




## 2017 Deloitte Renewable Energy Seminar

Innovating for tomorrow

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Deloitte Center *for*  
Energy Solutions

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Navigating DC:  
Regulatory  
developments,  
guidance, and  
process

Brian Americus, Senior Manager, Deloitte Tax LLP  
Gary Hecimovich, Partner, Deloitte Tax LLP

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# Regulatory landscape: White House actions and priority guidance plan

# Overview of White House actions impacting the energy industry

## **Presidential Memorandum on Regulatory Freeze Pending Review** (January 20, 2017)

- Freeze on “regulations”

## **Executive Order on Reducing Regulation and Controlling Regulatory Costs** (Signed January 30, 2017)

- “2 for 1” Executive Order

## **Executive Order on Identifying and Reducing Tax Regulatory Burdens** (Signed April 21, 2017)

- Review of “significant tax regulations”

## **Executive Order on Promoting Energy Independence and Economic Growth** (Signed March 28, 2017)

- Reduce regulatory burdens

## **Executive Order on Implementing an America-First Offshore Energy Strategy** (Signed April 28, 2017)

- Encourage energy exploration and production

# Priority guidance plan for 2017-2018

- Issued October 20, 2017
- Re-aligned with Trump Administration's Objectives
  - Burden Reduction
  - Less Regulation
- Number of Projects Drastically Reduced
- Energy Projects Included/Not Included
  - ITC Regulations
  - ITC Begun Construction Notice
  - Section 118 CIAC Notice

# Status of IRS guidance projects

# Begun construction

Current trends and issues related to the beginning of construction for PTC

- Diligence surrounding M&A of projects and pipelines
- Transfer rules
- Physical work of a significant nature
- Binding written contracts
- Documentation
- Work started in a prior year
- Work by subcontractors
- Continuity provisions for 2020 projects
- Offshore wind considerations

Solar ITC Begun Construction guidance

- SEIA meeting with government
- How will guidance differ from or impact PTC guidance?
- Timing?

