
IRS Issues New Guidance For Renewable Energy Tax Credits

Legal Alert

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The IRS continues to issue guidelines regarding the tax credit provisions of Sections 45Y and 48E of the Internal Revenue Code, as amended (IRC). The latest notice was issued as Notice 2025-42 on Aug. 15, 2025 (Notice). The standards and rules set forth in the Notice apply to projects where the construction begins after September 2, 2025. The Notice was issued to enforce the One Big Beautiful Bill Act, which terminated the Sections 45Y and 45E credits for applicable wind and solar facilities whose construction begins after July 4, 2026 and which are placed in service after December 31, 2027. It establishes standards for determining the beginning of construction for wind and solar facilities and limits the use of the 5% safe harbor to solar projects with a nameplate capacity of 1.5 MW (AC) or less. **Thus, if possible, any projects with a nameplate capacity greater than 1.5 MW (AC) which seek to utilize the 5% safe harbor rule should do so prior to Sept. 2, 2025.**

The Notice provides that construction is treated as beginning when physical work of a significant nature begins. The significant work required depends on the nature of the work performed, not its cost. Section 3 of the Notice establishes rules for determining when this occurs. For example, for solar facilities, physical work of a significant nature may include the installation of racks or other structures to affix photovoltaic panels, collectors, or solar cells to a site.

In many ways, the Notice is good news for the wind and solar industry. Each had been concerned that the Treasury would issue rules that would not allow for a project to begin construction for tax purposes until a significant portion of the facility is built.

Although the Executive Order pursuant to which the Notice was issued directs Treasury to issue guidance on the Foreign Entity of Concern (FEOC) requirements, the Notice specifically states (in a footnote) that the Notice does not address the FEOC restrictions, including when construction begins for the material assistance from a prohibited foreign entity rules found in Section 45Y(b)(6) and 48E(b)(1)(E) of the Code, as amended by the OBBBA (the FEOC Equipment Rule), which only apply to projects beginning construction Jan. 1, 2026, or later.

Taxpayers also must maintain a continuous program of construction with respect to the facility. A continuous program of construction involves continuing physical work of a significant nature. Section 4.04 of the Notice provides a safe harbor that taxpayers may rely on to satisfy this requirement; outside the safe harbor, establishing continuity will be determined by the relevant facts and circumstances.

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As McGuireWoods notes, although the Notice does not contain specific language regarding work on a main power transformer (69 KV or greater), the applicable Treasury Regulations include in a qualified facility transformers, inverters and converters which modify the characteristics of electricity into a form suitable for use, transmission or distribution. Therefore, a popular safe harbor method whereby a taxpayer begins physical work of a significant nature on a main power transformer should continue to be available.

ATTORNEYS MENTIONED

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