

INTERNAL REVENUE BULLETIN



HIGHLIGHTS OF THIS ISSUE

Bulletin No. 2016-23
June 6, 2016

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

Rev. Rul. 2016-13, page 1022.

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. For purposes of sections 382, 642, 1274, 1288, and other sections of the Code, tables set forth the rates for June 2016.

Notice 2016-31, page 1025.

Beginning of Construction for Sections 45 and 48. Notice 2016-31 updates prior IRS guidance to reflect the PATH Act extension and modification of the date by which facilities must begin construction. Notice 2016-31 also extends the date by which taxpayers must place a facility in service to satisfy the Continuity Safe Harbor.

EMPLOYEE PLANS

T.D. 9769, page 1020.

These final regulations provide guidance on distributions from designated Roth accounts. The guidance removes a rule that had required a direct rollover to an eligible retirement account and a payment to the employee to each receive a proportionate share of the pretax and after-tax amounts in the account.

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned

against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.

This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.

This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.

To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.

This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

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Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

§1.402A-1 Designated Roth Accounts

T.D. 9769

**DEPARTMENT OF THE
TREASURY
Internal Revenue Service
26 CFR Part 1**

Removal of Allocation Rule for Disbursements from Designated Roth Accounts to Multiple Destinations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations eliminating the requirement that each disbursement from a designated Roth account that is directly rolled over to an eligible retirement plan be treated as a separate distribution from any amount paid directly to the employee and therefore separately subject to the rule in section 72(e)(2) of the Internal Revenue Code (the Code) allocating pretax and after-tax amounts to each distribution. As a result of this change, if disbursements are made from a taxpayer's designated Roth account to the taxpayer and also to the taxpayer's Roth IRA or designated Roth account in a direct rollover, then pretax amounts will be allocated first to the direct rollover, rather than being allocated pro rata to each destination. Also, a taxpayer will be able to direct the allocation of pretax and after-tax amounts that are included in disbursements from a designated Roth account that are directly rolled over to multiple destinations, applying the same allocation rules to distributions from designated Roth accounts that apply to distributions from other types of accounts. These regulations affect participants in, beneficiaries of, employers maintaining, and administrators of designated Roth accounts under tax-favored retirement plans.

DATES: *Effective Date:* These regulations are effective on May 18, 2016.

Applicability Date: These regulations generally apply to distributions on or after January 1, 2016 (or an earlier date chosen by the taxpayer that is on or after September 18, 2014). For more information see the "Effective/Applicability Dates" section of this preamble.

FOR FURTHER INFORMATION CONTACT: Michael Brewer at (202) 317-6700 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 402(a) provides generally that any amount distributed from a trust described in section 401(a) that is exempt from tax under section 501(a) is taxable to the distributee under section 72 in the taxable year of the distributee in which distributed. Under section 403(b)(1), any amount distributed from a section 403(b) plan is also taxable to the distributee under section 72.

If a participant's account balance in a plan qualified under section 401(a) or in a section 403(b) plan includes both after-tax and pretax amounts, then, under section 72(e)(8), each distribution (other than a distribution that is paid as part of an annuity) from the plan will include a pro rata share of both after-tax and pretax amounts. (Under section 72(d), a different allocation method applies to annuity distributions.)

Section 402(c) prescribes rules for amounts that are rolled over from qualified trusts to eligible retirement plans, including individual retirement accounts or annuities ("IRAs"). Subject to certain exceptions, section 402(c)(1) provides that if any portion of an eligible rollover distribution paid to an employee from a qualified trust is transferred to an eligible retirement plan, the portion of the distribution so transferred is not includible in gross income in the taxable year in which paid.

Under section 402(c)(2), the maximum portion of an eligible rollover distribution that may be rolled over in a transfer to which section 402(c)(1) applies generally cannot exceed the portion of the distribution that is otherwise includible in gross income. However, under section 402(c)(2)(A)

and (B), the general rule does not apply to such a distribution to the extent that such portion is transferred in a direct trustee-to-trustee transfer to a qualified trust or to an annuity contract described in section 403(b) and such trust or contract provides for separate accounting for amounts so transferred (and earnings thereon), including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible, or such portion is transferred to an IRA.

