

ONE BIG BEAUTIFUL BILL ACT - THE IMPACT ON THE CLEAN ENERGY PRODUCTION TAX CREDIT AND INVESTMENT TAX CREDIT

On July 4, 2025, President Trump signed into law the One Big Beautiful Bill Act¹ (the OBBBA), which significantly curtails and, in some cases, terminates, clean energy tax incentives introduced or expanded under the Inflation Reduction Act of 2022 (the IRA).² This includes the clean electricity production credit under Section 45Y³ (the PTC) of the Internal Revenue Code of 1986 (the Code) and the clean electricity investment credit under Section 48E⁴ of the Code (the ITC). The OBBBA also expands upon the existing foreign entity of concern (FEOC) rules under the IRA⁵ by imposing new "prohibited foreign entity" restrictions on U.S. taxpayers and qualified facilities.

Below is a summary of the notable provisions in sections 70512 and 70513 of the OBBBA, which relate to the ITC and PTC. The Clifford Chance team will continue to monitor any guidance or executive orders as they are published.

Phase-Outs of PTC and ITC for Wind and Solar Facilities

Section 45Y of the Code provides PTCs of up to 1.5 cents per kilowatt-hour of electricity produced and sold by a qualified facility, assuming compliance with certain prevailing wage and apprenticeship requirements.⁶ Section 48E of the Code provides a base ITC of up to 30% of eligible project costs of a qualified facility, assuming compliance with certain prevailing wage and apprenticeship requirements.⁷ Under the IRA, PTCs and ITCs were subject to phaseouts beginning in the later of (i) 2032 or (ii) the calendar year in which the U.S. achieves certain greenhouse gas emissions targets.⁸ Under the OBBBA,

¹ OBBBA, H.R. 1. 119th Cong. (2025).

² IRA, H.R. 5376 117th Cong. (2022).

³ 26 U.S.C. § 45Y.

⁴ 26 U.S.C. § 48E.

⁵ 42 U.S.C. § 18741(a)(5).

⁶ 26 U.S.C. § 45Y(a)(1) and (2).

⁷ 26 U.S.C. § 48E(a)(1) and (2).

⁸ 26 U.S.C. § 45Y(d).

these PTC and ITC phaseouts are accelerated and will begin in 2032.⁹ Now facilities, other than wind and solar, must begin construction before 2033 to claim the full PTC or ITC credit.

The OBBBA further restricts wind and solar facilities by terminating PTC and ITC eligibility for wind and solar facilities that begin construction after July 4, 2026, unless the facility is placed in service before January 1, 2028. Wind and solar facilities that begin construction prior to July 4, 2026, are not subject to this phase out of ITC and PTC eligibility. Notably, this placed in service deadline only applies to wind and solar facilities. As noted above, for non-solar and wind technologies, such as energy storage technologies (which are only ITC eligible), PTC and ITC phaseouts will begin only for facilities that begin construction after 2033.

Key takeaway: The placed in service deadline of January 1, 2028 creates a compressed development window for wind and solar facilities beginning construction after July 4, 2026, with potential consequences for financing, procurement, and construction timelines. Companies developing wind or solar facilities should carefully assess construction timelines and monitor any updates to the beginning-of-construction guidance (as further noted below).

Facilities that began construction before January 1, 2025, and comply with the continuity requirement¹⁰ remain eligible for tax credits under Sections 45 and 48 of the Code.

Updates to Beginning of Construction Guidance

Historically, the term “beginning of construction” refers to the date on which construction on a facility commenced under IRS Notices 2013-29 (with respect to the PTC) and 2018-59 (with respect to the ITC). The Department of the Treasury (the Treasury) and the Internal Revenue Service (the IRS) have long recognized two methods to determine whether a facility has begun construction under the Code: (i) the physical work test and (ii) the 5% safe harbor. Under the physical work test, construction is considered to have begun when “physical work of a significant nature”¹¹ is performed, which includes both onsite work directly related to the facility and offsite work on components integral to the facility’s operation. Under the 5% safe harbor, construction is deemed to have started when the taxpayer has paid or incurred at least 5% of the total cost of property that is integral to the production of electricity. Once the beginning of construction date has been established, a taxpayer must make continuous efforts towards such facility being placed in service for federal income tax purposes. The IRS provides a safe harbor under which the taxpayer is determined to have made continuous efforts towards completion if the facility is placed in service within four years of the end of the tax year the facility began construction.¹²

On July 7, 2025, President Trump issued an executive order¹³ instructing the Treasury to issue new and revised guidance on the longstanding “beginning of

⁹ OBBBA, § 70512, amending 26 U.S.C. § 45Y(d).

