

Clean Energy Deals After the One Big Beautiful Bill Act

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GIBSON DUNN

Webinar Panelists

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Today's Gibson Dunn Panelists



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[Matt Donnelly](#) is a partner in the New York and Washington, D.C. offices of Gibson, Dunn & Crutcher and a member of the firm's Tax Practice Group. Mr. Donnelly represents public and private companies on a broad range of U.S. federal and state income tax matters, with a concentration on domestic and international mergers and acquisitions, dispositions, spin-offs, Reverse Morris Trust transactions, joint ventures, financing transactions, capital markets transactions, restructurings and internal reorganizations. Mr. Donnelly received his law degree with high honors from the University of Iowa College of Law, where he also served as the Editor in Chief of the *Iowa Law Review* and won a Burton Award for Distinguished Legal Writing.

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Mike Cannon | Partner

[Michael Cannon](#) is a tax partner who dedicates the majority of his practice to energy, infrastructure and project finance tax matters, advising in connection with transactions involving a wide range of energy (both oil and gas, conventional power generation, and renewable energy) and other infrastructure assets. In addition to advising on mergers and acquisitions transactions, Michael has significant experience advising sponsors, tax-equity investors, and tax credit purchasers and sellers in connection with transactions designed to monetize tax assets in connection with energy infrastructure investments.



Jen Sabin | Partner

[Jennifer Sabin](#) is a partner in the New York office of Gibson, Dunn & Crutcher. She represents clients in a broad range of domestic and international tax matters, including taxable and tax-free mergers and acquisitions (public and private), spin-offs, joint ventures, financings, and restructurings. Her practice also includes formation of, and transactions undertaken by, private equity, hedge funds, and asset managers. In addition, Jennifer advises on various aspects of information reporting, including matters relating to the Foreign Account Tax Compliance Act.



Nick Politan | Partner

[Nicholas Politan](#) is a partner in the New York office of Gibson, Dunn & Crutcher, and Co-Chair of Gibson Dunn's Energy (Power and Renewables) Practice Group. Nick is also a member of the Finance Practice Group. Nick focuses his practice on domestic and cross-border energy-related transactions, including mergers and acquisitions, financings of all types, project development, construction and operation, and restructurings. He has particular experience in wind power, solar power, battery storage and other renewable technologies. He represents developers, sponsors, strategic investors and lenders in connection with these transactions.



Dan Alterbaum | Partner

[Daniel Alterbaum](#) is a partner in the Mergers and Acquisitions and Private Equity Practice Groups, where he represents buyers, sellers, and investors in a wide variety of transactions in the private equity, fintech, renewable energy and infrastructure sectors. His experience includes joint ventures, acquisitions, divestitures and financings of wind and solar other renewable energy projects and project portfolio. He also represents issuers and investment funds in connection with venture capital, growth equity, and structured preferred equity investments in a variety of sectors.



Josiah Bethards | Associate

[Josiah Bethards](#) is an associate in the Dallas office of Gibson, Dunn & Crutcher and is a member of the firm's Tax Practice Group. Mr. Bethards represents clients in a broad range of tax matters, including public and private mergers and acquisitions, dispositions, financing transactions, joint ventures, cross-border transactions, and energy and infrastructure transactions, including tax equity financings and tax credit purchase and sale transactions. Mr. Bethards also has extensive experience advising sponsors and investors on clean energy tax credit qualification matters for a variety of technologies, including wind, solar, storage, clean fuels, nuclear, and carbon capture and sequestration, as well as other emerging technologies.

