SEIA Solar Energy Industries Association®

April 12, 2021

The Honorable Janet L. Yellen
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Dear Secretary Yellen,

I am writing to you today on behalf of the Solar Energy Industry Association (SEIA)[1] to request urgent relief needed for the solar industry due to severe disruptions in the usual timeframe for completing projects caused by the COVID-19 crisis. As explained further below, to address this issue, we urge you to extend the IRS administrative "continuity" safe harbor under IRS Notice 2018-59[2] from four years to six years for projects that started construction on or before December 31, 2019, and from four years to five years for projects that started construction during 2020.

The government has recognized the vital need to take whatever reasonable steps possible to allay unforeseen burdens on American families and businesses caused by this ongoing COVID crisis, including by extending, under the Consolidated Appropriations Act, 2021, the deadlines for qualifying solar projects to be eligible for the energy investment tax credit under Section 48 of the Code (ITC)[3] at either a 26 percent or 22 percent rate (depending on when construction starts). This legislative action was crucial to the continued growth of the solar industry. However, the current four-year continuity safe harbor under Notice 2018-59 is hampering the solar industry's ability to fully benefit from the Covid-relief legislation.

Notice 2018-59, *inter alia*, provides the administrative rules governing when a taxpayer is considered to have started construction for purposes of satisfying the timing deadlines under IRC Section 48. Under Notice 2018-59, a taxpayer is treated as having begun construction by either (i) starting physical work of a significant nature (Physical Work Test) or (ii) incurring at least five percent of the total cost of the energy property (Five Percent Safe Harbor).[4] The taxpayer must then either (i) maintains a continuous program of construction, in the case of the Physical Work Test, or (ii) make continuous efforts to advance towards completion of the energy property (in the case of the Five Percent Safe Harbor).[5] In either case, the continuity requirement is deemed satisfied if the energy property is placed in service by the end of a calendar year that is no more than four calendar years after the calendar year during which construction began ("continuity safe harbor").[6]

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[1] Founded in 1974, SEIA is a national trade association building a comprehensive vision for the Solar+ Decade through research, education and advocacy. SEIA works with its 1,000 member companies to fight for policies that create jobs in every community and shape fair market rules that promote competition and the growth of reliable, low-cost solar power.
[2] 2018-28 I.R.B. 196, §6 (Jun. 6, 2018).
[3] PL 116-260, Div.EE, §132 (Dec. 27, 2020).
[4] Notice 2018-59, §3.
[5] Notice 2018-59, §6.
[6] Notice 2018-59, §6.05.

The importance of the continuity safe harbor to solar industry cannot be understated. It prevents costly and unnecessary disputes over the various facts and circumstances related to the financing, permitting, and construction of energy facilities. The certainty and flexibility provided by the safe harbor is critical to developers being able to construct and finance new projects.

The COVID-19 crisis has disrupted supply chains, construction operations, permitting, and financing timelines, delaying projects in ways the IRS never anticipated when it first adopted the four-year continuity safe harbor. While Notice 2018-59 provides certain exceptions for specified setbacks in construction, these exceptions do not anticipate nor fully capture the wide-ranging interruptions now faced by developers. Providing a temporary extension of the continuity safe harbor of six years or five years, in lieu of the current four, would address the unforeseen interruptions developers are experiencing due to COVID-19 and provide the certainty businesses need to move forward with existing projects.

There is ample precedent for extending and/or tolling the continuity safe harbor beyond four years, particularly in light of COVID timeline challenges. For example, the IRS provided relief last summer, in the form of a five-year continuity safe harbor, for a limited group of wind and solar projects that had begun construction in 2016 and 2017.[7] In addition, the IRS recently extended the continuity safe harbor for projects on federal land and for off-shore wind projects to ten years.[8] Similarly, in the context of the opportunity zone rules, which include a wide array of time-sensitive deadlines, the IRS recognized the need for relief due to the COVID-19 pandemic and issued Notice 2020-39, giving broad relief/extensions from all the significant time-sensitive requirements of these rules.[9] Lastly, the IRS provides a six year continuity safe harbor for carbon capture credits under IRC Section 45-Q.[10]

Solar has grown substantially in recent years, playing a significant role in creating a cleaner power sector. The modest adjustment to the IRS guidance requested would help preserve tens of thousands of jobs and billions of dollars in investments and provide some certainty in these challenging times. Further, extending the continuity to six years for projects that started construction on or before December 31, 2019, and to five years for projects that started construction during 2020, will align the IRS administrative "continuity" guidance to the legislative relief recently enacted by Congress. SEIA and its member companies are committed to building the industry consistent with the long-standing goals of Congress and successive Administrations. We appreciate your time and attention and look forward to working with you on this important matter.

Sincerely,

Abigail Ross Hopper
President & CEO
Solar Energy Industries Association

cc: Mark Mazur, Deputy Assistant Secretary for Tax Policy

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[7] IRS Notice 2020-41, 2020-25 I.R.B. (May 28, 2020)
[8] IRS Notice 2021-25, §4.
[9] IRS Notice 2020-39, 2020-26 I.R.B. (Jun. 5, 2020).
[10] IRS Notice 2020-12, 2020-11 I.R.B. (Feb. 19, 2020).