In addition, section 402(c)(2) provides that, in the case of a transfer described in subparagraph (A) or (B), the amount transferred shall be treated as consisting first of the portion of such distribution that is includible in gross income (determined without regard to section 402(c)(1)).

Under section 402A, an applicable retirement plan may include a designated Roth account. An applicable retirement plan is defined in section 402A(e)(1) to mean a plan qualified under section 401(a), a section 403(b) plan, and a governmental section 457(b) plan. Section 402A(d) provides that a qualified distribution (as defined in section 402A(d)(2)) from a designated Roth account is not includible in gross income.

Under section 402A(d)(4), section 72 is applied separately with respect to distributions and payments from a designated Roth account and other distributions and payments from the plan.

Section 1.402A-1, Q&A-5(a), of the Income Tax Regulations prescribes taxability rules for a distribution from a designated Roth account that is rolled over. Q&A-5(a) provides, in part, that "any amount paid in a direct rollover is treated as a separate distribution from any amount paid directly to the employee" (the "separate distribution rule").

Proposed regulations limiting the applicability of the separate distribution rule of §1.402A-1, Q&A-5(a), were published on September 19, 2014 (REG-105739-11, 79 FR 56310). The proposed regulations achieved this result by adding, after the separate distribution rule in paragraph A-5(a), the following sentence: "The preceding sen-

tence does not apply to distributions made on or after January 1, 2015; in addition, a taxpayer may elect not to apply the preceding sentence to distributions made on or after an earlier date that is no earlier than September 18, 2014.” Thus, under the proposed regulations, an amount paid in a direct rollover is not required to be treated as a separate distribution from any amount paid directly to the employee.

The proposed regulations were issued in conjunction with Notice 2014–54 (2014–41 IRB 670 (October 6, 2014)), which specified that a taxpayer may direct after-tax and pretax amounts that are simultaneously disbursed to multiple destinations so as to allocate them to specific destinations. Under Notice 2014–54, a taxpayer may direct the allocation of after-tax and pretax amounts in connection with disbursements that are directly rolled over, as well as in connection with disbursements that are rolled over in 60-day rollovers.

No comments were received regarding the proposed regulations.

Explanation of Provisions

These regulations finalize the proposed regulations, with a 1-year delay of the applicability date (from January 1, 2015, to January 1, 2016). They are substantively the same as the proposed regulations, but express the rule differently to better reflect the ongoing rule and the transition rule. For distributions made on or after January 1, 2016, the final regulations remove the sentence in the existing regulations that provided the separate distribution rule. For earlier distributions, the final regulations add a sentence at the end of the paragraph which provides that a separate distribution rule applies to distributions made prior to January 1, 2016, unless a taxpayer elects not to apply that rule with respect to a distribution made on or after September 18, 2014.

Effective/Applicability Dates

These regulations apply to distributions from designated Roth accounts made on or after January 1, 2016, and for such distributions taxpayers are required to fol-

low the allocation rules described in Notice 2014–54.

These regulations also preserve the separate distribution rule for distributions made prior to the January 1, 2016, applicability date, except that a taxpayer is permitted to choose not to apply the separate distribution rule to distributions that are made on or after September 18, 2014, and before January 1, 2016. Taxpayers choosing not to apply the separate distribution rule to distributions made during that transition period, must apply a reasonable interpretation of the last sentence of section 402(c)(2) (generally requiring that pretax amounts be treated as rolled over first) to allocate pretax and after-tax amounts among disbursements made to multiple destinations. For this purpose, a reasonable interpretation of the last sentence of section 402(c)(2) includes the rules described in Notice 2014–54.