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Wind, Solar, and Energy Storage

01

Wind, Solar and Storage

Sections 45Y and 48E

- Wind and solar facilities that **begin construction after July 4, 2026** must be placed in service by **December 31, 2027** to qualify for tech-neutral PTCs or ITCs under sections 45Y and 48E.
 - Section 45 PTC and section 48 ITC generally unaffected by the OBBBA.
- Wind and solar facilities that **begin construction before July 5, 2026** generally must be placed in service by **December 31, 2029** (if begun in 2025) or by **December 31, 2030** (if begun in 2026) to qualify for tech-neutral PTCs or ITCs.
- Two possible begun construction strategies apply:
 - If construction on that facility began **before September 2, 2025**, a taxpayer may rely on either the “physical work test” or the “five percent safe harbor.”
 - If construction on the facility began **on or after September 2, 2025**, a taxpayer generally only may rely on the “physical work test” (small solar facilities may rely on the “five percent safe harbor”).
- The OBBBA **did not change** the section 48E ITC eligibility timeline for battery storage projects.
- The OBBBA subjects projects to new FEOC rules (discussed below).

Foreign Entity of Concern (FEOC) Provisions

02

Overview

- The OBBBA introduced credit-eligibility requirements that target certain foreign (e.g., China) ownership or influence with respect to benefited projects and supply chains.
- These FEOC rules fall under three broad categories:
 - the “specified foreign entity” (**SFE**) rules,
 - the “foreign-influenced entity” (**FIE**) rules, and
 - the “**material assistance**” rules.
- **SFE** and **FIE** rules affect tax credits under sections 45Y, 48E, 45Q, 45U, 45X and 45Z.
 - The **SFE** rules apply for tax years beginning after **July 4, 2025**.
 - The **FIE** rules apply to sections 45Y, 48E, 45Q and 45X for tax years beginning after **July 4, 2025**, and to sections 45U and 45Z for tax years beginning after **July 4, 2027**.
- The “**material assistance**” rules affect credits under sections 45Y, 48E, and 45X for tax years beginning after **July 4, 2025**.
 - Do not apply if construction has begun **on or before Dec. 31, 2025**.
- Do not apply to projects that began construction **on or before Dec. 31, 2024** and are eligible for section 48 ITCs or section 45 PTCs.

Specified Foreign Entities and Foreign-Influenced Entities

- An “**specified foreign entity**” (SFE) includes:
 - certain foreign entities described in various enumerated statutes (and administrative implementation of those statutes),
 - the governments (including agencies and instrumentalities) of China, Iran, Russia, or North Korea,
 - citizens or nationals of any of those countries,
 - 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) (a “foreign-controlled entity”).
- A “**foreign-influenced entity**” (FIE) includes an entity the meets any of the following tests:
 - an SFE has direct authority to appoint certain officers,
 - an SFE has at least 25 percent equity ownership or, taken together with other SFEs, at least 40 percent equity ownership,
 - one or more SFEs owns at least 15 percent of the entity’s debt, or
 - the entity made an “**effective control**” payment to an SFE during the previous year (discussed on next slide).

Effective Control Payments

- 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 party related to that SFE) to exercise “specific authority over key aspects” of a facility (e.g., energy generation, storage, etc.) or the production of components.
- The OBBBA provides a broad list of contractual provisions (relating to amount and timing of electricity or component production, offtake arrangements, access to data, and facility maintenance and repair) that are deemed to 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 or modified after July 4, 2025 is **deemed** to convey effective control to the SFE.
- Backstopped by a new **10-year recapture rule** applicable to section 48E ITCs that applies to facilities placed in service in a taxable year beginning after July 4, 2027.

Material Assistance

- Taxpayers receive “**material assistance**” from an SFE or FIE if an impermissible amount of the total direct costs of the manufactured products “(including components)” incorporated into an ITC- or PTC-eligible facility, or if an impermissible amount of the total direct costs paid or incurred for production of section 45X-eligible components are mined, produced, or manufactured by an SFE or an FIE.
 - For ITC- and PTC-eligible facilities (other than storage facilities), the threshold starts at **40 percent** (for facilities on which construction begins in 2026) and increases to **60 percent** (for facilities begun after 2029).
 - For ITC-eligible storage facilities, the threshold goes from **55 percent** to **75 percent**.
 - For section 45X, the threshold varies by component.
 - Pending Treasury guidance, taxpayers may rely on certifications from suppliers of manufactured products to determine whether those products (or components) were manufactured by an SFE or FIE.
- **Stricter penalties** (and an extended statute of limitations) apply to assessments in respect of credits disallowed for “material assistance” violations.

