NEW TREASURY GUIDANCE SIGNIFICANTLY EXPANDS FIELD OF RENEWABLE ENERGY PROJECTS THAT MAY QUALIFY FOR THE PTC OR ITC

Date: 26 May 2016

Energy Alert

By: Charles H. Purcell, Won-Han Cheng, William H. Holmes

On May 5, the U.S. Treasury Department released Notice 2016-31 to address certain changes made to the Production Tax Credit ("PTC") and Investment Tax Credit ("**ITC**") in the Protecting Americans from Tax Hikes ("**PATH**") Act of 2015, Pub. L. No. 114-113, Div. Q. The Notice generally extends the application of the "beginning of construction" and "continuous construction" requirements set forth in Notices 2013-29, 2013-60, 2014-46, and 2015-25, and also favorably modifies several key factors of both requirements. In addition, on May 18, the U.S. Treasury Department released a revised version of Notice 2016-31, which states that the provisions of Notice 2016-31 apply to any project for which a taxpayer claims the PTC or, via Code Section 48(a)(5), the ITC, that is placed in service after **January 2, 2013**.

NOTICE 2016-31 CONCERNS A VARIETY OF PROJECTS

Notice 2016-31 concerns only projects that qualify for the PTC and, by extension, those projects that qualify for the ITC under the election provided in Code[1] Section 48(a)(5) (under which the owner of a PTC-eligible project can elect to claim the ITC in lieu of the PTC). After the PATH Act, this includes the following types of projects: wind, open- and closed-loop biomass, geothermal, municipal solid waste, qualified hydropower, and marine and hydrokinetic. To qualify for the PTC or the ITC under post-PATH Act law, construction of a wind project must begin no later than December 31, 2019 and construction of any of other qualifying project must begin no later than December 31, 2016. Importantly, Notice 2016-31 does **not** apply to solar projects as Treasury intends to issue further guidance regarding solar projects that may qualify for the ITC.

IMPROVEMENTS MADE BY NOTICE 2016-31

There are many reasons why Notice 2016-31 is a boon for both renewable energy project developers and investors:

- A new four-year safe harbor period applies for purposes of the "continuous construction" requirement first discussed in Notice 2013-29. This revision to the so-called "Continuity Safe Harbor" is a welcome departure from the previous two-year period and will enable many new projects with typically longer development times, for example, large wind installations, to qualify for the PTC or ITC.
- It is now clear that the PTC (and, via Code Section 48(a)(5), the ITC) is available with respect to refurbishments of certain renewable energy facilities to the extent that the "used" property does not

©2005-2026 K&L Gates LLP. All Rights Reserved.

exceed 20% of the adjusted basis of the refurbished property. This clarification may afford significant new opportunities for refurbishing or expanding existing facilities and may, in some cases, permit the ITC to be claimed with respect to energy storage property installed at an existing, proven facility. The potential for tax credits may help to accelerate the expansion of the already exciting energy storage market.

- Useful - and pragmatic - additions and modifications to the types of "excusable disruptions" that will not prevent a project from being treated as under continuous construction provide increased comfort to both developers and investors. The newly added or modified types of delays include:
  - financing delays, now without regard to the length of the delay;
  - delays requested in writing by federal, state, or - now - Indian tribal governments, for "public safety, security, or similar concerns";
  - licensing or permits (now specifically including those issued by the Federal Energy Regulatory Commission (FERC), the Environmental Protection Agency (EPA), the Bureau of Land Management (BLM), and the Federal Aviation Agency (FAA));
  - a variety of interconnection-related delays; and
  - delays in the manufacture of custom components.
- An express "disaggregation" principle that permits individual facilities that have been treated as one project for purposes of testing whether construction began on time to be considered independently of one another for purposes of determining whether the four-year Continuity Safe Harbor is met. This new principle is available in the context of both the "physical work" safe harbor and the "five percent" safe harbor.
- New examples of how the "physical work" safe harbor may be met. Prior guidance included an example regarding wind installations. Notice 2016-31 adds examples specifically for hydropower, "biomass and trash" (presumably, both open- and closed-loop biomass and municipal solid waste), and geothermal projects.

While Notice 2016-31 also modifies and adds to the list of "preliminary" activities that do not qualify as physical work for purposes of the safe harbor, the modifications are not surprising. These include: geologic mapping and modeling; specifically listing geophysical, gravity, magnetic, seismic and resistivity surveys; and performing activities to develop a geothermal deposit prior to valid discovery.

RETROACTIVE APPLICATION

Section 7 of the May 18 revised version of Notice 2016-31 expressly states that Notice 2016-31 applies to any PTC or, via Code Section 48(a)(5), ITC project that is placed in service after January 2, 2013. The retroactive application of the favorable provisions of the notice should provide significant comfort to developers of and investors in projects that are in progress or have already been placed in service. In addition, it could be deployed to resuscitate moribund projects that have been stalled by financing or infrastructure delays and those stymied by other delays that would extend beyond two years after the beginning of construction.

©2005-2026 K&L Gates LLP. All Rights Reserved.

We invite you to contact any of the authors of this alert for more information about how Notice 2016-31 may impact your planned development of investment activities in the renewable energy space.

Notes:

[1] All references to the "Code" are to the Internal Revenue Code of 1986, as amended.

KEY CONTACTS



CHARLES H. PURCELL
PARTNER

SEATTLE
+1.206.370.8369
CHARLES.PURCELL@KLGATES.COM



WON-HAN CHENG
PARTNER

SEATTLE
+1.206.370.8331
WON-HAN.CHENG@KLGATES.COM



WILLIAM H. HOLMES
OF COUNSEL

PORTLAND
+1.503.226.5767
BILL.HOLMES@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.