¹⁰ IRS Notice 2022-61.

¹¹ IRS Notice 2013-29 and Notice 2018-59.

¹² IRS Notice 2022-61.

¹³ Exec. Order “Ending Market Distorting Subsidies For Unreliable, Foreign Controlled Energy Sources”.

construction” rules by August 18, 2025 (the Executive Order). The Executive Order directs the Treasury to restrict “the use of broad safe harbors unless a substantial portion of a subject facility has been built.” Since it is unclear what the new guidance will include, the Executive Order introduces uncertainty on whether and to what extent taxpayers can continue to rely on the physical work test or 5% safe harbor to begin construction on a facility.

The Executive Order further directed the Treasury to promptly implement the enhanced rules concerning Prohibited Foreign Entities (as further discussed below). Notably, the OBBBA seems to codify the beginning-of-construction guidance under IRS Notice 2013-29 and Notice 2018-59, but only for the purposes of determining whether a facility is subject to the Material Assistance Rule (as described below).¹⁴ It is unclear whether the new beginning-of-construction guidance, as applicable to ITC and PTC safe harboring, directed by the Executive Order will wholly or partially replace the guidance, as applicable to ITC and PTC safe harboring, under IRS Notice 2013-29 and Notice 2018-59.

Key takeaway: The Executive Order throws the industry into disarray by potentially creating two beginning-of-construction standards for the purposes of determining: (i) whether a facility begins construction in time to be eligible to claim credits without being subject to the December 31, 2027 placed in service date and (ii) the beginning of construction as related to applicability of the Material Assistance Rule. It remains unclear whether any new guidance will drastically change the longstanding beginning of construction framework. Taxpayers seeking to begin construction on their wind and solar facilities prior to the July 4, 2026 deadline should carefully monitor any new guidance. Clifford Chance will provide updates as they become available.

Prohibited Foreign Entity Rules

The OBBBA introduces new restrictions on taxpayers and facilities concerning Prohibited Foreign Entities¹⁵ (PFEs and each, a PFE). Below is a summary of the key aspects of these rules.

Prohibited Foreign Entities

Immediately upon enactment of the OBBBA, a taxpayer who is deemed to be a PFE will be prohibited from claiming PTCs or ITCs, in addition to other credits.¹⁶ Qualified facilities or energy storage technologies will also face PTC and ITC eligibility restrictions if the facility receives “material assistance” from a PFE (as further discussed below), which includes “specified foreign entities” (SFEs and each, an SFE) and “foreign-influenced entities” (FIEs and each, an FIE), each defined below:

An SFE means:

1. An entity designated as a foreign terrorist organization by the Secretary of State;¹⁷

¹⁴ OBBBA, § 70512, amending 26 U.S.C. § 7701(a).

¹⁵ OBBBA, § 70512, amending 26 U.S.C. § 45Y.

¹⁶ CC is publishing other briefings on the other energy tax credits where the PFE rules may also apply.

¹⁷ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, §9901(8)(A).

