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Tax Update

August 18, 2025

IRS and Treasury Issue Beginning of Construction Guidance Related to Termination of Tax Credits for Wind and Solar Facilities

IRS Notice 2025-42 generally requires that a taxpayer begin actual physical work on a wind or solar facility before July 5, 2026 to escape the December 31, 2027 placement-in-service deadline, eliminating a taxpayer-favorable safe harbor method available under earlier IRS and Treasury guidance.

On August 15, 2025, the IRS and Treasury issued Notice 2025-42 (the [Notice](#)), which provides highly anticipated guidance for determining whether a new solar or wind facility must meet a strict December 31, 2027 placement-in-service deadline to be eligible for certain federal income tax credits.^[1] The Notice, which can be found [here](#), generally requires that a taxpayer begin actual physical work on a wind or solar facility before July 5, 2026 to escape the placement-in-service deadline, eliminating a taxpayer-favorable safe harbor method available under earlier IRS and Treasury guidance that would have made it feasible to escape the deadline by purchasing equipment.

Background

On July 4, 2025, President Trump signed into law the legislation commonly known as the One Big Beautiful Bill Act (the [OBBBA](#) or the [Act](#)).^[2] The Act generally terminates the clean electricity production credit under section 45Y (the [PTC](#)) and the clean electricity investment credit under section 48E (the [ITC](#)) for wind and solar facilities that are placed in service after December 31,

2027, but this deadline does not apply to those facilities on which construction begins before July 5, 2026.^[3]

On July 7, 2025, President Trump issued Executive Order 14315 (the Executive Order), which directs the Secretary of the Treasury to issue guidance by August 18, 2025 to “strictly enforce the termination of the [section 48E ITC and section 45Y PTC] for wind and solar facilities” and to “ensure that policies concerning the ‘beginning of construction’ are not circumvented.”^[4] The Executive Order can be found [here](#).

The Notice provides the guidance directed by the Executive Order.

Prior Beginning of Construction Guidance

Beginning in 2013, the IRS and Treasury issued a series of guidance clarifying when construction on a facility has “begun” for purposes of determining various aspects of tax credit eligibility (e.g., whether a project was subject to a phased-down credit amount or subject to new prevailing wage and apprenticeship requirements). That guidance generally provided two methods for establishing the beginning of construction on a project, and each method included a four-year safe harbor for achieving placement-in-service after beginning construction.^[5]

Under the first method, beginning of construction could be established under a facts-and-circumstances test by completing either off-site or on-site physical work of a significant nature (the Physical Work Test). The second method allowed a taxpayer to establish that construction had begun on a facility by paying or incurring eligible costs totaling at least five percent of the total eligible costs of the facility (the Five Percent Safe Harbor).^[6] Under either method, a taxpayer was required to make progress towards completion after beginning construction, either by establishing progress through a facts-and-circumstances test or by qualifying for a safe harbor by placing the facility in service no later than the end of the fourth calendar year beginning after the calendar year in which construction began on that facility.

The Notice

The Notice provides that, with one narrow exception for certain small solar facilities,^[7] for purposes of determining whether construction on an applicable wind or solar facility began before July 5, 2026, the Physical Work Test is the exclusive method, thereby eliminating the availability of the Five Percent Safe Harbor in respect of facilities that otherwise would claim PTCs or the ITC and that are not placed into service prior to January 1, 2028 (and on which construction begins on or after September 2, 2025).

The Notice also retains the continuous program of construction requirement from earlier guidance along with the same safe harbor (e.g., for a facility on which construction begins in 2026, but before July 5, 2026, the facility would need to be placed in service by December 31, 2030).

Effective Date

The Notice is effective for wind or solar facilities on which construction begins on or after September 2, 2025. For purposes of determining whether construction on a facility began before September 2, 2025, taxpayers are able to use both the Physical Work Test and the Five Percent

Safe Harbor.

[1] Unless indicated otherwise, all references to the “IRS” are to the U.S. Internal Revenue Service and all references to the “Treasury” are to the U.S. Department of the Treasury.

