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Tax Update July 14, 2025

Focus on Clean Energy Tax Provisions in the One Big Beautiful Bill Act

This update details changes made by the Act to the tax benefits for clean energy projects, including the new limitations on certain energy-related tax credits enacted in the Inflation Reduction Act of 2022 (the IRA).

On July 4, 2025, President Trump signed into law the One Big Beautiful Bill Act (the OBBBA or the Act),[1] which enacts significant changes to the U.S. federal income tax benefits available to clean energy projects. The text of the Act can be found here. Our prior alert on the tax highlights of the Act can be found here.

This alert provides further details regarding the changes made by the OBBBA to the tax benefits for clean energy projects, including the new limitations on certain energy-related tax credits enacted in the Inflation Reduction Act of 2022 (the IRA).[2]

Wind and Solar Energy (Sections 45Y and 48E)

Background

Before the OBBBA, qualifying wind and solar projects were eligible for a production tax credit (PTC) under section 45Y or an investment tax credit (ITC) under section 48E. Under the IRA, the section 45Y PTC and section 48E ITC were subject to phase-out following the later of 2032 or the year the Treasury Secretary determined that the annual greenhouse gas emissions (GGEs) from the production of electricity in the United States was equal to or less than 25 percent of a 2022 baseline. Our prior alert on the section 45Y and 48E credits can be found here.

Under pre-OBBBA IRS guidance (first issued in 2014), a wind or solar project that began construction would qualify for ITCs or PTCs if it was placed in service by the end of the fourth calendar year after the year in which construction began (assuming other applicable requirements are met).[3] Construction of a project was deemed to "begin" by the performance of physical work of a significant nature or by satisfying a safe harbor through payment or incurrence of at least five percent of certain project costs.[4] That pre-OBBBA IRS guidance contains rules governing the type of "physical work" that qualifies but specifically provides that "there is no fixed minimum amount of work or monetary or percentage threshold required to satisfy" the physical work standard.[5]

Projects that begin construction after July 4, 2026

Under the Act, qualifying wind and solar projects that begin construction after July 4, 2026 must be placed in service by December 31, 2027 to be eligible for ITCs and PTCs.

Projects that begin construction on or before July 4, 2026[6]

As of the date of this alert (July 14, 2025), the section 48E ITC and section 45Y PTC placement-in-service deadline is uncertain for qualifying wind and solar projects that began construction before July 4, 2026 and thus are exempt from the December 31, 2027 placement-in-service deadline.

This uncertainty stems from President Trump's July 7, 2025 Executive Order that directed the Treasury Secretary, by August 18, 2025, to "strictly enforce the termination of the [section 48E ITC and section 45Y PTC] for wind and solar facilities," which includes

> issuing new and revised guidance as the Secretary of the Treasury deems appropriate and consistent with applicable law to ensure that policies concerning the 'beginning of construction' are not circumvented, including by preventing the artificial acceleration or manipulation of eligibility and by restricting the use of broad safe harbors unless a substantial portion of a subject facility has been built.

Both the scope of the Executive Order and the manner in which it will be interpreted are unclear, and we will publish another alert once this guidance is issued.

Certain Leasing Arrangements

For taxable years beginning after July 4, 2025, the OBBBA prohibits the section 48E ITC for qualified investments in certain small wind facilities (used in connection with a residential dwelling unit by the lessee) if the taxpayer rents or leases the facilities to a third party, and disallows the section 45Y PTC with respect to electricity produced by such facilities during those taxable years.

Application of the prohibition is uncertain with respect to facilities generating electricity from solar energy. The heading of the provision states that it applies to "solar leasing arrangements," but the prohibition by its terms (and a potentially errant cross-reference) applies to solar water heating property, which is not eligible for either the section 48E ITC or section 45Y PTC in the first instance.

