

# Client Alert

Current Issues Relevant to Our Clients

September 25, 2013

## IRS Clarifies PTC / ITC Eligibility Requirements

*Pursuant to the American Taxpayer Relief Act of 2012, qualified facilities that begin construction before January 1, 2014 will be eligible to receive the renewable electricity production tax credit (PTC) under section 45 of the Internal Revenue Code (Code) or, in lieu thereof, the energy investment tax credit (ITC) under section 48 of the Code. In April 2013, the IRS issued preliminary guidance (April Guidance) setting forth two alternative paths for establishing when construction of a qualifying facility “begins”: (1) the commencement of physical work of a significant nature (Physical Work Test); and (2) the satisfaction of the safe harbor (Safe Harbor). On September 20, 2013, the IRS updated its April Guidance (September Guidance) to clarify three aspects of the PTC / ITC eligibility requirements.*

### Continuous Construction/ Continuous Efforts Test

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Under the April Guidance, the IRS stated that, in order to satisfy the Physical Work Test, a taxpayer would need to maintain a “continuous program” of construction with respect to its facility. The IRS also stated that, in order to satisfy the Safe Harbor, the taxpayer would need to maintain “continuous efforts” to advance the completion of the facility. In each case, the IRS indicated that it would make its determination based on the relevant facts and circumstances. Effectively, this meant that the IRS’ determination would not be made until after the facility had been completed and well after the taxpayer had committed substantial resources.

To help bring certainty to taxpayers that their facilities will qualify for the PTC / ITC before they dedicate such resources, the IRS has now clarified that the “continuous program” and “continuous efforts” requirements will be deemed satisfied if the facility is placed in service before January 1, 2016. For facilities placed in service after January 1, 2016, the IRS will continue to make its determination based on the relevant facts and circumstances. Consequently, so long as a facility satisfies either the Physical Work Test or the Safe Harbor before January 1, 2014; AND is placed in service before January 1, 2016, the facility will qualify for the PTC / ITC.

### Master Contracts

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Under the April Guidance, the IRS stated it would take into account, for purposes of determining whether the Physical Work Test was satisfied, components that were (1) manufactured, constructed or produced for a taxpayer by another person under a binding written contract (Master Contract); and (2) then assigned (through another binding written contract) to an affiliated special purpose vehicle that will own the facility in which such components will be used. The April Guidance did not indicate whether the same rule would apply under the Safe Harbor.

In the September Guidance, the IRS clarified that the Master Contract provision in the Physical Work Test also applies to the Safe Harbor.

### Transfer of Facility

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The April Guidance did not address whether a facility would qualify for the PTC / ITC if it was transferred to another owner after construction had begun. As part of the September Guidance, the IRS clarified that, if a facility satisfies either the Physical Work Test or the Safe Harbor, the taxpayer that owns the facility during the 10-year period following the date the facility is placed in service may claim the PTC even if such taxpayer did not own the facility at the time construction began. Alternatively, the taxpayer that owns the facility on the date it is placed in service may claim the ITC even if such taxpayer did not own the facility at the time construction began (limited to such taxpayer’s basis in qualified property).

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## For More Information

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*To discuss any issue covered in this client alert, please contact any of the following, or visit us online at [Chapman.com](http://Chapman.com):*

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