Statement of Availability of IRS Documents

Notice 2014–54 is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by visiting the IRS website at <http://www.irs.gov>.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Michael Brewer, Office of the IRS Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Department of Treasury participated in the development of the regulations.

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.402A–1 is amended by removing the third sentence of paragraph A–5(a) and adding a new sentence to the end of paragraph A–5(a) to read as follows:

§1.402A–1 Designated Roth Accounts.

* * * * *

A–5. (a) * * * For distributions made prior to January 1, 2016, any amount paid in a direct rollover is treated as a separate distribution from any amount paid directly to the employee, except that taxpayers may choose not to apply this sentence to distributions made on or after September 18, 2014, and before January 1, 2016.

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John M. Dalrymple
*Deputy Commissioner for
Services and Enforcement.*

Approved: March 24, 2016.

Mark J. Mazur
*Assistant Secretary of
the Treasury (Tax Policy).*

(Filed by the Office of the Federal Register on May 17, 2016, 8:45 a.m., and published in the issue of the Federal Register for May 18, 2016, 81 F.R. 31165)

Section 1274.— Determination of Issue Price in the Case of Certain Debt Instruments Issued for Property

(Also Sections 42, 280G, 382, 412, 467, 468, 482, 483, 642, 807, 846, 1288, 7520, 7872.)

Rev. Rul. 2016–13

This revenue ruling provides various prescribed rates for federal income tax

purposes for June 2016 (the current month). Table 1 contains the short-term, mid-term, and long-term applicable federal rates (AFR) for the current month for purposes of section 1274(d) of the Internal Revenue Code. Table 2 contains the short-term, mid-term, and long-term adjusted applicable federal rates (adjusted AFR) for the current month for purposes of section 1288(b). Table 3 sets forth the adjusted federal long-term rate and the long-term tax-exempt rate described in section 382(f). Table 4 contains the appropriate

percentages for determining the low-income housing credit described in section 42(b)(1) for buildings placed in service during the current month. However, under section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after July 30, 2008, shall not be less than 9%. Finally, Table 5 contains the federal rate for determining the present value of an annuity, an interest for life or for a term of years, or a remainder or a reversionary interest for purposes of section 7520.

REV. RUL. 2016–13 TABLE 1				
Applicable Federal Rates (AFR) for June 2016				
	<i>Period for Compounding</i>			
	<i>Annual</i>	<i>Semiannual</i>	<i>Quarterly</i>	<i>Monthly</i>
		<i>Short-term</i>		
AFR	.64%	.64%	.64%	.64%
110% AFR	.70%	.70%	.70%	.70%
120% AFR	.77%	.77%	.77%	.77%
130% AFR	.83%	.83%	.83%	.83%
		<i>Mid-term</i>		
AFR	1.41%	1.41%	1.41%	1.41%
110% AFR	1.56%	1.55%	1.55%	1.55%
120% AFR	1.70%	1.69%	1.69%	1.68%
130% AFR	1.84%	1.83%	1.83%	1.82%
150% AFR	2.13%	2.12%	2.11%	2.11%
175% AFR	2.49%	2.47%	2.46%	2.46%
		<i>Long-term</i>		
AFR	2.24%	2.23%	2.22%	2.22%
110% AFR	2.47%	2.45%	2.44%	2.44%
120% AFR	2.70%	2.68%	2.67%	2.67%
130% AFR	2.92%	2.90%	2.89%	2.88%

REV. RUL. 2016–13 TABLE 2				
Adjusted AFR for June 2016				
	<i>Period for Compounding</i>			
	<i>Annual</i>	<i>Semiannual</i>	<i>Quarterly</i>	<i>Monthly</i>
Short-term adjusted AFR	.64%	.64%	.64%	.64%
Mid-term adjusted AFR	1.16%	1.16%	1.16%	1.16%
Long-term adjusted AFR	2.15%	2.14%	2.13%	2.13%