Other Credits

03

Nuclear, Fuel Cells, and Clean Hydrogen Projects

Sections 45Y, 48E, and 45V

- Nuclear facilities claiming the 10-year tech-neutral section 45Y PTC are eligible for a new location-based “**nuclear energy community**” bonus credit for taxable years beginning after July 4, 2025, based on the facility site’s satisfying a threshold amount of local employment in the nuclear industry.
 - This bonus is not allowed if the ITC is claimed.
- Qualifying fuel cell projects that begin construction after December 31, 2025 are now eligible for a **new 30-percent ITC**.
 - These fuel cell projects do **not** have to meet the IRA’s prevailing wage and apprenticeship requirements and greenhouse gas requirements.
 - However, these fuel cell projects are **not** eligible for either the domestic content bonus or the energy community bonus.
- The OBBBA also moves up the commencement of construction deadline for the 10-year credit under section 45V for the production of clean hydrogen (a fuel cell feedstock) from January 1, 2033 to January 1, 2028.

Clean Fuels; Carbon Capture, Utilization, and Sequestration (CCUS); and Advanced Manufacturing

Sections 45Q, 45Z, and 45X

- Increased the section 45Q credit for qualified carbon oxide that is “utilized” (e.g., used in a commercial process) or used in enhanced oil or natural gas recovery to **equal the credit rate** for qualified carbon oxide that is stored in secure geological formations.
 - Applicable to equipment placed in service **after July 4, 2025**.
- Extends the clean fuel 45Z PTC by **two years** (from December 31, 2027 to December 31, 2029).
 - Partially **relaxes** the greenhouse gas emissions requirements under the clean fuel PTC for fuel produced and sold after 2025.
 - For fuel produced **after 2025**, eliminates the enhanced PTC rate for sustainable aviation fuel, effectively introduces a cap on the credit (except for fuel for which certain animal manure is a feedstock), and limits to fuel derived exclusively from feedstock produced or grown in the **United States, Mexico, or Canada**.
- For wind components, the section 45X credit is not available in respect of those components produced and sold **after 2027**.
 - Introduced a general phase-out of the section 45X credit for the production of critical minerals **starting in 2031**.
 - Introduced a section 45X credit for metallurgical coal, which terminates **at the end of 2029**.

Tax Credit Transfers

04

Tax Credit Transfers

Post-OBBBA

- The OBBBA **largely leaves intact** the tax credit transfer regime introduced by the IRA.
 - For taxable years beginning after July 4, 2025, however, an SFE is not permitted to purchase any credits arising under sections 45Q, 45U, 45X, 45Y, 45Z, or 48E.
- Tax credit purchasers will need to diligence (and contract around) risks introduced by the OBBBA, including the FEOC provisions and begun construction matters.
- Other provisions enacted or amended in the OBBBA (e.g., sections 168(k), 174A, and 163(j)) reduced the amount of taxable income that many potential tax credit purchasers have to offset by tax credit purchases.

Recent Market Trends in the Tax Credit Space

05

Market Trends

- More buyers are looking to delay tax credit purchases until 2026.
 - The OBBBA reduced the effective tax rate for many corporations, which means that quarterly payments made prior to the passage of the bill were higher than ultimately necessary.
 - Some buyers also are pursuing carrybacks to offset taxes paid in prior years.
- Section 45U production tax credits have become particularly popular as a result of the current administration's support of nuclear energy (as well as the absence of recapture risk and the relatively straightforward diligence process).
- Sellers are showing flexibility on pricing terms if buyers will make forward commitments to purchase credits arising in 2026 and 2027.
 - Developers can obtain financing in part on the strength of such forward commitments from tax credit buyers.
- Basic corporate issues in structuring tax credit transactions remain unaffected (e.g., use of forbearance agreements to avoid recapture as a result of foreclosure by lenders and strength of guarantees to backstop indemnification obligations) although the passage of the OBBBA has reduced some of the perceived risk around adverse changes in tax law and related allocation of risk.

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