Clifford Chance

BRIEFING

Wind and solar projects in the US

The vacatur of Notice 2025-42

September 04, 2026

This briefing explains a recent US court decision affecting tax credits for wind and certain solar energy projects. It covers how a key Internal Revenue Service (IRS) notice was struck down, what that means for the government's ability to appeal, and what developers should now consider when planning their projects.

Key issues

1. The Notice
2. Background
3. The Government's appeal window
4. Discussion

THE NOTICE

Notice 2025-42 was issued to clarify the beginning of construction rules for wind and certain solar projects with respect to the Production Tax Credit (PTC) and Investment Tax Credit (ITC) termination provisions in Sections 45Y and 48E of the Internal Revenue Code. These termination provisions apply to applicable wind and solar projects which begin construction after July 4, 2026 and are placed in service after December 31, 2027. For applicable wind and solar projects whose construction begins after July 4, 2026, the tax credits generally remain available only if the project is placed in service by December 31, 2027.

Before the Notice was issued, developers could establish the beginning of construction by incurring at least 5% of the total project cost or by proving that "physical work of a significant nature" had begun on the project.

The Notice applied solely to wind projects and certain solar projects.[1] The Notice eliminated the 5% test as a means of establishing the beginning of construction for these projects, leaving only the physical work test available to developers.

The Notice was effective as of September 2, 2025. For projects beginning construction on or after September 2, 2025, many developers have been relying on physical work to trigger the start of construction.

BACKGROUND

On June 6, 2026, the U.S. District Court for the District of Columbia vacated Notice 2025-42 in its entirety in Oregon Environmental Council v. Internal Revenue Service. The court concluded that Treasury and the IRS acted arbitrarily and capriciously by (i) failing to adequately explain their departure from the prior beginning of construction framework, (ii) failing to properly consider the reliance interests that departure affected, and (iii) treating wind projects and certain solar projects differently without adequate justification. The court's order nullified Notice 2025-42 rather than limiting relief to the parties in the litigation.

THE GOVERNMENT'S APPEAL WINDOW

The government had 60 days from entry of judgment to file a notice of appeal. The government's appeal window expired on August 5, 2026.

The government could seek an extension of the appeal deadline under Federal Rule of Appellate Procedure 4(a)(5), but it must do so by close of business September 4, 2026 (today). A successful motion for an extension would require the government to show excusable neglect or good cause.

As of the date of this publication, the government has not filed a notice of appeal. Absent a timely notice of appeal, a timely Rule 4(a)(5) extension motion, or the narrow circumstances supporting reopening under Rule 4(a)(6), the government's ordinary direct-appeal options would be exhausted. The expiration of the initial deadline therefore represents a significant development, although the extension period must also close before the parties can treat the government's appellate options as exhausted.

DISCUSSION

If the extension period closes without an appeal-related filing, developers should revisit beginning of construction strategies for projects which began construction on or after September 2, 2025.

Many developers have relied upon physical work for wind projects and certain solar projects beginning construction on or after September 2, 2025. Now, developers have an opportunity to revisit their beginning of

[1] Notice 2025-42 retained the 5% test for "low output solar facilities." A low output solar facility is an applicable solar project that has a maximum net output of not greater than 1.5 MW (AC), measured at the level of the qualified facility. Section 6 of Notice 2025-42.

construction methods and supporting documentation. This is of particular importance where such projects have also met the 5% test on or before July 4, 2026. Careful planning may provide developers additional flexibility across project pipelines.

The vacatur does not prevent Treasury or the IRS from issuing new beginning of construction guidance. Any new guidance, however, would need to address the deficiencies identified by the court, including the agencies' obligation to explain a change in policy and to consider reliance interests.

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