REV. RUL. 2016-13 TABLE 3

Rates Under Section 382 for June 2016

Adjusted federal long-term rate for the current month	2.15%
Long-term tax-exempt rate for ownership changes during the current month (the highest of the adjusted federal long-term rates for the current month and the prior two months.)	2.25%

REV. RUL. 2016-13 TABLE 4

Appropriate Percentages Under Section 42(b)(1) for June 2016

Note: Under section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after July 30, 2008, shall not be less than 9%

Appropriate percentage for the 70% present value low-income housing credit	7.42%
Appropriate percentage for the 30% present value low-income housing credit	3.18%

REV. RUL. 2016-13 TABLE 5

Rate Under Section 7520 for June 2016

Applicable federal rate for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest	1.8%
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Section 42.—Low-Income Housing Credit

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of May 2016. See Rev. Rul. 2016-13, page 1022.

Section 412.—Minimum Funding Standards

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of May 2016. See Rev. Rul. 2016-13, page 1022.

Section 482.—Allocation of Income and Deductions Among Taxpayers

Federal short-term, mid-term, and long-term rates are set forth for the month of May 2016. See Rev. Rul. 2016-13, page 1022.

Section 280G.—Golden Parachute Payments

Federal short-term, mid-term, and long-term rates are set forth for the month of May 2016. See Rev. Rul. 2016-13, page 1022.

Section 467.—Certain Payments for the Use of Property or Services

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of May 2016. See Rev. Rul. 2016-13, page 1022.

Section 483.—Interest on Certain Deferred Payments

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of May 2016. See Rev. Rul. 2016-13, page 1022.

Section 382.—Limitation on Net Operating Loss Carryforwards and Certain Built-In Losses Following Ownership Change

The adjusted applicable federal long-term rate is set forth for the month of May 2016. See Rev. Rul. 2016-13, page 1022.

Section 468.—Special Rules for Mining and Solid Waste Reclamation and Closing Costs

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of May 2016. See Rev. Rul. 2016-13, page 1022.

Section 642.—Special Rules for Credits and Deductions

Federal short-term, mid-term, and long-term rates are set forth for the month of May 2016. See Rev. Rul. 2016-13, page 1022.

Section 807.—Rules for Certain Reserves

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of May 2016. See Rev. Rul. 2016–13, page 1022.

Section 846.—Discounted Unpaid Losses Defined

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of May 2016. See Rev. Rul. 2016–13, page 1022.

Section 1288.—Treatment of Original Issue Discount on Tax-Exempt Obligations

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of May 2016. See Rev. Rul. 2016–13, page 1022.

Section 7520.—Valuation Tables

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of May 2016. See Rev. Rul. 2016–13, page 1022.

Section 7872.—Treatment of Loans With Below-Market Interest Rates

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of May 2016. See Rev. Rul. 2016–13, page 1022.

Part III. Administrative, Procedural, and Miscellaneous

Beginning of Construction for Sections 45 and 48

Notice 2016–31

SECTION 1. PURPOSE

Section 38 of the Internal Revenue Code (the Code) allows certain business credits against the tax imposed by Chapter 1 of the Code. Among the credits allowed by § 38 is the credit for renewable electricity production described in § 45(a). To qualify for the renewable electricity production tax credit, electricity must, among other things, be produced by the taxpayer at a qualified facility. Section 45(a)(2)(A). Section 45(d) defines qualified facilities for purposes of § 45.

Prior to the American Taxpayer Relief Act of 2012, Pub. L. No. 112–240, 126 Stat. 2313 (ATRA), § 45(d) required a facility to be placed in service before January 1, 2014, in order to be a qualified facility, except for qualified wind facilities which had to be placed in service before January 1, 2013. ATRA modified the definition of certain qualified facilities under § 45(d) by replacing the placed in service requirement with a beginning of construction requirement. ATRA provided that a taxpayer is eligible to receive the renewable electricity production tax credit (PTC) under § 45, or the energy investment tax credit (ITC) under § 48 in lieu of the PTC, with respect to certain renewable energy facilities if construction of such facility began before January 1, 2014. On December 19, 2014, the Tax Increase Prevention Act of 2014, Pub. L. No. 113–295, 128 Stat. 4021 (TIPA), extended by one year, to January 1, 2015, the date by which construction of a qualified facility must begin.