2. An entity included on the “Specially Designated Nationals” list maintained by the Department of the Treasury’s Office of Foreign Assets Control;¹⁸
3. An entity alleged by the Attorney General to have been involved in conduct for which a conviction was obtained under certain espionage and export control laws;¹⁹
4. An entity determined by the Secretary of Commerce, in consultation with the Secretary of Defense and the Director of National Intelligence, to be engaged in unauthorized conduct that is detrimental to U.S. national security or foreign policy;²⁰
5. An entity identified as a Chinese military company operating in the U.S.;²¹
6. An entity included on the Department of Homeland Security’s “Uyghur Forced Labor Prevention Act Entity List”;²²
7. Certain Chinese battery manufacturers, including Contemporary Amperex Technology Company, Limited; BYD Company, Limited; Envision Energy, Limited; EVE Energy Company, Limited; Gotion High tech Company, Limited; Hithium Energy Storage Technology company, Limited; or any successors;²³ or
8. A “foreign-controlled entity,” which means: (i) the government of China, Russia, Iran, or North Korea (collectively, the Covered Nations); (ii) an agency of a Covered Nation; (iii) a citizen or national of a Covered Nation who is not a U.S. citizen or lawful permanent resident; (iv) an entity organized under the laws of or having its principal place of business in a Covered Nation; or (iv) entities (including subsidiaries) “controlled” by an entity or person described in (i) to (iii).²⁴
 - (a) “Controlled” for the purposes of the “foreign-controlled entity” definition means the ownership (by vote or value) of the profits or the ownership of a beneficial interest equal to more than 50% of the entity being tested.
 - (b) The attribution rules under Section 3.18(a)(2) of the Code apply for purposes of determining ownership of interests in any entity.

Key takeaway: The most important prong of the SFE is the “foreign controlled entity” definition. Foreign taxpayers or sponsors should carefully consider their ownership structure to determine whether they might be considered a foreign controlled entity.

¹⁸ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, §9901(8)(B).

¹⁹ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, §9901(8)(D).

²⁰ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, §9901(8)(E).

²¹ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, §1260H.

²² UFLPA Entity List, DEP’T. OF HOMELAND SEC., <https://www.dhs.gov/uflpa-entity-list>.

²³ National Defense Authorization Act for Fiscal Year 2024, H.R.2670 § 154(b), 119th Congress (2023).

²⁴ OBBBA, amending 26 U.S.C. § 7701(a)(51)(C)(i) – (v).

An FIE is an entity in which:²⁵

- An SFE has direct authority to appoint a board member, executive officer, or individual with similar powers;
- An SFE owns a 25% or greater interest;
- Multiple SFEs collectively own 40% or more interest;
- One or multiple SFEs collectively own 15% or more of the entity's debt; or
- An "applicable payment" is made to an SFE, pursuant to a contract, agreement or arrangement that grants the SFE "effective control" (see below for what constitutes "effective control") over the qualified facility or energy storage technology.²⁶

Prior to additional guidance being issued by the Secretary of the Treasury, "effective control" for the purposes of the PFE rules means the ability to:²⁷

- Determine the amount or timing of activities related to electricity production or storage;
- Determine which entity may purchase or use the output of the qualified facility or energy storage technology;
- Restrict access to data critical to the production or storage of energy undertaken at the qualified facility or energy storage technology; or
- On an exclusive basis, maintain, repair, or operate any plant or equipment necessary to the production of energy.

For licensing agreements, "effective control" means the ability to:²⁸

- Direct one or more sources of components, subcomponents, or applicable critical minerals utilized in a qualified facility or energy storage technology;
- Direct the operation of any qualified facility or energy storage technology;
- Limit a taxpayer's use of the intellectual property related to the operation of a qualified facility or energy storage technology; or
- Require the taxpayer to enter into a contract for services for a period of greater than two years.

Transferability Restrictions on PFEs

Section 6418 of the Code, enacted under the IRA, allows certain taxpayers to transfer eligible federal income tax credits, including PTCs and ITCs, to unrelated buyers for cash. The OBBBA preserves the ability to transfer credits but restricts any transfer of credits to an SFE.²⁹

Material Assistance

Qualified facilities or energy storage technologies that begin construction after December 31, 2025, are deemed to have received "material assistance" from a PFE if the qualified facility or energy storage technology has a "material

²⁵ OBBBA, amending 26 U.S.C. § 7701(a)(51)(D)(i).

²⁶ OBBBA, amending 26 U.S.C. § 7701(a)(51)(D)(i)(I) – (II).

²⁷ OBBBA, amending 26 U.S.C. § 7701(a)(51)(D)(ii)(II)(aa)–(ff).