Foreign Entity of Concern Rules (FEOC)

The OBBBA also introduces new section 48E ITC and section 45Y PTC eligibility requirements that target certain foreign (*e.g.*, China) ownership or influence with respect to benefited projects and participation in supply chains (collectively, "Foreign Restrictions").[7] As discussed below, some or all of the restrictions also apply to various other credits.

More specifically, the section 45Y PTC and section 48E ITC are not allowed to a "specified foreign entity" (SFE) or a "foreign-influenced entity" (FIE), nor are they allowed with respect to a facility the construction of which receives "material assistance" from an SFE or an FIE. These three concepts are discussed in more detail below.

- **SFE**: An SFE is defined to include the governments (including agencies and instrumentalities) of China, Iran, Russia, and North Korea; citizens or nationals of any of those countries;[8] entities or branches formed in or having their principal place of business in any of those countries; and controlled entities and subsidiaries of any of the above (determined on a more-than-50 percent equity ownership basis and regardless of jurisdiction of organization).[9] SFE status is generally determined as of the last day of the taxable year.[10]
- **FIE**: An FIE is defined as an entity that meets any of the following tests: (i) an SFE has direct authority to appoint certain officers, (ii) an SFE has at least 25 percent equity ownership or, taken together with other SFEs, at least 40 percent equity ownership, (iii) one or more SFEs has issued at least 15 percent of the entity's debt, or (iv) the entity made an "**effective control**" payment to an SFE during the previous year (discussed below). FIE status is determined as of the last day of the taxable year.
  - **Effective Control**: An entity makes an "effective control" payment if, during the previous taxable year, the entity made a payment to an SFE pursuant to a contract, agreement, or other arrangement that entitles the SFE (or a related party) to exercise "specific authority over key aspects" of the energy generation of the entity's (or a related person's) facility that are "not included in the measures of control through authority, ownership, or debt" that otherwise would determine FIE status. The OBBBA goes on to provide a broad list of contractual provisions (relating to amount and timing of electricity production, offtake arrangements, access to data, and facility maintenance and repair) that convey impermissible authority to a counterparty. The OBBBA is especially scrutinous of intellectual property licenses (other than qualifying bona fide sales)—for example, any such arrangement (relating to a facility) that is entered into after July 4, 2025 is deemed to convey effective control to the SFE.[11]
- **Material Assistance**: A facility receives "material assistance" from an SFE or FIE if an impermissible amount of the total direct costs of the manufactured products (including components) incorporated into the facility upon completion of construction are mined, produced, or manufactured by an SFE or an FIE. Pending receipt of Treasury guidance contemplated by the Act, taxpayers may rely on certifications from suppliers of

manufactured products to determine if those products (or components) were manufactured by an SFE or FIE; new penalties apply to false or inaccurate supplier certifications.[12] Stricter penalties (and an extended statute of limitations) apply to assessments in respect of credits disallowed for "material assistance" violations.

Special rules allow publicly traded entities to rely on publicly reported information to determine their SFE and FIE status.[13]

The SFE ownership, FIE, and "effective control" rules apply to credits claimed for taxable years beginning after July 4, 2025, and the "material assistance" rules apply to projects that begin construction after December 31, 2025.

The "effective control" payment rules are also backed up by a new section 48E ITC recapture rule, effective for taxable years beginning after July 4, 2025. Under this rule, for the 10 years after a qualifying facility is placed in service, a section 48E ITC is subject to 100-percent recapture (*i.e.*, no vesting) if the taxpayer (i) is allowed a section 48E ITC for any taxable year beginning after July 4, 2027 and (ii) makes a payment to an SFE ("with respect to a taxable year") pursuant to a contract that entitles the SFE (or a related person) to "effective control" over any facility of the taxpayer or a related person.[14] The recapture tax is due in the year the "effective control" payment is made.

The OBBBA did not include a controversial proposed excise tax included in prior versions of the legislation that would have applied to wind and solar facilities (regardless of whether ITCs or PTCs were claimed) that incorporated certain components sourced from prohibited foreign sources.