On December 18, 2015, the Protecting American from Tax Hikes Act of 2015, Pub. L. No. 114–113, Div. Q, 129 Stat. 2242 (the PATH Act), enacted amendments to the PTC and the ITC for certain renewable energy facilities. The PATH Act extended the PTC for two years with respect to certain facilities the construction of which begins before January 1,

2017, and further extended the PTC for wind facilities the construction of which begins before January 1, 2020. The PATH Act also modified the PTC for wind facilities by providing that the credit will phase out over the next four years.¹ The PATH Act also extended the ITC for solar energy facilities the construction of which begins before January 1, 2022. The Treasury Department and the Internal Revenue Service (Service) anticipate issuing separate guidance addressing the extension of the ITC for solar energy facilities.

The Service will not issue private letter rulings to taxpayers regarding the application of this notice or the application of the beginning of construction requirement under §§ 45(d) and 48(a)(5) as provided in Notice 2013–29, 2013–1 C.B. 1085; Notice 2013–60, 2013–2 C.B. 431; Notice 2014–46, 2014–2 C.B. 520; and Notice 2015–25, 2015–13 I.R.B. 814 (collectively “the prior IRS notices”).

SECTION 2. BACKGROUND

On May 13, 2013, the Treasury Department and the Service published Notice 2013–29, which provides two methods that a taxpayer may use to establish that construction of a qualified facility has begun. A taxpayer may establish the beginning of construction by beginning physical work of a significant nature as described in section 4 of Notice 2013–29 (Physical Work Test). Alternatively, a taxpayer may establish the beginning of construction by meeting the safe harbor provided in section 5 of Notice 2013–29 (Five Percent Safe Harbor). Both methods require that a taxpayer make continuous progress towards completion once construction has begun, as set forth in section 4.06 of Notice 2013–29 (Continuous Construction Test) for taxpayers using the Physical Work Test and section 5.02 of Notice 2013–29 (Continuous Efforts Test) for taxpayers using the Five Percent Safe Harbor (collectively, the Continuity Requirement).

On October 28, 2013, the Treasury Department and the Service published Notice 2013–60, which provides a safe harbor

for satisfying the Continuity Requirement (the Continuity Safe Harbor). Under the Continuity Safe Harbor in section 3.02 of Notice 2013–60, if a facility was placed in service before January 1, 2016, the facility will be considered to satisfy the Continuity Requirement. Failure to satisfy the Continuity Safe Harbor does not mean that a facility has not satisfied the Continuity Requirement, however. If a facility was not placed in service before January 1, 2016, whether the facility satisfies the Continuity Requirement will be determined by the relevant facts and circumstances, as described in sections 4.06 and 5.02 of Notice 2013–29.

After the publication of Notice 2013–60, the Treasury Department and the Service received requests for further clarification regarding how to satisfy the Physical Work Test, as well as questions regarding the effect of various types of transfers with respect to a facility after construction has begun. On September 2, 2014, the Treasury Department and the Service published Notice 2014–46 to clarify the application of the Physical Work Test and the effect that certain transfers with respect to a facility after construction has begun will have on a taxpayer’s ability to qualify for the PTC or the ITC.

In response to a significant number of questions received after the extension of the PTC and the ITC by TIPA, on March 30, 2015, the Treasury Department and the Service published Notice 2015–25 to extend by one year the Continuity Safe Harbor provided in Notice 2013–60. Under the extended Continuity Safe Harbor in Notice 2015–25, if a taxpayer began construction on a facility prior to January 1, 2015, and places the facility in service before January 1, 2017, the facility will be considered to satisfy the Continuity Requirement, regardless of the amount of physical work performed or the amount of costs paid or incurred with respect to the facility after December 31, 2014, and before January 1, 2017.

