August 8, 2025

The Honorable Scott Bessent
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Secretary Bessent:

We write regarding the July 7 Executive Order, *Ending Market Distorting Subsidies for Unreliable, Foreign Controlled Energy Sources* (the "EO"). Section 3 of the EO directs the Secretary to issue guidance "to ensure policies concerning the "beginning of construction" are not circumvented, including by preventing the artificial acceleration or manipulation of eligibility and by restricting the use of broad safe harbors unless a substantial portion of a subject facility has been built." We strongly support efforts to prevent manipulation or abuse of the tax credits.

At the same time, we support the IRS's longstanding methods to determine "beginning of construction" through either: (1) the "Physical Work" of a significant nature test; or (2) the "5% Safe Harbor," whereby a taxpayer that incurs 5% or more of project costs is deemed to have started construction. Either method requires the taxpayer to make continuous efforts to advance the facility's completion.

Many commercial real estate ("CRE") owners earn income by converting underutilized roof space to energy-producing assets, sized to maximize value to the building owner, typically less than 5 MW. Rooftop solar investments can optimize underused commercial space by providing an additional "floor" of rent payments to enhance real estate firms' productivity and profitability, without disrupting or disturbing new land or public views. Rooftop solar provides extra revenue streams for CRE owners, lowers utility payments for families and businesses, enhances underlying property values, and supports local economies.[1] Furthermore, the extra power generated by rooftop solar, co-located near load centers, can alleviate strain on transmission lines and enhance grid resilience, supporting the electricity America needs to lead the world in AI, grow crypto asset markets, and bring more manufacturing back to our shores.

We believe Congress's intent in the *One Big Beautiful Bill Act* was to continue the IRS's longstanding guidance – allowing taxpayers to rely on ***either*** the Physical Work Test ***or*** the 5% Safe Harbor – for at least 12-months after enactment.[2] It can take months and even years for building owners and contractors to run the regulatory gauntlet to obtain all necessary state and local permits, as well as utility interconnections, before physical work can start on a rooftop solar project.

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[1] See, e.g., NAIOP, *Commercial Rooftop Solar: Tackling America's Energy Crisis* (Spring 2025).

[2] Under the *OB3 Act*, if a project begins construction **on or before** July 4, 2026, it must be "placed in service" within four years after the start of construction to qualify for Section 48E and other credits. If the project begins construction **on or after** July 5, 2026, it must be "placed in service" by December 31, 2027.

Eliminating the 5% Safe Harbor without acknowledging these barriers to meeting the Physical Work test would discourage necessary and productive real estate investment. We strongly support President Trump's overall efforts to "deliver historic permitting wins" across the federal government, "so that America can get back to building again."[3] The 5% Safe Harbor in particular helps achieve this purpose by mitigating uncertainties inherent to construction permitting for real estate and energy projects.

For these reasons, should Treasury and the IRS contemplate modifying longstanding guidance and change "beginning of construction" methods, we respectfully request you seek stakeholder input on how best to minimize economic harm and job losses in implementing the EO. The IRS's most recent endorsement of both the Physical Work Test and 5% Safe Harbor – in Notice 2022-61 (published at 87 Fed. Reg. 73,580 (Nov. 30, 2022)) – sets forth the history of notices and bulletins confirming the continued validity of both methods to access the incentives at Section 45Y, Section 48E, and numerous other energy credits.[4] Taxpayers have relied on these alternative approaches for more than twelve years, going back to May 13, 2013, when Notice 2013-29 was published.[5]

Critically, we request that any initial notice or revised guidance make clear that any such revisions will be applied prospectively after the issuance of guidance, so as not to disrupt projects already started under its current and valid guidance. Changing the rules midstream, especially retroactively, would create significant risks of stranding capital already invested in existing real estate assets.

Thank you for considering our perspectives. We would be pleased to work with you on guidance that responds to the EO's directive, minimizes economic harm, and does not conflict with congressional intent. Please contact Duane Desiderio, SVP and Counsel for energy policy, The Real Estate Roundtable (ddesiderio@rer.org); Eric Schmutz, Senior Director, Federal Affairs, NAIOP (schmutz@naiop.org); Jessica Long, SVP, Nareit (jlong@nareit.com); or Abby Jagoda, SVP, Public Policy, ICSC (ajagoda@icsc.com) if you would like additional information.

The Real Estate Roundtable
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[3] The White House, *President Trump Is Delivering Historic Permitting Wins Across the Federal Government*, Fact Sheet (June 30, 2025).

[4] E.g., the 5% Safe Harbor is used as a test to determine "beginning of construction" for purposes of the energy-related tax credits at §§ 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, and 48E, and the deduction at § 179D. 87 Fed. Reg. at 73,580, col. 2.

[5] See 87 Fed. Reg. at 73,581, notes 4, 5, and 6, col. 3. The IRS has since re-affirmed the Physical Work Test and 5% Safe Harbor in Notice 2013-60 (Sept. 20, 2013); Notice 2014-46 (Aug. 8, 2014); Notice 2015-25 (March 11, 2015); Notice 2016-31 (May 5, 2016); Notice 2017-04 (Dec. 15, 2016); Notice 2018-59 (June 22, 2018); Notice 2019-43 (July 12, 2019); Notice 2020-41 (May 27, 2020); Notice 2021-5 (Dec. 31, 2020); and Notice 2021-41 (June 29, 2021).