

IRS Releases Initial Section 45Q Carbon Sequestration Credit Guidance

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Treasury and the IRS released initial guidance on the amended Section 45Q carbon oxide sequestration credit on February 19, 2020. Notice 2020-12 and Revenue Procedure 2020-12 provide guidance relating to the beginning of construction and tax equity partnership allocations.

This is the first Section 45Q guidance since Treasury issued a request for comments in Notice 2019-32 last year. That Notice sought input on a number of issues raised by amendments to Section 45Q that expanded the scope and enhanced the amount of the Section 45Q credit pursuant to the Bipartisan Budget Act of 2018, P.L. 115-123. The new guidance in Notice 2020-12 and Revenue Procedure 2020-12 is effective March 9, 2020.

Notice 2020-12 closely follows the beginning of construction guidance for the Investment Tax Credit (ITC) in Notice 2018-59 and the Production Tax Credit (PTC) in Notice 2013-29 (as clarified and modified by subsequent notices). Like the ITC and PTC guidance, taxpayers can demonstrate construction has begun for purposes of Section 45Q by beginning significant physical work or incurring at least five percent of the total project cost. The guidance provides a six-year continuity safe-harbor period, which is an increase from the four-year safe harbor for the ITC and PTC. Perhaps in acknowledgment of the technical challenges of implementing carbon capture technology, certain front-end engineering and design costs are eligible for the five-percent safe harbor.

Revenue Procedure 2020-12 creates a safe harbor for partnership allocations of the Section 45Q credit, similar to the safe harbor in Rev. Proc. 2007-65 applicable to PTC-eligible wind facilities. The new guidance applies a 50 percent contingent consideration requirement, rather than the 75 percent requirement under the previous guidance. The safe harbor guidelines are otherwise very similar to the existing PTC guidance in Rev. Proc. 2007-65 as to minimum unconditional investment, purchase and sale rights, and limitations on guarantees and loans.

A number of issues specific to the carbon sequestration credit were not addressed in Notice 2020-12 and Revenue Procedure 2020-12. In particular, the new guidance does not define “secure geological

storage” and does not delineate what uses of sequestered carbon are eligible for the credit. IRS and Treasury are expected to issue additional guidance on these questions in the near future.

We will be issuing a more detailed analysis of the new guidance in the coming days.

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