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November 4, 2022

Submitted at regulations.gov
Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-46)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, D.C., 20044.

Re: Notice 2022-46, Request for Comments on Credits for Clean Vehicles

The National Consumer Law Center (on behalf of its low-income clients) appreciate the opportunity to respond to your request for comments on credits for clean vehicles. In these comments, we focus on the perspective of consumers and consumer protection.

The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts corporation, founded in 1969, specializing in low-income consumer issues, including car finance and ownership and energy affordability. NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of practice treatises on consumer credit laws and unfair and deceptive practices. NCLC attorneys have written and advocated extensively on all aspects of consumer law and energy justice matters affecting low-income people, conducted training for tens of thousands of legal services and private attorneys, and provided extensive oral and written testimony to numerous Congressional committees on various topics. In addition, NCLC attorneys regularly provide comprehensive comments to federal agencies on the regulations under consumer laws that affect low-income consumers. These comments were written by NCLC attorneys John Van Alst, Olivia Wein, Jenifer Bosco, Margot Saunders and senior policy analyst John Howat, incorporate valuable thoughts and input from other advocates, and are submitted on behalf of our low-income clients.

Introduction

We appreciate the opportunity to provide feedback on the 30D and 25E credits. The inclusion of previously owned clean vehicles in eligibility for a federal tax credits and providing a way for moderate and low-income taxpayers who lack the tax liability to take advantage of non-

refundable tax credits, albeit only though an eligible entity, are exciting improvements and should make clean vehicles more available and affordable for moderate and low-income consumers.

.01 Clean Vehicles (§ 30D)

(1) Definitions: Section 30D(d)(1)(B) of the Code defines a "new clean vehicle," in part, as a motor vehicle which is acquired for use or lease by the taxpayer and not for resale.

a. ***As used in this definition, what, if any, guidance is needed as to the meaning of the terms "acquired," "use," and "lease?"***

Prior to the passage of the IRA, if an eligible vehicle under 30D was leased, the lessor and not the lessee was eligible for the credit. With the passage of the IRA, income eligibility requirements were introduced for credits under 30D. Even if the definition of "taxpayer" is such as to allow non-individual lessors to be eligible for the credit under § 30D, most lessors are unlikely to meet the income requirements to be eligible for credits.
A large portion of EVs are leased.[1] If the lessor remains the entity eligible for credits, most if not all of these transactions will not be eligible for the credit.

Treasury and IRS should define acquired for use to include lessees who acquire a clean vehicle through a lease. This would make the large number of new clean vehicle lease transactions eligible for the credit and fulfil the intent of income requirements by providing the credit to the consumer using and paying for the vehicle and looking to the income of that consumer/taxpayer to determine eligibility for the credit. In so doing however, Treasury and the IRS must ensure that the taxpayer whose income is being used to qualify is the actual recipient of the benefit of the credit. The income eligible taxpayer/lessee could claim the credit on their tax return. If the consumer instead elects to transfer the credit to an eligible entity, the amount should be included in the lease transaction as an itemized capitalized cost reduction under Reg. M § 1013.2(f) [§ 213.2(f)] and disclosed to the consumer as a capitalized cost reduction for the purposes of the payment calculation disclosure 12 CFR § 213.4(f)(2). The election to transfer the credit to an eligible entity should take place after the taxpayer has already finalized the terms of the lease transaction, which should then be adjusted by applying the credit amount as a capitalized cost reduction. The entity to whom the credit is transferred should be responsible for any excess payment if there is a lack of eligibility for the credit.

Should Treasury allow for the use of SEC. 45W. CREDIT FOR QUALIFIED COMMERCIAL CLEAN VEHICLES, for vehicles that are leased by commercial entities to consumers, it should apply similar requirements regarding taxpayer income and vehicle pricing as those found in the 30D credit to ensure that the 45W credit is not used in lease transactions with consumers as a way to subvert the income and pricing requirements of the 30D credit.

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[1] See, *Experian's State of the Automotive Finance Market: Q4 2021* (finding that 27.7% of EVs were leased) Kyle Stock, *Electric Car Drivers Are Too Smart to Own Electric Cars, Almost 80 percent of battery-powered vehicles in the U.S. are leased, not owned,* Bloomberg,.January 3, 2018.

Treasury and IRS should be aware that new business models for transportation, such as vehicle subscriptions, are emerging. To the extent Treasury and IRS provide updated guidance to address any new model, they must ensure that the consumer/taxpayer whose income is being used to qualify for the credit is the actual recipient of the benefit of the credit.

(6) Recordkeeping and Reporting.
(a) In addition to VIN numbers, what additional information should a qualified manufacturer provide to the Secretary to be considered a qualified manufacturer with respect to a particular vehicle, per § 30D(d)(3)?

Qualified Manufacturers should collect and provide to the Secretary record of the vehicle's cash sale price to the consumer in order that Treasury and IRS can verify that manufacturers are not setting the Manufacturer's Suggested Retail Price artificially low in order to qualify the vehicle for the credit. (see response to question 10(c) below)

(c) What information should be included in the report furnished by the seller of the vehicle to the taxpayer and the Secretary under § 30D(d)(1)(H), including the election to transfer the credit under § 30D(g)?

The seller of the vehicle should collect and provide to the manufacturer and the Secretary record of the vehicle's cash sale price to the consumer in order that Treasury and IRS can verify that manufacturers are not setting the Manufacturer's Suggested Retail Price artificially low in order to qualify the vehicle for the credit. (see response to question 10(c) below)

(7) Tax-exempt Entities. Section 30D(f)(3) is stricken by § 13401(g) of the IRA with respect to vehicles placed in service after December 31, 2023. How should clean vehicles acquired and used by a tax-exempt entity after this statutory change becomes effective be treated for purposes of § 30D?

