

Tax Insurance

# Client Alert: Begun Construction

Timing is everything when it comes to qualifying for renewable energy tax credits.

## Navigating the BOC Rules in the Post-OB3 Era

While the IRS's **beginning of construction ("BOC")** framework has long served as an important milestone for tax credit eligibility, the enactment of the **One Big Beautiful Bill Act ("OB3")** introduces a potential legislative cliff that may eliminate the availability of existing tax credits if wind and solar projects do not timely satisfy BOC rules.

On August 15, 2025, the IRS issued **IRS Notice 2025-42 (the "Notice")** to provide guidance for what it means for a project to attain BOC.

This article will briefly touch upon the pre-existing BOC standards found in IRS Notice 2018-59, discuss the changes implemented by the Notice, and describe how tax insurance will continue to play a meaningful role in supporting financing wind and solar projects.

## Key Takeaways

- **Hard Deadline Approaching:** OB3 terminates existing tax credits for wind and solar projects that haven't achieved BOC by July 4, 2026, and aren't placed in service by December 31, 2027.
- **Physical Work Test Unchanged:** Existing strategies for beginning on-site or off-site physical work of a significant nature can continue to be used to satisfy BOC.
- **The Notice Eliminates The 5% Safe Harbor:** For new solar and wind projects over 1.5 MW AC, the 5% Safe Harbor test is no longer an option. The **Physical Work Test** can still be used to establish BOC with no capacity-based restrictions.

- **Multiple Tests for Multiple Purposes:**

The Notice offers clarity on certain BOC rules, giving stakeholders a stronger footing for planning. However, unless further guidance is provided, ambiguity between the Notice and previous guidance may oddly result in a project having multiple BOC dates.

- **Tax Insurance Provides Certainty:**

Tax insurance provides certainty to a project's BOC position, ensuring the qualification for the project's tax credits and protecting against a potential IRS challenge.

## A Refresher: The BOC Rules under IRS Notice 2018-59

Prior to the release of the Notice, the IRS recognized two methods for establishing a project's BOC:

1. **Physical Work Test:** Physical work of a significant nature (on-site or off-site), provided the work is integral to the project and not merely preliminary.
2. **5% Safe Harbor:** Incur at least 5% of total project costs before the applicable deadline.

Both the Physical Work Test and 5% Safe Harbor include a "continuity requirement." Generally, the purpose of the continuity requirement is to ensure that a project that has reached BOC does not have an unlimited amount of time to be placed in service and qualify for a more favorable tax credit regime.

## The Notice

The primary change implemented by the Notice is the elimination of the 5% Safe Harbor for wind or solar projects with a nameplate capacity greater than 1.5 MWac. For such projects, only the Physical Work Test is available to establish a project's BOC.

The Notice only applies to a project with a BOC date on or after September 2, 2025. For purposes of determining if the Notice applies, a project's BOC date is determined under Notice 2022-61. As such, a project, regardless of its nameplate capacity, can rely on the 5% Safe Harbor or the Physical Work Test to determine if the Notice applies to such project.

## Risk Areas and Pressure Points

The OB3 deadline and Notice amplify the financial risks associated with wind and solar projects and the importance of proper tax planning when constructing such projects. Stakeholders must be vigilant to avoid common pitfalls when analyzing BOC dates that could lead to the disqualification of credits:

- Documentation (e.g., vague invoices, unclear scopes of work)
- Application of the 3 ½ Month Rule
- Change orders, warranty claims, and replacement of equipment
- Transfers of equipment
- Cost allocation (particularly on multi-phase or portfolio-level spends)
- Gaps in continuity due to permitting delays, supply chain issues, or changes in financing
- Legal interpretations of "integral" physical work or qualified cost basis
- Uncertainty around the legislative effective date and transition rules

Any of these items could result in disqualification of available tax credits.

## Where Tax Insurance Comes In

Tax insurance provides stakeholders certainty that a project will qualify for the anticipated tax credits. In the event the IRS challenges a project's BOC date and there is a resulting loss of some, or all the tax credits generated by the project, tax insurance can make the insured financially whole.

## Specifically, tax insurance can:

- Protect against an IRS challenge that the project failed to timely satisfy the BOC requirement that results in a loss of some or all tax credits.
- Backstop legal positions taken under the Physical Work or 5% Safe Harbor, especially where facts are nuanced or where cost allocations and contractual terms are under scrutiny.
- Mitigate timing risk in transactions that close before an IRS audit window or prior to receiving an IRS ruling.
- Support financing and tax equity investment, providing comfort that expected tax credits won't be disallowed, delayed, or reduced.

By insuring the validity of the BOC position, tax insurance can provide certainty around critical timing-related tax requirements, which is especially valuable when financiers are evaluating project risk. Sponsors and developers are expected to seek tax insurance to support their BOC position earlier in the project's financing timeline than prior to the enactment of OB3 - even before a tax equity investor or tax credit buyer has been identified.

For example, as lenders often scrutinize a project's BOC position, a tax insurance policy that supports such position offers meaningful comfort and reduces perceived risk, which enhances lender confidence, streamlines underwriting, and ultimately facilitates access to construction or bridge financing at more favorable terms.

## Why CAC Specialty Tax Insurance?

### Our Commitment to Our Clients



Tax technical expertise to discuss the issues with you and your advisors



Comprehensive policy comments to drive better terms and conditions



Dedicated deal team with a minimum of four CAC colleagues



Deep relationships with advisors and underwriters



Dedicated transactional liability claims handling team



Published leaders in the renewable energy sector

## Our Team: Why Are We Better?



Largest US dedicated tax advisory & brokerage team (10 full time tax attorneys)



Experience placing coverage on deal timelines



Highest tax insurance bind rate in the industry for the last 4 years



99% of all tax insurance submissions receive primary terms



100+ tax equity and transferability transactions bound in 2024

- Average limit size of \$86 million
- Average premium rate-on-line of 1.89%

## Final Thoughts

As the regulatory and legislative backdrop continues to evolve in the wake of OB3 and the Notice, the BOC rules will remain a focal point for wind and solar projects. Tax insurance is a commercially tested risk management tool to help stakeholders navigate the tax uncertainty and execute financings with confidence.

CAC has already received a significant uptick in inquiries regarding insuring BOC risk and is standing by to help stakeholders navigate these issues. Contact us to discuss how tax insurance can be utilized to facilitate project finance and protect and secure a project's BOC strategy.

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