²⁸ OBBBA, amending 26 U.S.C. § 7701(a)(51)(D)(ii)(III)(aa)(AA)–(GG).

²⁹ OBBBA, amending 26 U.S.C. § 6418(g).

assistance cost ratio” (the Material Assistance Cost Ratio) is less than certain threshold percentages (the Material Assistance Rule). If a qualified facility or energy storage technology fails to meet those threshold percentages, such qualified facility or energy storage technology will no longer be eligible for the PTC³⁰ or ITC³¹.

For qualified facilities or energy storage technologies seeking credits under Section 45Y or 48E of the Code, the formula to calculate the Material Assistance Cost Ratio is set forth below.³²

$$\frac{\left(\begin{array}{l} \text{taxpayer's total direct costs} \\ \text{attributable to manufactured} \\ \text{products and components} \\ \text{incorporated into the qualified} \\ \text{facility or energy storage} \\ \text{technology} \end{array} \right) - \left(\begin{array}{l} \text{taxpayer's total direct costs attributable} \\ \text{to manufactured products and} \\ \text{components incorporated into the} \\ \text{qualified facility or energy storage} \\ \text{technology which were mined,} \\ \text{produced, or manufactured by a PFE} \end{array} \right)}{\left(\begin{array}{l} \text{taxpayer's total direct costs} \\ \text{attributable to manufactured} \\ \text{products and components} \\ \text{incorporated into the qualified} \\ \text{facility or energy storage} \\ \text{technology} \end{array} \right)}$$

The threshold percentages increase over time for both qualified facilities and energy storage technologies, which means that the direct costs of the manufactured products and components mined, produced, or manufactured by a PFE must decrease over time to maintain PTC or ITC eligibility. Stated another way, qualified facilities or energy storage technologies may contain manufactured products or manufactured product components mined, produced, or manufactured by a PFE, so long as the amount, on a direct cost basis, of such products not mined, produced, or manufactured by PFEs is greater than or equal to the threshold percentages as set forth below.³³

	Beginning construction in 2026	2027	2028	2029	2030 and after
Qualified Facilities	40%	45%	50%	55%	60%
Energy Storage Technologies	55%	60%	65%	70%	75%

³⁰ OBBBA, amending 26 U.S.C. § 45Y(b)(1)(E).

³¹ OBBBA, amending 26 U.S.C. § 48E(b)(6)(E) and 48E(c)(3).

³² OBBBA, amending 26 U.S.C. § 7701(a)(52)(D)(i)(I)-(II).

³³ OBBBA, amending 26 U.S.C. § 7701(a)(52)(B)(i)(I)-(V) and (52)(B)(ii)(I)-(V).

Material Assistance Safe Harbor Tables

The Treasury plans to issue safe harbor tables to identify the total direct costs and percentages of any manufactured products necessary to calculate the Material Assistance Cost Ratio. These safe harbor tables must be published by December 31, 2026. Until the Treasury issues such guidance, taxpayers may rely on (i) the safe harbor tables found in IRS Notice 2025-08,³⁴ which establish the percentage of the total direct costs of any listed eligible manufactured product or manufactured product component for the purposes of determining eligibility for the “domestic content bonus credit,” and (ii) a certification by a supplier of a manufactured product, eligible component, or constituent element, material, or subcomponent of an eligible component regarding (a) the actual direct costs of the product or component that was not produced or manufactured by a prohibited foreign entity, or (b) that the product or component was not produced or manufactured by a PFE.³⁵

Key takeaway: Overall, the new PFE rules introduce significant compliance and diligence obligations for developers, investors, and supply chain partners, who must consider the manufacturing location of all applicable product components and manufactured product components incorporated in their facility. Furthermore, the Executive Order³⁶ directs the Treasury to take “prompt action” to implement the PFE rules and clients should expect the PFE rules to evolve and are advised to maintain thorough records of all procurement-related documentation.