Domestic Content Clarification

The Act aligns the thresholds for the domestic content bonus credit under the section 48E ITC with the domestic content thresholds under the section 45Y PTC by increasing the section 48E thresholds to match the section 45Y requirements. In an apparent drafting glitch made by Congress in the IRA, the domestic content thresholds were lower under section 48E as compared to the domestic content thresholds under section 45Y.[15] This change is effective for facilities the construction of which begins on or after June 16, 2025.

Depreciation

The Act does not affect the eligibility of solar or wind projects to claim preferential five-year accelerated depreciation.

Battery Storage (Section 48E)

Background

Before the OBBBA, qualifying energy storage projects were eligible for the section 48E ITC, subject to phase-out on the same timeline as wind and solar projects (discussed above).

OBBBA Changes

The OBBBA did not change the section 48E ITC eligibility timeline for battery storage projects.

The OBBBA subjects storage projects seeking the section 48E ITC to the Foreign Restrictions applicable to wind and solar projects (discussed above), albeit with stricter "material assistance" provisions.

Fuel Cells (Section 45V and 48E)

Background

Under prior law, fuel cells were eligible for credits under Section 48E only if those cells met the emissions requirements of that section. Because feedstocks for fuel cell projects typically produce GGEs, this often made eligibility for the section 48E ITC challenging.

OBBBA Changes

Qualifying fuel cell projects that begin construction after December 31, 2025 are now eligible for a new 30-percent ITC that exempts the projects from the IRA's prevailing wage and apprenticeship requirements and GGE requirements. The new ITC is not eligible for the domestic content and energy community bonuses made available under the IRA.[16]

The Act also moves up the commencement-of-construction deadline for the IRA's 10-year credit under section 45V for the production of clean hydrogen (a fuel cell feedstock) from January 1, 2033 to January 1, 2028. The Foreign Restrictions do not apply to the clean hydrogen PTC. Our prior alert on the section 45V credit can be found here.

Clean Fuels (Section 45Z)

Background

Before the OBBBA, section 45Z provided a PTC for clean transportation fuel, including a higher credit rate for sustainable aviation fuel. This credit was not available for fuel sold after December 31, 2027

OBBBA Changes

The Act extends the clean fuel production credit by two years, with the result that eligible fuel sold until December 31, 2029 is eligible for this credit.

The Act also relaxes the lifecycle GGE rules for credit-eligible fuel produced after 2025 by excluding the effects of indirect land use changes from the lifecycle GGE calculation.

In an apparent negative reaction to Treasury and IRS guidance released earlier this year, the OBBBA also authorizes the Treasury Secretary to confirm that sales by a taxpayer to an intermediary are permitted if the taxpayer has reason to believe that the fuel ultimately will be sold to an unrelated person.[17]

The Act effectively introduces a new cap on the credit. As background, the credit's rate is the product of a formula that reduces the credit by reference to a specific fuel's GGE rate; before the Act, however, fuels with a *negative* GGE rate could have seen their credit rate *increase* over the headline statutory rate under the Code's formula.[18] The Act prospectively limits the fuels for which negative GGE rates that can be taken into account to fuels from specific animal manure feedstocks (*e.g.*, dairy, swine, poultry).

The Act also provides that, for fuel produced after 2025, the credit is available only for fuel derived exclusively from feedstocks produced or grown in the United States, Mexico, or Canada. The Act also eliminates the enhanced credit rate for sustainable aviation fuel effective for fuel produced after December 31, 2025.

Certain of the Foreign Restrictions also apply to clean fuel PTCs. The SFE ownership prohibition applies to taxable years beginning after July 4, 2025, and the FIE prohibition (other than the "effective control" payment rules) applies to taxable years beginning after July 4, 2027.

Nuclear (Section 45Y and 48E)

Background

Under current law, qualifying nuclear projects are eligible for PTCs under section 45Y or ITCs under section 48E.