Similarly, in response to a significant number of questions received after the

¹As a result, facilities the construction of which begins before January 1, 2017, are eligible to receive 100% of the PTC; facilities the construction of which begins after December 31, 2016, and before January 1, 2018, are eligible to receive 80% of the PTC; facilities the construction of which begins after December 31, 2017, and before January 1, 2019, are eligible to receive 60% of the PTC; and facilities the construction of which begins after December 31, 2018, and before January 1, 2020, are eligible to receive 40% of the PTC.

extension of the PTC and the ITC by the PATH Act, this notice further extends and modifies the Continuity Safe Harbor and provides additional guidance regarding the application of the Continuity Safe Harbor and the Physical Work Test. This notice also clarifies the application of the Five Percent Safe Harbor to retrofitted renewable energy facilities. Except as otherwise specified in this notice, the guidance provided in the prior IRS notices continues to apply.

SECTION 3. EXTENSION AND MODIFICATION OF THE CONTINUITY SAFE HARBOR

On December 18, 2015, the PATH Act extended the PTC for two years with respect to certain facilities the construction of which begins before January 1, 2017, and further extended the PTC for wind facilities the construction of which begins before January 1, 2020, with the PTC phasing out over the next four years. This notice modifies the Continuity Safe Harbor originally provided in section 3.02 of Notice 2013–60 and extended by section 3 of Notice 2015–25. Accordingly, if a taxpayer places a facility in service by the later of (1) a calendar year that is no more than four calendar years after the calendar year during which construction of the facility began or (2) December 31, 2016, the facility will be considered to satisfy the Continuity Safe Harbor. For example, if construction begins on a facility on January 15, 2016, and the facility is placed in service by December 31, 2020, the facility will be considered to satisfy the Continuity Safe Harbor.

SECTION 4. ADDITIONAL ISSUES REGARDING THE CONTINUITY REQUIREMENT

.01 *Combination of methods.* A taxpayer may not rely upon the Physical Work Test and the Five Percent Safe Harbor in alternating calendar years to satisfy the beginning of construction requirement or the Continuity Requirement. For example, if a taxpayer performs physical work of a significant nature on a facility in 2015, and then pays or incurs five percent or more of the total cost of the facility in 2016, the Continuity Safe Harbor will be applied beginning in 2015, not in 2016.

.02 *Disruptions to Continuous Construction or Continuous Efforts Tests.*

(1) *In general.* Section 4.06(1) of Notice 2013–29 provides that whether a taxpayer satisfies the Continuity Requirement will be determined by the relevant facts and circumstances.

(2) *Excusable disruptions.* Sections 4.06(2) and 5.02(2) of Notice 2013–29 provide a non-exclusive list of construction disruptions that will not be considered as indicating that a taxpayer has failed to maintain a continuous program of construction or continuous efforts to advance towards completion of the facility. This notice revises that list, which remains non-exclusive, and provides additional excusable disruptions:

- (a) severe weather conditions;
- (b) natural disasters;
- (c) delays in obtaining permits or licenses from federal, state, local, or Indian tribal governments, including, but not limited to, delays in obtaining permits or licenses from the Federal Energy Regulatory Commission (FERC), the Environmental Protection Agency (EPA), the Bureau of Land Management (BLM), and the Federal Aviation Agency (FAA);
- (d) delays at the written request of a federal, state, local, or Indian tribal government regarding matters of public safety, security, or similar concerns;
- (e) interconnection-related delays, such as those relating to the completion of construction on a new transmission line or necessary transmission upgrades to resolve grid congestion issues that may be associated with a project's planned interconnection;
- (f) delays in the manufacture of custom components;
- (g) labor stoppages;
- (h) inability to obtain specialized equipment of limited availability;
- (i) the presence of endangered species;
- (j) financing delays; and
- (k) supply shortages.