As an example of considerations developers should be taking into account, developers of grid-scale energy storage facilities seeking ITCs must consider the manufacturing processes of all components listed in the “Updated Table for Battery Energy Storage System (BESS)” of IRS Notice 2025-08.³⁷ The BESS cells are assigned 52% under the safe harbor table. As such, if they are manufactured by a PFE, the inclusion of the BESS cells alone would preclude the facility from ITC eligibility. Energy storage facilities that begin construction in 2026 must contain at least 55% of manufactured products or manufactured product components mined, produced, or manufactured not by a PFE, meaning the 52% for the BESS cells associated with material assistance from a PFE would render the facility ineligible for ITCs.

Penalties

ITC Recapture

For taxpayers claiming the Section 48E ITC after July 4, 2027,³⁸ the OBBBA introduces a 100% recapture for any facility that claimed the ITC but subsequently makes certain payments to a PFE (Applicable Payment) any time before the 10-year anniversary of the facility’s placed in service date.³⁹

³⁴ OBBBA, amending 26 U.S.C. § 7701(a)(52)(D)(iii)(II)(aa).

³⁵ OBBBA, amending 26 U.S.C. § 7701(a)(52)(D)(iii)(II)(bb).

³⁶ Exec. Order “Ending Market Distorting Subsidies For Unreliable, Foreign Controlled Energy Sources”.

³⁷ IRS Notice 2025-08, §7.02.

³⁸ OBBBA, amending 26 U.S.C. § 7701(a)(50)(a)(4)(C).

³⁹ OBBBA, amending 26 U.S.C. § 7701(a)(50)(a)(4)(A).

An Applicable Payment means a payment to an SFE under a contract or other arrangement that would allow the SFE to exercise “effective control” (as detailed above) over a qualified facility or energy storage technology.⁴⁰

Key takeaway: ITCs claimed after July 4, 2027, will have a 10-year, post-placed in service date period where the taxpayer is at risk of recapture for payments to SFEs that would allow an SFE to exert effective control over the qualified facility or energy storage technology. In contrast, under previous law, the recapture risk period after a facility was placed in service was 5 years for ITCs.

Penalties for Understatements and Misstatements

The OBBBA imposes strict penalties for noncompliance with the requirements and restrictions placed on the energy tax credits, including PTCs and ITCs. Taxpayers who understate income by 1% or more due to disallowed or recaptured tax credits may be subject to a penalty equal to 20% of the understatement.⁴¹ In addition, beginning in 2026, taxpayers could receive penalties for relying on inaccurate certifications by suppliers regarding domestic content or foreign sourcing. Such penalties may equal the greater of \$5,000 or 10% of the understatement.⁴² This penalty may be avoided if the taxpayer can establish that the inaccuracy or falsity was due to a reasonable cause and not willful neglect.

Key takeaway: Disallowed credits due to violations of the PFE rules, including violations of the Material Assistance rules, may lead to a taxpayer’s understatement of income. Taxpayers claiming energy tax credits must be diligent in ensuring compliance with the PFE rules, including compliance through their supply chains.

Clifford Chance is closely monitoring developments and will provide updates as further guidance becomes available. If you have any questions, please contact a member of Clifford Chance’s Energy & Infrastructure team.

⁴⁰ OBBBA, amending 26 U.S.C. § 7701(a)(50)(a)(4)(B), incorporating by reference 26 U.S.C. § 7701(a)(51)(D)(i)(II).

⁴¹ OBBBA, amending 26 U.S.C. § 6662(m).

⁴² OBBBA, amending 26 U.S.C. § 6695.

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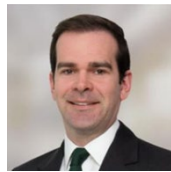
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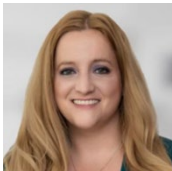
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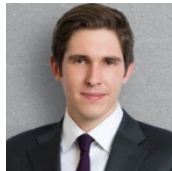
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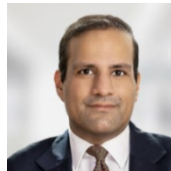
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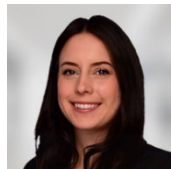
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