OBBBA Changes

Under the Act, a bonus amount was added to the section 45Y PTC for certain nuclear facilities placed in service in metropolitan statistical areas that have (or, at any time after December 31, 2009, has had) at least 0.17 percent direct employment in nuclear-related sectors.[19] The bonus amount is available for qualifying projects that begin construction in taxable years beginning after July 4, 2025.

The Foreign Restrictions apply to ITCs or PTCs for new nuclear projects on the same timeline as wind and solar projects. For nuclear facilities placed in service before the IRA and claiming the section 45U PTC, the SFE prohibition applies to taxable years beginning after July 4, 2025, and the FIE prohibition (other than the "effective control" payment rules) applies to taxable years beginning after July 4, 2027.

Carbon Capture, Utilization, and Sequestration (<u>CCUS</u>) (Section 45Q)

Background

Prior to the OBBBA, section 45Q provided a tax credit of $60 per metric ton for qualified CCUS facilities that captured qualified carbon oxides (<u>QCOs</u>) and either "utilized" (*e.g.*, used in a commercial process) the QCOs or used the QCOs for enhanced oil and gas recovery. Qualified CCUS facilities that stored QCOs in secure geological formations were eligible for a higher credit of $85 per metric ton.[20]

OBBBA Changes

The OBBBA increases the section 45Q credit for QCOs that are "utilized" or used in enhanced oil or natural gas recovery to equal the credit rate for QCOs that are stored in secure geological formations. The credit rate increase applies to equipment placed in service after July 4, 2025

The SFE ownership prohibition and the FIE prohibition (other than the "effective control" payment rules) apply to CCUS projects for taxable years beginning after July 4, 2025.

Advanced Manufacturing Production Credit (Section 45X)

Background

The IRA made available a tax credit for the production and sale of certain eligible solar, wind, and energy storage components manufactured in the United States, as well as the production of certain critical minerals. The credits (other than the credits for critical minerals) were subject to a phaseout beginning in 2030.

OBBBA Changes

The Act introduces a new category of credit-eligible critical minerals—metallurgical coal suitable for use in the production of steel, regardless of where produced. The metallurgical coal credit is 2.5 percent of qualifying production costs (as compared to the 10 percent credit for other critical minerals).

The credit for wind components is terminated for components produced and sold after December 31, 2027. The Act phases out the credit for critical minerals (other than metallurgical coal) starting in 2031 and terminates the new credit for metallurgical coal produced after December 31, 2029.

The Act also revises the definition of credit-eligible battery module production to require inclusion of all essential equipment necessary for battery functionality.

The Foreign Restrictions are made applicable to section 45X but are generally applied to the production of components (rather the construction of the facility) and are subject to separate "material assistance" thresholds.

These changes are effective for taxable years beginning after July 4, 2025.

The OBBA did not adopt an earlier Senate proposal to prohibit claiming multiple credits (or "stacking") for the production of components that are integrated into and sold as a single product but did add new requirements to qualify for such stacking. To be eligible for stacking, the components must be produced at the same facility, the end product must be sold to an unrelated person, and at least 65 percent of the direct material costs of the underlying components must be attributable to United States mining, production, or manufacturing. This change is effective for components sold during taxable years beginning after December 31, 2026.

Tax Credit Transfers (Section 6418)

Background

The IRA made certain tax credits (including the section 45Y PTC and 48E ITC) transferable for cash on a one-time basis, subject to certain limitations. Please see our prior client alert on the IRA tax credit transfer regime here.

OBBBA Changes

The Act largely leaves intact the tax credit transfer regime introduced by the IRA; for taxable years beginning after July 4, 2025, however, an SFE cannot buy section 45Q, 45U, 45X, 45Y, 45Z, or 48E credits.[21]

New Classes of Qualified Income for Publicly Traded Partnerships (Section 7704)

Background

Publicly traded partnerships are generally taxed as corporations unless they derive at least 90 percent of their income from certain qualifying sources. Prior to the OBBBA, qualifying sources were limited to passive income and income from certain fossil fuel-related energy or transportation activities.