SECTION 5. PHYSICAL WORK TEST

.01 *In general.* The Physical Work Test requires that a taxpayer begin physical work of a significant nature. As provided in section 3 of Notice 2014–46, this test focuses on the nature of the work performed, not the amount or the cost. Assuming the work performed is of a significant nature, there is no fixed minimum amount of work or mone-

etary or percentage threshold required to satisfy the Physical Work Test.

.02 *Examples.* The following list of examples is intended to illustrate physical work of a significant nature for different types of renewable energy facilities and is non-exclusive.

(1) *Wind facilities.* On-site physical work of a significant nature may include the excavation for the foundation, the setting of anchor bolts into the ground, or the pouring of the concrete pads of the foundation.

(2) *Hydropower facilities.* On-site physical work of a significant nature may include the excavation for or construction of a penstock, power house, or retaining wall structure.

(3) *Biomass and trash facilities.* On-site physical work of a significant nature may include the performance of site improvements (as opposed to site clearing), such as filling or compacting soil, or installing stack piling.

(4) *Geothermal facilities.* On-site physical work of a significant nature may include physical activities that are undertaken at a project site after a valid discovery.

.03 *Preliminary activities.* As provided in section 4.02(1) of Notice 2013–29, physical work of a significant nature does not include preliminary activities, even if the cost of those preliminary activities is properly included in the depreciable basis of the facility. Generally, preliminary activities include, but are not limited to:

- (1) planning and designing;
- (2) securing financing;
- (3) exploring;
- (4) researching;
- (5) conducting geologic mapping and modeling;
- (6) obtaining permits and licenses;
- (7) conducting geophysical, gravity, magnetic, seismic and resistivity surveys;
- (8) conducting environmental and engineering studies;
- (9) performing activities to develop a geothermal deposit prior to valid discovery;
- (10) clearing a site;
- (11) conducting test drilling to determine soil condition;
- (12) excavating to change the contour of the land (as distinguished from excavation for footings and foundations); and
- (13) removing existing turbines and towers, solar panels, or any components that will no longer be part of the facility.

.04 Facility.

(1) *In general.* As provided in section 4.04 of Notice 2013–29, a facility (within the meaning of § 45(d)) generally includes all components of property that are functionally interdependent. Components of property are functionally interdependent if the placing in service of each of the components is dependent upon the placing in service of each of the other components in order to generate electricity.

(2) *Single project.* Solely for purposes of determining whether construction of a facility has begun for purposes of §§ 45 and 48, multiple facilities that are operated as part of a single project (along with any property, such as a computer control system, that serves some or all such facilities) will be treated as a single facility. Whether multiple facilities are operated as part of a single project will depend on the relevant facts and circumstances. The single project rule may be applied to facilities that rely upon either the Physical Work Test or the Five Percent Safe Harbor to satisfy the Continuity Requirement.

(3) *Timing of single project determination.* The determination of whether multiple facilities are operated as part of a single project and are therefore treated as a single facility for beginning of construction purposes under section 5.04(2) must be determined in the calendar year during which the last of the multiple facilities is placed in service.

(4) *Disaggregation.* Multiple facilities that are operated as part of a single project and treated as a single facility under section 5.04(2) for purposes of determining whether construction of a facility has begun may be disaggregated and treated as multiple separate facilities for purposes of determining whether a facility satisfies the Continuity Safe Harbor. Those disaggregated facilities that are placed in service prior to the Continuity Safe Harbor deadline will be eligible for the Continuity Safe Harbor. The remaining disaggregated facilities may satisfy the Continuity Requirement under a facts and circumstances determination. The disaggregation rule may be applied to facilities that rely upon either the Physical Work Test or the Five Percent Safe Harbor to satisfy the Continuity Requirement.