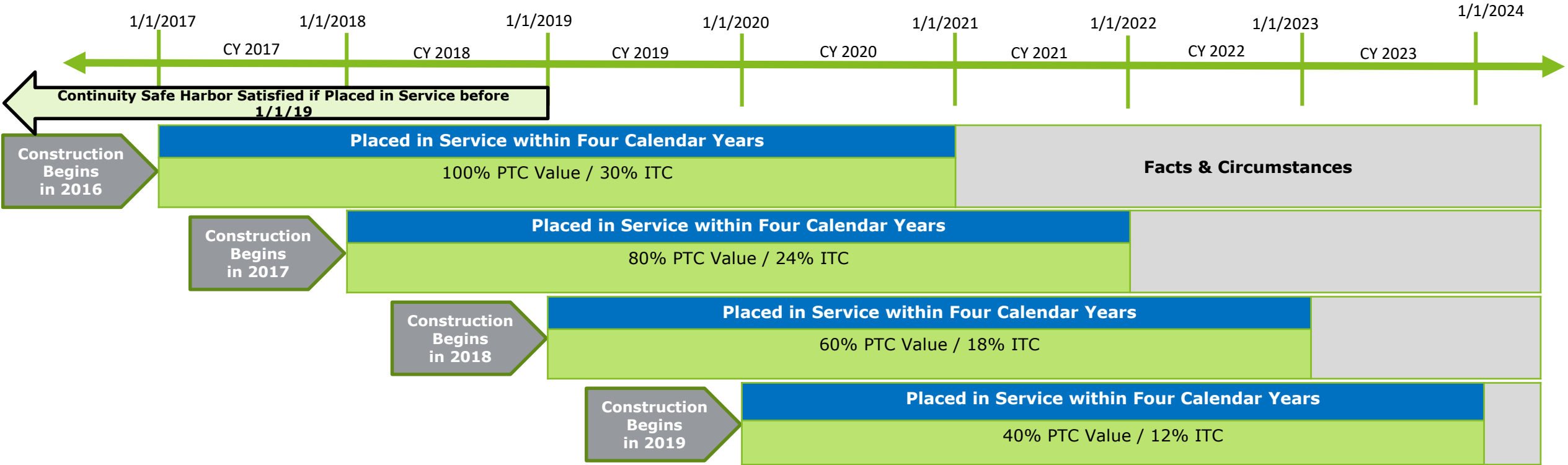


# Begun construction

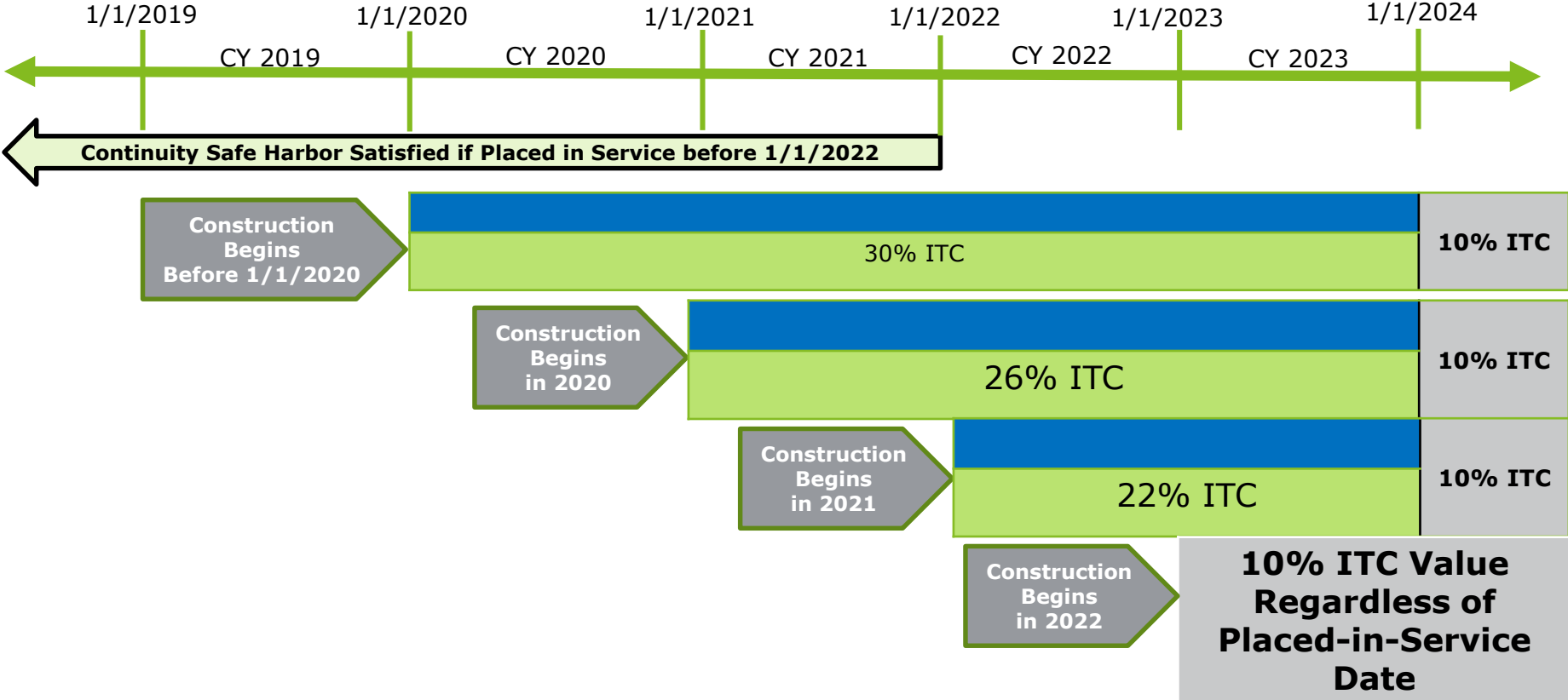
## Summary of Recommendations for ITC Begun Construction Guidance:

- Provide a technology-neutral Continuity Safe Harbor that aligns with the statutory placed-in-service deadline;
- Confirm eligibility of property integral to the qualifying activity and provide examples
- Clarify the relevant unit of property and adopt a Single Project Election for units of solar energy property under the ITC;
- Clarify application of Inventory Rule;
- Provide specific examples of physical work of a significant nature on solar energy property;
- Adopt 5% Safe Harbor and incorporate a Scale-back Provision in recognition of cost over-runs that commonly occur in the project development process;
- Clarify requirements to preserve ITC eligibility when a project or solar energy property is transferred; and
- Provide Excusable Disruptions specific to solar project development.

# Wind begun construction guidance after notice 2016-31 with retroactive "fix"



# Solar begun construction guidance after notice 2016-31 with retroactive "fix"



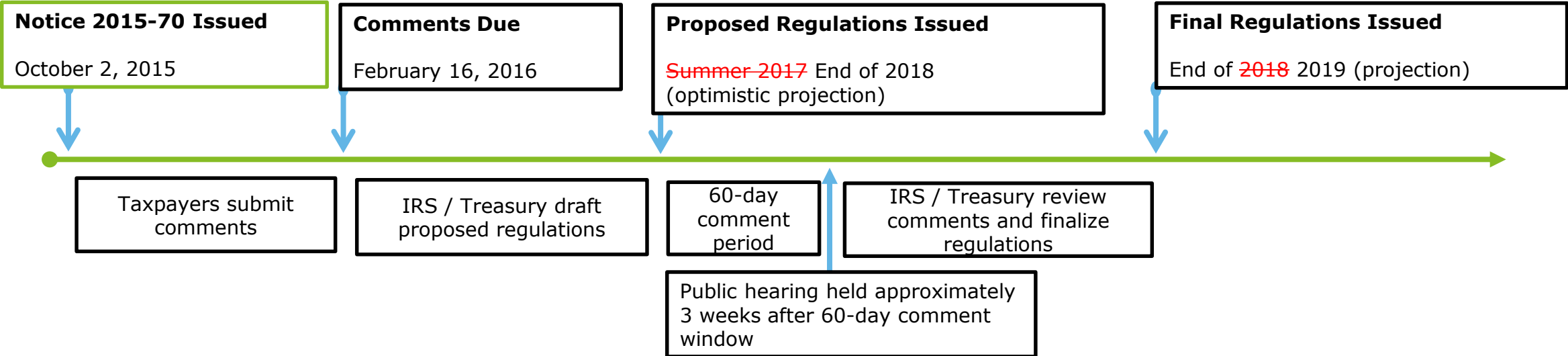
# ITC regulations update

- Public comment for new regulations on definition of qualifying energy property submitted in February of 2016
- 36 letters submitted

SEIA meeting with government

Project removed from “skinny” Priority Guidance Plan

## Possibility of PLRs?



# ITC regulations update (cont'd)

## SEIA Comment Letter

- Re-affirm integral property rule
- Re-affirm building component rule
- Re-affirm a storage device is qualifying ITC system property
- Revise the dual use equipment rule to provide flexibility and certainty to taxpayers
- Apply integral property and primary use standard to dual function property
- Clarify technical issues concerning energy property that includes a storage device

# Alta Wind 1603 case

## Alta Wind 1603 case

- Basis issue from sale of wind projects via sale leaseback
- Cash grant requested based on 30% of purchase price allocated to eligible property
- Treasury reduced grant award to 30% of Alta's cost to build wind projects
- Court awarded \$206 million in damages
- 20 plaintiffs, 8 complaints
- Service's expert witness testimony dismissed
- Appealed to Federal Circuit: Government brief filed in April; Response Brief filed in June; Reply to Response Brief filed in August
- Potential for settlement?