OBBBA Changes

The Act expands the definition of "qualifying income" to include income derived from qualifying hydrogen storage and transportation; electricity production from qualifying nuclear, hydropower, and geothermal facilities; carbon capture facilities, including electricity production from qualifying facilities with sufficient carbon capture; and thermal energy from hydropower and geothermal facilities.

The amendment is effective for taxable years beginning after December 31, 2025.

[1] The technical name for the Act is "an Act to provide for reconciliation pursuant to title II of H. Con. Res. 14."

[2] Unless indicated otherwise, all "section" references are to the Internal Revenue Code of 1986, as amended (the "Code"), and all "Treas. Reg. §" are to the regulations promulgated by the U.S. Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) under the Code, in each case as in effect as of the date of this alert.

[3] Notices 2014-46, 2014-35 I.R.B. 520, 2016-31, 2016-23 I.R.B. 1025, 2018-59, 2018-28 I.R.B. 196, and 2022-61, 2022-52 I.R.B. 560.

[4] Notice 2022-61, 2022-52 I.R.B. 560.

[5] Notices 2014-46, 2014-35 I.R.B. 520, 2016-31, 2016-23 I.R.B. 1025, 2018-59, 2018-28 I.R.B. 196, and 2022-61, 2022-52 I.R.B. 560.

[6] The cut-off applies "to facilities the construction of which begins after the date which is 12 months after the date of enactment of this Act." This alert presumes that July 4, 2026 is the date which is 12 months after July 4, 2025.

[7] The rules also apply to Russia, Iran, and North Korea, but we understand that China is their principal focus.

[8] The definition excludes citizens, nationals, or lawful permanent residents of the United States.

[9] For purposes of this rule, section 318(a)(2) attribution (*i.e.*, attribution from entities to owners) applies.

[10] For the first taxable year beginning after July 4, 2025, SFE status (other than for entities that are SFEs by reason of being controlled by another SFE) is determined as of the first day of the taxable year.

[11] The OBBBA's list of impermissible contractual arrangements applies pending Treasury and IRS guidance, but presumably any such guidance will not be more permissive than the OBBBA.

[12] This rule applies pending Treasury and IRS guidance. Treasury is also directed to issue safe harbor tables to determine the percentages of total direct costs of manufactured products (and taxpayers may rely on domestic content safe harbors until such guidance is issued).

[13] The favorable reliance rules do not apply if the relevant exchange or market is in China, Russia, Iran, or North Korea.

[14] The heading states the rule applies to payments to SFEs or FIEs ("Prohibited Foreign Entities"), but the operative rule applies only to payments to SFEs.

[15] Joint Committee on Tax'n, Description of Energy Tax Law Changes Made by Public Law 117-169, JCX 5-23 (April 7, 2023), at n. 201.

[16] The property must have electricity-only generation efficiency greater than 30 percent. For descriptions of certain of those bonus amounts made available under the IRA, please see our prior client alerts here, here, and here.

[17] In Notice 2025-10, 2025-6 I.R.B. 682, App'x (including "forthcoming" Prop. Treas. Reg. § 1.45Z-1(b)(25)(ii)), Treasury and the IRS previewed proposed regulations that would not have allowed the clean fuel PTC for certain common intermediary sales.

[18] Joint Committee on Tax'n, Description of Energy Tax Law Changes Made by Public Law 117-169, JCX 5-23 (April 17, 2023), at n. 201.

[19] The bonus is not available for the section 48E ITC.

[20] Our prior alert on section 45Q can be found here. These rates assume satisfaction of all prevailing wage and apprenticeship requirements.

[21] The section 45V clean hydrogen production credit, the section 45 PTC, and the section 48 ITC are not subject to these restrictions.

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Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding this proposed legislation. To learn more about these issues or discuss how they might impact your business, please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any member of the firm's Tax and Tax Controversy and Litigation practice groups:

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