(a) *Example.* X is developing a wind farm that will consist of 50 turbines, associated towers and supporting pads, a com-

puter system that monitors and controls the turbines, and associated power conditioning equipment. The entire wind farm will be connected to the power grid through a single intertie, and power generated by the wind farm will be sold to a local utility through a single power purchase agreement. Using the single project rule in section 5.04(2), the entire wind farm is a single project that will be treated as a single facility. On June 1, 2018, X excavates the site for the foundations of 10 of the 50 turbines and pours concrete for the supporting pads. Accordingly, X has performed physical work of a significant nature that constitutes the beginning of construction of the single facility for purposes of §§ 45 and 48.

Thereafter, X places in service only 40 of the 50 turbines and related facilities before January 1, 2023. X disaggregates the 50 turbines under section 5.04(4). Forty of the 50 turbines satisfy the Continuity Safe Harbor. For the remaining 10 turbines, X may demonstrate that it satisfies the Continuous Construction Test described in section 4.06 of Notice 2013–29 based on the facts and circumstances.

SECTION 6. APPLICATION OF FIVE PERCENT SAFE HARBOR TO RETROFITTED FACILITIES

.01 *In general.* A facility may qualify as originally placed in service even though it contains some used property, provided the fair market value of the used property is not more than 20 percent of the facility's total value (the cost of the new property plus the value of the used property) (80/20 Rule). See Rev. Rul. 94–31, 1994–1 C.B. 16; Notice 2008–60, 2008–2 C.B. 178. In the case of a single project comprised of multiple facilities (as described in section 5.04(2)), the 80/20 Rule is applied to each individual facility comprising the single project.

.02 *Application of beginning of construction to retrofitted facilities.* To satisfy beginning of construction for §§ 45 and 48, the Five Percent Safe Harbor is applied only with respect to the cost of new property used to retrofit an existing facility. Therefore, only expenditures paid or incurred that relate to new construction should be taken into account for purposes of the Five Percent Safe Harbor.

(1) *Example.* Taxpayer owns an existing wind farm comprised of 13 turbines,

and towers for which the eligibility periods for the PTC or the ITC have elapsed. Each facility has a fair market value of \$1 million. Taxpayer replaces components worth \$900,000 at each of 11 of the facilities at a cost of \$1.4 million for each facility. Two of the 13 facilities are not upgraded. The fair market value of the remaining original components at each of the upgraded facilities is \$100,000. The total expenditures to retrofit the 11 facilities are \$15.4 million (\$1.4 million x 11). Taxpayer applies the single project rule provided in section 5.04(2).

The fair market value of the remaining original components of each individual upgraded facility (\$100,000) is not more than 20% of each facility's total value of \$1.5 million (the cost of the new components (\$1.4 million) + the value of the remaining original components (\$100,000)). Thus, each upgraded facility will be considered newly placed in service for purposes of §§ 45 and 48. Accordingly, if the taxpayer pays or incurs at least \$770,000 (5% of \$15.4 million) of qualified expenditures in 2016, construction of the single facility will be considered to have begun in 2016, and if the taxpayer also satisfies the Continuity Efforts Test, each of the 11 upgraded facilities will be a qualified facility within the meaning of § 45(d). No additional PTC will be allowed with respect to energy produced by the taxpayer at the two facilities that were not upgraded. Nor will those two facilities qualify for additional ITC.

SECTION 7. EFFECT ON OTHER DOCUMENTS

Notice 2013–29, Notice 2013–60, Notice 2014–46, and Notice 2015–25 are clarified and modified. The guidance provided in this notice is applicable to any project for which a taxpayer claims the PTC or the ITC under §§ 45 or 48, as modified by ATRA, that is placed in service after January 2, 2013.

SECTION 8. DRAFTING INFORMATION

The principal author of this notice is Jennifer C. Bernardini of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Ms. Bernardini on (202) 317-6853 (not a toll-free number).

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as “rulings”) that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with modified, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A

and B, the prior ruling is modified because it corrects a published position. (Compare with amplified and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the sub-

stance of a prior ruling, a combination of terms is used. For example, modified and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.

ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel’s Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.

PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

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