[2] The technical name for the Act is “an Act to provide for reconciliation pursuant to title II of H. Con. Res. 14.” The text of the Act can be found [here](#). Our prior alert on the tax highlights of the Act can be found [here](#); our prior alert on the clean energy tax provisions in the Act can be found [here](#).

[3] Unless indicated otherwise, all “section” references are to the Internal Revenue Code of 1986, as amended (the Code), as in effect as of the date of this alert.

[4] Section 3(b) of the Executive Order directs the Secretary of the Treasury to take prompt action as the Secretary of the Treasury deems appropriate and consistent with applicable law to implement the “Foreign Entity of Concern” restrictions, which are summarized in our earlier client alert [here](#). The Notice indicates that guidance on the “Foreign Entity of Concern” restrictions is forthcoming.

[5] See Notices 2013-60, 2013-44 I.R.B. 431, 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] For a detailed discussion of the Physical Work Test and the Five Percent Safe Harbor, please see [here](#).

[7] In particular, solar facilities that have a maximum net output (measured on the basis of a facility’s nameplate capacity) equal to 1.5 megawatts or less are permitted to rely on the Five Percent Safe Harbor for purposes of determining whether construction on that low output solar facility began before July 5, 2026. Multiple solar facilities with integrated operations that are owned by a taxpayer (or a related taxpayer) are measured on an aggregate basis to determine whether this 1.5 megawatt limitation is reached.

The following Gibson Dunn lawyers prepared this update: Josiah Bethards, Michael Q. Cannon, Matt Donnelly, and Eric B. Sloan.

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:

Tax:

Dora Arash – Los Angeles (+1 213.229.7134, darash@gibsondunn.com)
Sandy Bhogal – Co-Chair, London (+44 20 7071 4266, sbhogal@gibsondunn.com)
Michael Q. Cannon – Dallas (+1 214.698.3232, mcannon@gibsondunn.com)
Jérôme Delaurière – Paris (+33 (0) 1 56 43 13 00, jdelaunerie@gibsondunn.com)
Anne Devereaux* – Los Angeles (+1 213.229.7616, adevereaux@gibsondunn.com)
Matt Donnelly – New York/Washington, D.C. (+1 212.351.5303, mjdonnelly@gibsondunn.com)
Benjamin Fryer – London (+44 20 7071 4232, bfryer@gibsondunn.com)
Evan M. Gusler – New York (+1 212.351.2445, egusler@gibsondunn.com)
James Jennings – New York (+1 212.351.3967, jjennings@gibsondunn.com)
Kathryn A. Kelly – New York (+1 212.351.3876, kkelly@gibsondunn.com)
Brian W. Kniesly – New York (+1 212.351.2379, bkniesly@gibsondunn.com)
Pamela Lawrence Endreny – Co-Chair, New York (+1 212.351.2474, pendreny@gibsondunn.com)
Kate Long – New York (+1 212.351.3813, klong@gibsondunn.com)
Gregory V. Nelson – Houston (+1 346.718.6750, gnelson@gibsondunn.com)
Benjamin Rapp – Munich/Frankfurt (+49 89 189 33-290, brapp@gibsondunn.com)
Jennifer Sabin – New York (+1 212.351.5208, jsabin@gibsondunn.com)
Eric B. Sloan – Co-Chair, New York/Washington, D.C. (+1 212.351.2340, esloan@gibsondunn.com)
Edward S. Wei – New York (+1 212.351.3925, ewei@gibsondunn.com)
Lorna Wilson – Los Angeles (+1 213.229.7547, lwilson@gibsondunn.com)
Daniel A. Zygielbaum – Washington, D.C. (+1 202.887.3768, dzygielbaum@gibsondunn.com)

Tax Controversy and Litigation:

Saul Mezei – Washington, D.C. (+1 202.955.8693, smezei@gibsondunn.com)
Sanford W. Stark – Chair, Washington, D.C. (+1 202.887.3650, sstark@gibsondunn.com)
C. Terrell Ussing – Washington, D.C. (+1 202.887.3612, tussing@gibsondunn.com)

**Anne Devereaux, of counsel in the firm's Los Angeles office, is admitted to practice in Washington, D.C.*

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