical Work Test or the Five Percent Safe Harbor will be determined by the relevant facts and circumstances.

(5) Notice 2019-43, which provides that the Continuity Safe Harbor may be tolled and extended in certain limited circumstances involving significant national security concerns.

(6) Notice 2020-41, which, in response to development delays caused by the Coronavirus Disease 2019 (COVID-19) pandemic, extended the Continuity Safe Harbor from four years to five years for qualified facilities or energy property that began construction under the Physical Work Test or the Five Percent Safe Harbor in either calendar year 2016 or 2017.

.06 Relief provided to qualified offshore wind facilities by the Taxpayer Certainty and Disaster Tax Relief Act of 2020 -- (1) Qualified offshore wind facilities. Section 204 of the Act amends § 48(a)(5) of the Code to provide special rules for “qualified offshore wind facilities.” Under amended § 48(a)(5)(F)(ii), a “qualified offshore wind facility” means a qualified facility described in § 45(d)(1) (determined without regard to any date by which the construction of the facility is required to begin) that is located in the inland navigable waters of the United States or in the coastal waters of the United States.

(2) Summary of relief. Solely with regard to qualified offshore wind facilities, amended § 48(a)(5)(F)(i) provides the following relief. First, for purposes of qualifying as a qualified investment credit facility (as defined by § 48(a)(5)(C)), the beginning of construction deadline under § 48(a)(5)(C)(ii) is extended to December 31, 2025. See § 48(a)(5)(F)(i)(I). In addition, the phaseout of credit for wind facilities under § 48(a)(5)(E) does not apply. See § 48(a)(5)(F)(i)(II). Lastly, for purposes of qualifying as a qualified facility (as defined by § 45(d)(1)) for which a taxpayer can elect to claim the ITC in lieu of the PTC under § 48(a)(5), the beginning of construction deadline provided in § 45(d)(1) is extended to December 31, 2025. See § 48(a)(5)(F)(i)(III).

(3) Applicability of relief. Amended § 48(a)(5)(F) applies to periods after December 31, 2016, under rules similar to the rules of § 48(m) of the Code before the amendment of § 48 by the Revenue Reconciliation Act of 1990. This citation makes applicable certain transitional rules regarding the ability of a taxpayer to claim qualified

progress expenditures to the extent of their qualified investment. See section 204(b) of the Act.

SECTION 3. RECOGNITION OF GREATER DELAYS FOR CONSTRUCTION OF PROJECTS OFFSHORE AND ON FEDERAL LAND

.01 Overview. The Treasury Department and the IRS are aware of certain qualified facilities and energy property that are being constructed Offshore or on Federal Land (each as defined in section 4.02 of this notice). Based on comments received from Congress and project stakeholders, the Treasury Department and the IRS have determined that such projects ordinarily are subject to significantly greater delays than projects not constructed Offshore or on Federal Land, and therefore are at a significantly higher risk of failing the Continuity Safe Harbor.

.02 Description of typical project delays. The ordinary-course delays for the qualified facility and energy property projects described in section 3.01 of this notice result from various complicating factors, including (i) the applicability of significantly more stringent permitting requirements, (ii) lengthier engineering and construction timelines due to, for example, the difficulty of installing equipment Offshore, (iii) heightened environmental regulation (including, for example, the environmental analysis process carried out by the Director of the Bureau of Land Management), and (iv) the need to construct new transmission lines to connect these projects to the electrical grid system of the United States (Grid). In addition, such delays ordinarily are outside the control of the project developers and can result in project completion times of up to twice as long as those experienced by qualified facility and energy property

projects that are not constructed Offshore or on Federal Land.

.03 Additional certainty to investors provided by this notice. The Treasury Department and the IRS are providing this relief to complement previous relief provided through the list of excusable disruptions under section 4.02(2) of Notice 2016-31 and section 6.03 of Notice 2018-59, which potentially would cover the complicating factors described in section 3.02 of this notice (and therefore would disregard them, and the delays resulting therefrom, for purposes of determining whether a taxpayer satisfied the Continuous Construction Test or Continuous Efforts Test with regard to a qualified facility or energy property).

SECTION 4. EXTENSION OF THE CONTINUITY SAFE HARBOR FOR SECTIONS 45 and 48

.01 Qualification for Continuity Safe Harbor Extension. A qualified facility or an energy property construction project that is an Offshore Project or a Federal Land Project (each as defined in section 4.02 of this notice) satisfies the Continuity Safe Harbor if a taxpayer places the qualified facility or energy property that is the subject of the project into service by the end of a calendar year that is no more than 10 calendar years after the calendar year during which construction of the project began.

.02 Definitions. For purposes of qualifying for the Continuity Safe Harbor extension under section 4.01 of this notice, the following definitions apply:

(1) Federal Land. The term “Federal Land” means any land owned or controlled by the United States.

(2) Federal Land Project. The term “Federal Land Project” means a qualified

facility or an energy property construction project--

(a) more than 50 percent of which will be placed in service on Federal Land, as determined by relative value or relative area; and

(b) that will require the construction of one or more high-voltage transmission lines to connect the qualified facility or energy property to the Grid.

(3) Offshore. The term “Offshore” means any inland navigable waters of the United States or any coastal waters of the United States.

(4) Offshore Project. The term “Offshore Project” means a qualified facility or an energy property construction project that--

(a) will be placed in service Offshore; and

(b) will require the construction of one or more high-voltage transmission lines to connect the qualified facility or energy property to the Grid.

SECTION 5. NO RULE

The IRS will not issue private letter rulings or determination letters to a taxpayer regarding the application of this notice, the prior IRS notices, or the beginning of construction requirements under §§ 45 and 48.

SECTION 6. EFFECT ON OTHER DOCUMENTS

Each of Notice 2013-29, Notice 2013-60, Notice 2014-46, Notice 2015-25, Notice 2016-31, Notice 2017-04, Notice 2018-59, Notice 2019-43, and Notice 2020-41 is clarified and modified.

SECTION 7. DRAFTING INFORMATION

The principal author of this notice is Jennifer Bernardini of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Jennifer Bernardini on (202) 317-6853 (not a toll-free call).