## Alta Wind 1603 case

- Court rejected government's arguments holding:
  - Section 1060 does not apply
  - No goodwill or going concern value could attach
  - PPAs not separate intangible assets with value independent of tangible property
  - Wind projects had “Turn-Key Value”
  - No “peculiar circumstances” indicating inflated purchase prices such as:
    - Unduly manipulating purchase price
    - Entering into separate agreements
    - Causing purchase price to be highly inflated
    - Sale-leaseback NOT per se peculiar circumstances
  - Pro-rata allocations are reasonable



# Energy storage

# Energy storage

## Recurring Tax Technical Issues for ITC eligibility

- Storage eligible? (Integral vs. Functionally Interdependent)
- Eligibility of Storage Property Added to Existing Energy Project
- Separate Ownership of Qualifying Energy Generation and Storage Property
- Dual Use Equipment Rule Compliance
  - Drawing the box to identify relevant property
  - Uncertainty around measurement methodology
- Storage as part of transmission stage? (see Treas. Reg. § 1.48-9(d)(3))

# Energy storage and ITC regulations

## Industry Recommendations (SEIA and ESA)

- Introduce energy storage technologies and market applications
- Emphasize regulations should re-affirm positions concerning:
  - Eligibility of energy storage device generally
  - Storage added to existing energy property
  - Separate ownership
  - Residential energy property divided between IRC sections 48 and 25D
- Proposal for application of Primary Use standard to Dual Use Equipment

