

# IRS Extends Production Tax Credit and Investment Tax Credit Safe Harbor Period

---

July 1, 2021

*In light of industrywide supply chain disruptions and construction delays caused by the COVID-19 pandemic, the U.S. Internal Revenue Service issued Notice 2021-41. The Notice relaxes certain requirements for renewable energy projects and extends the continuity safe harbor period to six years for projects that began construction in 2016, 2017, 2018, or 2019 and to five years for projects that begin construction in 2020.*

On June 29, 2021, the U.S. Internal Revenue Service (IRS) issued Notice 2021-41, providing welcome relief for certain projects intending to claim either the Section 45 production tax credit (PTC) or the Section 48 investment tax credit (ITC) by extending the “safe harbor” period during which construction of a project can be completed without running afoul of the “continuity” prong of the beginning-of-construction test.

*Background.* Under current law, taxpayers are eligible to claim PTCs or ITCs on eligible projects that begin construction by a specific date. The PTC is available for the 10-year period beginning on the date the project is “placed in service” and is equal to a specified dollar amount (currently as high as \$25) per megawatt-hour generated by the project and sold to an unrelated person. The ITC is claimed as a percentage of the project’s eligible cost, up to 30%.

As the result of a legislative phasedown of the PTC and ITC, the actual percentage of the PTC and ITC that can be claimed with respect to a particular project will depend on the year construction of the project begins. Pursuant to guidance set forth by the IRS in various notices, a taxpayer will be treated as having begun construction of a project by a particular date if it can establish that (i) before the relevant date, it either (A) began physical work of a significant nature (the Physical Work Test) or (B) incurred at least 5% of the total cost of the project (the 5% Safe Harbor) and (ii) in either case, it made continuous progress toward completion of the project once construction began (the Continuity Requirement).

The Continuity Requirement is satisfied if the taxpayer either maintains a continuous program of construction (in the case of the Physical Work Test) or makes continuous efforts to advance the project toward completion (in the case of the 5% Safe Harbor). Whether the Continuity Requirement is satisfied with respect to a specific project is generally determined based on an analysis of the relevant facts and circumstances. Recognizing the potential uncertainty associated with such a determination, however, the IRS previously provided a safe harbor (the Continuity Safe Harbor) pursuant to which a project will be deemed to have satisfied the Continuity Requirement if the project is “placed in service” no later than the fourth calendar year after construction of the project began.

In May of last year, in response to delays caused by the COVID-19 pandemic, the IRS issued Notice 2020-41, which extended the Continuity Safe Harbor period to five years for projects that began construction in 2016 or 2017.

*Notice 2021-41.* Recognizing the ongoing impact of the COVID-19 pandemic on the renewable industry, Notice 2021-41 further extends the Continuity Safe Harbor. Specifically, the Notice provides that (i) projects on which construction began in 2016, 2017, 2018, or 2019 will now have a six-year Continuity Safe Harbor period and (ii) projects on which construction began in 2020 will now have a five-year Continuity Safe Harbor period.

A summary of the updated PTC and ITC rates and timeline for eligible projects is as follows:

Year Construction Begins	PTC		ITC* (percentage of eligible cost)	
	<i>PTC Rate</i> (percentage of the full PTC rate)	<i>Continuity Safe Harbor -</i> “placed in service” deadline	<i>ITC Rate</i>	<i>Continuity Safe Harbor -</i> “placed in service” deadline
2016	100% PTC	12/31/2022	30%	12/31/2022
2017	80% PTC	12/31/2023	30%	12/31/2023
2018	60% PTC	12/31/2024	30%	12/31/2024
2019	40% PTC	12/31/2025	30%	12/31/2025
2020	60% PTC	12/31/2025	26%	12/31/2025
2021	60% PTC	12/31/2025	26%	12/31/2025
2022	0% PTC		26%	12/31/2025**
2023	0% PTC		22%	12/31/2025**
2024 and onward	0% PTC		10%* *	

\* The ITC rates in this table do not apply to wind projects that elected to claim the ITC in lieu of PTC; such projects are subject to an ITC phasedown schedule similar to the phasedown rate of the PTC.

\*\* The 10% ITC would also apply to projects that (i) commenced construction in prior years but did not meet the placed-in-service deadline or (ii) pursuant to Section 48, commenced construction in prior years but are not “placed in service” by the end of 2025.

In addition to extending the Continuity Safe Harbor period, Notice 2021-41 further relaxes the Continuity Requirement by allowing a taxpayer that fails to qualify for the Continuity Safe Harbor to nevertheless qualify for the PTC or ITC at the percentage applicable in the year construction began if it can establish, based on the facts and circumstances, that it satisfied either the “continuous program of construction” test (that was previously applicable only to the Physical Work Test) or the “continuous efforts” test (that was previously applicable only to the 5% Safe Harbor), regardless of the method used to establish that construction began.

The ability to use the relatively less strict “continuous efforts” test also for projects relying on the Physical Work Test may provide additional relief to taxpayers that do not meet the Continuity Safe Harbor deadline as extended.

Overall, Notice 2021-41 is a welcome and positive development for the renewable energy industry, providing relief and certainty for projects that faced ongoing supply chain disruptions and shipping and construction delays in the last year. Extending the periods during which projects potentially affected by those disruptions and delays can be developed and constructed should contribute to the ongoing growth of the industry in years to come. It remains to be seen whether any of the various outstanding proposals to further extend and delay the current phasedown of the PTC and ITC will be enacted. Such potential extensions would provide an additional boon to the industry and further the Biden administration's goal to reach a net-zero emission economy by 2050.

## CONTACTS

**John T. Schaff**, Partner

+1 312 853 7522, [jschaff@sidley.com](mailto:jschaff@sidley.com)

**Hagai Zaifman**, Partner

+1 212 839 5754, [hagai.zaifman@sidley.com](mailto:hagai.zaifman@sidley.com)

---

Sidley Austin LLP provides this information as a service to clients and other friends for educational purposes only. It should not be construed or relied on as legal advice or to create a lawyer-client relationship. Readers should not act upon this information without seeking advice from professional advisers.

Attorney Advertising—Sidley Austin LLP, One South Dearborn, Chicago, IL 60603. +1 312 853 7000. Sidley and Austin refer to Sidley Austin LLP and affiliated partnerships, as explained at [www.sidley.com/disclaimer](http://www.sidley.com/disclaimer).

© Sidley Austin LLP