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IRS Issues New Begin Construction Rules for Solar and Wind Projects

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On August 15, 2025, the U.S. Department of the Treasury (“[Treasury](#)”) issued [Notice 2025-42](#) (the “[New Notice](#)”). The New Notice provides highly-anticipated guidance on the beginning of construction standard for purposes of qualifying solar and wind projects for the clean electricity production credit under Section 45Y (the “[CEPC](#)”) and the clean electricity investment credit under Section 48E (the “[CEIC](#)”).¹

The New Notice came as a relief to solar and wind developers. The changes to the beginning of construction standard in the New Notice are neither retroactive nor as restrictive as initially feared. Although the New Notice eliminates the Five Percent Safe Harbor—thereby removing a key planning tool for developers—this change applies only prospectively. The New Notice leaves the Physical Work Test largely intact and therefore allows developers to continue to use a familiar standard, which many have relied on successfully for years. Most importantly, solar and wind developers, now armed with clear start-of-construction guidance, can accelerate planning for projects in their pipelines.

Background

The One Big Beautiful Bill Act (the “[OBBBA](#)”), signed into law on July 4, includes an early sunset provision for the CEPC and CEIC for solar and wind projects.² Under the OBBBA, a solar or wind project will not be eligible for the CEPC or CEIC unless the project is placed in service (as determined for federal income tax purposes) by the end of 2027. However, a solar or wind project will not be subject to this early sunset rule if the project begins construction on or before July 4, 2026 (i.e., one year after the enactment of the OBBBA) (the “[BOC Exception](#)”).³

¹ All “Section” references are intended to refer to sections of the Internal Revenue Code of 1986, as amended.

² We discussed the energy tax provisions of the OBBBA in a recent [client alert](#).

³ A project that successfully begins construction in 2025 or in 2026 (on or before July 4) nonetheless must be placed in service in 2029 or 2030, respectively, in order to satisfy the Continuity Safe Harbor (as defined below).

When the OBBBA was enacted, the U.S. clean energy industry anticipated that the existing beginning of construction standard would apply for purposes of the BOC Exception. The IRS and Treasury developed this standard through a series of notices going back to 2013 (the “[Prior IRS Notices](#)”).⁴ Based on this guidance, a project owner generally could begin construction of a credit-eligible project by paying or incurring at least five percent (5%) of total project costs under a bright-line test (the “[Five Percent Safe Harbor](#)”) or beginning physical work of a significant nature on the project, whether on-site or off-site, under a facts-and-circumstances test (the “[Physical Work Test](#)”). In addition, in order to secure a begin construction date, a project owner must demonstrate continuous construction or continuous efforts on the project (the “[Continuity Requirement](#)”) or, under a safe harbor, place the project in service during the four calendar years after the calendar year when the project satisfied the Five Percent Safe Harbor or the Physical Work Test (the “[Continuity Safe Harbor](#)”).

However, soon after enacting the OBBBA, the Trump administration caught the industry off guard by signaling a new beginning of construction standard for purposes of the BOC Exception. [Executive Order 14315](#), issued on July 7, 2025 (the “[Executive Order](#)”), directed the U.S. Department of Treasury (“[Treasury](#)”), to strictly enforce the early sunset of CEPC and CEIC described above, including by issuing new guidance to ensure that taxpayers cannot circumvent existing beginning of construction rules to avoid the application of the early sunset provision, within 45 days of the OBBBA’s enactment (i.e., by August 18, 2025).

Key Takeaways from the New Notice

- **Physical Work Test Retained.** The Physical Work Test remains largely unchanged for purposes of the BOC Exception. Under the New Notice, the test continues to focus on the nature of the work performed and not the amount or the cost. Project owners may still perform on-site work and off-site work (including the manufacture of step-up transformers) to satisfy the test. Physical work of a significant nature continues to include work performed by the taxpayer or another person under a binding written contract. From this perspective, developers that have successfully applied the Physical Work Test can continue to apply a familiar legal standard and generally will not need to alter planning or strategy. However, in a subtle change, the New Notice revises IRS Notice 2018-59 and IRS Notice 2013-29 by requiring that physical work of a significant nature be “performed” rather than “begin.” It is unclear if Treasury intended this to be a substantive change or a clarifying change, as these notices use the words “begin” and “performed” almost interchangeably.
- **Five Percent Safe Harbor Eliminated.** The New Notice eliminates the Five Percent Safe Harbor for purposes of the BOC Exception, which will create challenges for solar and wind developers. The Five Percent Safe Harbor gave developers the opportunity for bright-line certainty in contrast to the Physical Work Test, which relies on a facts-and-circumstances analysis and therefore is less predictable. Moreover, the Five Percent Safe Harbor gave developers the flexibility to purchase equipment (e.g., solar modules) in bulk to allocate across a portfolio of projects.
- **Exception for Small Solar Systems.** The Five Percent Safe Harbor continues to be available for distributed solar systems with nameplate capacities of 1.5 megawatts (as measured in alternating current) or less. Nameplate capacity of two or more applicable solar facilities having integrated operations (i.e., common ownership, same placed-in-service year, common point of interconnection/common end user) are aggregated for purposes of this limitation. Residential rooftop solar systems under a third-party ownership model are likely to qualify for this exception.

⁴ See, e.g., IRS Notice 2013-29; IRS Notice 2018-59; IRS Notice 2022-61.

- Modest Change to the Continuity Rules. Although the New Notice does not accelerate the Continuity Safe Harbor (which was a concern for the market), it makes an important change to the Continuity Requirement for taxpayers relying on the Physical Work Test. Under Prior IRS Notices, taxpayers could demonstrate continuity through (1) a “continuous program of construction” continuing physical work of a significant nature or (2) “continuous efforts” toward completion, regardless of whether satisfying the Five Percent Safe Harbor or the Physical Work Test.⁵ Going forward, however, projects relying on the Physical Work Test must establish a “continuous program of construction” in order to satisfy the Continuity Requirement, which is generally viewed as a more stringent standard than “continuous efforts.”⁶
- Prospective Application Only. The New Notice does not apply to solar and wind projects that begin construction (under the Prior IRS Notices) before September 2, 2025. Accordingly, any solar or wind project that has successfully begun construction as of today, or will begin construction in the next ~2 weeks, can continue to utilize the Five Percent Safe Harbor and/or the Physical Work Test as described in the Prior IRS Notices.
- Other Technologies Still Governed by Prior Guidance. Consistent with the Executive Order, the New Notice does not apply to other project technologies that are eligible for the CEPC and CEIC, including energy storage, geothermal, and nuclear. These technologies continue to be subject to the beginning of construction standard under the Prior IRS Notices and therefore remain eligible to use the Five Percent Safe Harbor.
- What Does this Mean for FEOC? The OBBBA codified the beginning of construction rules as in effect on January 1, 2025 (i.e., as described under the Prior IRS Notices) for purposes of the foreign entity of concern (“FEOC”) provisions. Most notably, the material assistance limitation does not apply to any CEPC- or CEIC-eligible project that begins construction before 2026. In a footnote, Treasury appears to confirm that the New Notice will not affect the beginning of construction standard for purposes of the FEOC provisions—although the note does not foreclose Treasury from having more to say on this topic in future guidance.

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⁵ See IRS Notice 2021-41. Prior to this notice, taxpayers seeking to satisfy the Five Percent Safe Harbor were required to show “continuous efforts” and taxpayers seeking to satisfy the Physical Work Test were required to demonstrate a “continuous program of construction.”

⁶ Most developers establish construction timelines to ensure qualification under the Continuity Safe Harbor, and therefore we do not expect this change to have a material impact in practice.

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