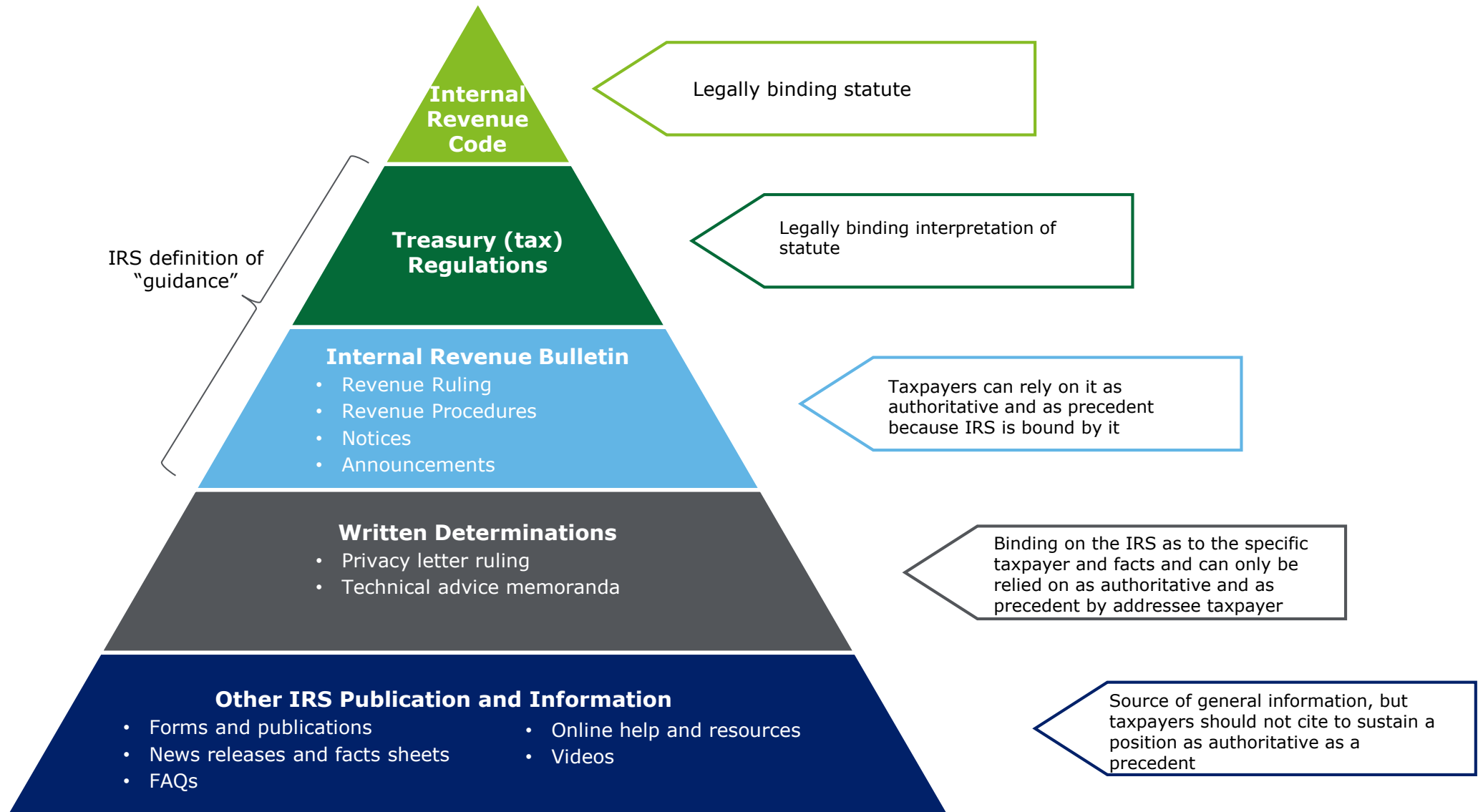
# Moving ahead in energy storage

- Options for taxpayers without additional guidance or PLRs
  - Taxpayers should comprehensively document on the front-end relevant eligibility issues, including:
    - Technical configurations
    - Metering for Dual Use Equipment
    - Legal relationships of the parties
    - Do *contracts* really integrate solar and storage?
  - Utility contracts - control of charging/discharging?
  - Procedures to mitigate risk over recapture period

# Obtaining PLRs and commenting on guidance

# Private letter rulings

- What is a private letter ruling (PLR)?
  - Taxpayer specific guidance, non precedential
  - Filing fee
- Types of issues to be addressed
  - Hypotheticals
  - No rule list (e.g., Begun Construction, Section 48 ITC)
  - Interests of sound tax administration
- Process of obtaining a PLR
  - Pre-submission conference
  - Adverse conference
- Players
- Timing



Source: GAO analysis of IRS documents | GAO-16-720

# Commenting on guidance

- What are the different types of guidance?
  - Regulations, Revenue Rulings, Revenue Procedures, Notices, CCAs, GLAMs, TAMs, FAAs, LB&I Directives
  - Ranges of specificity and precedence
- Types of issues to be addressed
  - Formal requests for industry comments
  - Informal requests for clarification
- Process of developing guidance
  - Maze of approvals
- Process of providing input on guidance
- Players
- Timing

## Clearance Chain for IRS Guidance Publication

- ✓ Drafting attorney
- ✓ Branch reviewer
- ✓ Associate Chief Counsel
- ✓ Deputy Chief Counsel (Technical) or Deputy Chief Counsel (Operations), as appropriate
- ✓ Chief Counsel
- ✓ Assistant to the Commissioner
- ✓ Commissioner/Deputy Commissioner for Services and Enforcement
- ✓ Treasury Attorney-Advisor
- ✓ Tax Legislative Counsel, Benefits Tax Counsel, or International Tax Counsel, as appropriate
- ✓ Assistant Secretary (Tax Policy)



# Discussion and Q&A with Treasury

# Discussion with Treasury

- Hannah Hawkins, Attorney Advisor, Office of Tax Policy, Department of Treasury
  - Focus on Energy and Excise Taxes
- Background
- Updates on Regulatory Guidance
- Impact of Tax Reform
- Q&A



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