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IRS Issues Welcome Guidance on “Continuity Safe Harbor” for Wind Energy Projects

New rules provide wind developers with additional time to satisfy a critical safe harbor.

On December 15, 2016, the Internal Revenue Service (IRS) issued Notice 2017-4, which modifies the “continuity safe harbor” as set forth in prior Notice 2016-31 for taxpayers seeking to qualify wind energy facilities for federal tax credits before the credits are phased out under current law.¹ Under the new rules, taxpayers will now have until at least December 31, 2018 to complete their project without being required to prove that construction was continuous. The full text of Notice 2017-4 is available [here](#).

This notice is likely the last piece of guidance on renewable energy tax credits from the IRS before the administration change in January. It will benefit wind projects that started construction before 2014 as well as large developers who purchased wind turbines in 2016 intending to qualify development projects for tax credits using the “5% safe harbor.”

As discussed in prior *Client Alerts*, in order for wind energy facilities to qualify for tax credits, a taxpayer generally must “begin construction” before the specified deadline and thereafter work continuously to complete the project.² Prior to Notice 2016-31, IRS guidance had provided that the continuity requirement would be automatically satisfied if the facility was placed in service within two calendar years following the tax credit deadline.³

The IRS significantly modified its prior approach in Notice 2016-31 stating that a taxpayer could satisfy the continuity requirement if the taxpayer completed a project by the later of December 31, 2016 or December 31 of the fourth calendar year following the calendar year in which it began construction. Notice 2016-31 also expressly prohibited taxpayers from relying on the “physical work test” and the 5% safe harbor to satisfy the begun construction requirement in alternating years and thereby extend the continuity safe harbor deadline. This modification created significant qualification issues for projects on which construction may have begun prior to 2013 but could not be completed by December 31, 2016.

Under the new rules, a wind energy facility will now satisfy the continuity safe harbor if it is placed in service on or before the later of December 31, 2018 and December 31 of the fourth calendar year following the calendar year in which construction began. This change gives developers essentially two years to complete projects that have already satisfied the physical work test or the 5% safe harbor, but may not have satisfied the continuity requirement under Notice 2016-31. In addition, Notice 2017-4 allows taxpayers who began construction on a project under the physical work test or the 5% safe harbor prior to June 6, 2016 (the date Notice 2016-31 was issued) to again begin construction under the other method

for purposes of establishing the continuity safe harbor deadline. This change should be especially helpful to developers that began construction under the physical work test in earlier years and then satisfy the 5% safe harbor by the end of 2016 and thereby restart the four-year continuity safe harbor clock.

Finally, Notice 2017-4 also provides further clarification on the application of the 5% safe harbor to repowering and retrofitting existing wind energy facilities, in order for the updated facilities to qualify for federal tax credits. In general, a developer must spend at least four times the value of the old turbine in order for the repowered turbine to qualify for new tax credits. In determining whether a taxpayer has satisfied the 5% safe harbor for a repowered turbine, Notice 2016-31 provides that only the cost of new property used to retrofit the existing facility is taken into account. Notice 2017-4 clarifies that the cost of new property includes all costs properly included in the depreciable basis of the new property.

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Endnotes

- ¹ For the current deadlines and phase-out percentages, see [Client Alert 1907 New Long-Term Extension of Wind and Solar Tax Credits Subject to Phase-out](#).
- ² See [Client Alert 1906 IRS Issues Additional Guidance on “Begun Construction” Requirement for Wind Energy Credits](#).
- ³ See [Client Alert 1501 IRS Issues Guidance on “Begun Construction” Requirement for Wind Energy Credits](#).