Treasury and IRS should ensure that tax exempt entities are eligible for the credit. The credit could be used against liability for unrelated business income or could be eligible for transfer to an eligible entity if the tax exempt entity lacks tax liability to enable them to make use of the credit themselves.

(8) Registered Dealer and Eligible Entity.
(a) What guidance, if any, is needed to determine who is a licensed dealer who can be registered with the Secretary for purposes of the transfer of the credit under § 30D(g)(2), (7), and (8)?

The ability to register as an eligible entity, entitling a dealer to receive advance payments for credit originally provided to the taxpayer, is one which entails a great

responsibility on the part of the dealer to both the taxpayer and to the Treasury and IRS. Accordingly, Treasury and IRS should prescribe a registration procedure which establishes the dealer's responsibility and trustworthiness. Dealers wishing to be registered as eligible entities should demonstrate that neither they, nor their principals, nor their employees that deal with the taxpayers have been convicted of crimes relating to fraud, odometer tampering, title forgery, or other crimes involving dishonesty or breach of trust or money laundering. Dealer's should also demonstrate they have not been the subject of successful enforcement actions by local, state, or federal enforcement entities. Dealers wishing to be registered as eligible entities should also be required to agree that they owe a fiduciary duty to taxpayers seeking to obtain a clean vehicle tax credit for a vehicle purchased from the eligible entity.

(b) What guidance, if any, is needed regarding what circumstances may lead to the revocation of such registration under § 30D(g)(4)?

Treasury and IRS should create a user-friendly, 30D and 25E dedicated complaint line and on-line complaint form to address consumer issues with eligible entities or, in the alternative, Treasury and IRS should assign responsibility for the creation of such a system to the Office of Taxpayer Advocate. The complaint instructions should be part of required 30D and 25E disclosures. The disclosures and the information about the complaint line should be provided in the language used in the transaction and in accessible formats. Registered dealers should have an obligation to timely address complaints. Whatever entity is in charge of the complaint system should also monitor the Consumer Sentinel Network organized by the Federal Trade Commission for complaints made in regards to eligible entities. Excess complaints should result in a revocation of registration. Excess transfer of credits to dealers that are subsequently found to be ineligible should trigger investigation and potentially revocation of registration.

(10) Vehicle Classifications.
(a) What, if any, guidance is needed to define how vehicles are classified as vans, sport utility vehicles, pickup trucks, or other designations of vehicles for purposes of the manufacturer's suggested retail price limitation in § 30D(f)(11)?

Vehicles should be accurately classified as cars, and not misclassified by manufacturers as light trucks, sports utility vehicles or pickup trucks to take advantage of higher MSRP limit (30(D)(f)(11)). Ensuring vehicles are correctly classified as cars will encourage manufacturers to price them to qualify for the credit and make available more affordable EVs accessible to LMI households. Manufacturers have tried to claim their vehicles are not passenger cars for years but rather trucks or SUVs, in an effort to use a loophole to allow them to sell vehicles that fail to meet mileage requirements.[2] This not only allows them to sell more inefficient vehicles, but

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[2] See, The SUV Loophole:How a changing sales mix is affecting the efficacy of light-duty vehicle efficiency regulations, available at: https://www.nrdc.org/experts/roland-hwang/light-truck-loophole-bad-pickup-drivers-oil-dependency-and-pollution; https://downloads.regulations.gov/EPA-HQ-OAR-2015-0827-4016/attachment_2.pdf.

the vehicles are more profitable and more dangerous for pedestrians and other cars.[3][2] Absent strict enforcement of exclusions from the passenger car category, manufacturers will now attempt to continue to game the system by trying to classify their vehicles as SUVs, Vans, or trucks rather than cars so that they can charge more for them. Some manufacturers have already announced their intentions to focus on selling big, expensive, more profitable EVS to individual consumers and focus their more affordable EVs on fleet sales.[4]

Treasury and IRS charged with prescribing "such regulations or other guidance as the Secretary determines necessary for determining vehicle classifications using criteria similar to that employed by the Environmental Protection Agency and the Department of the Energy to determine size and class of vehicles.". EPA defines vehicles as Vans and SUVs if they are light trucks and not passenger cars.[5] In order to decide whether something is either a passenger car or light truck, EPA looks to the DOT. DOT allows vehicles to be non-passenger automobiles based upon a number of criteria such as transporting more than 10 people or including living quarters or having an open bed for transport.[6] The method most often used to avoid being classified as a passenger vehicle is being classified an automobile capable of off-highway operation[7], as indicated by the fact that it:

> (1)(i) Has 4-wheel drive; or
> (ii) Is rated at more than 6,000 pounds gross vehicle weight; and
> (2) Has at least four of the following characteristics calculated when the automobile is at curb weight, on a level surface, with the front wheels parallel to the automobile's longitudinal centerline, and the tires inflated to the manufacturer's recommended pressure -
> (i) Approach angle of not less than 28 degrees.

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[3] Kea Wilson, Buttigieg's New Emissions Standards Fail to Close 'Light Truck Loophole', Streetsblog, April 4, 2022, available at: https://usa.streetsblog.org/2022/04/04/buttigiegs-new-emissions-standards-fail-to-close-the-infamous-light-truck-loophole/ ("A recent study found that SUV and pickup truck drivers are three to four times more likely to strike a walker when they're making a turn, compared to motorists with smaller vehicles — and when that happens, the pedestrian is two to three times more likely to die.")

[4] David Welch, GM is considering a midsize Hummer, October 19, 2022, Bloomberg, available at: https://www.autonews.com/cars-concepts/gm-considering-midsize-hummer?utm_source=daily&utm_medium=email&utm_campaign=20221020&utm_content=article3-readmore ("Hummer is emerging as a key piece of GM's electric-vehicle strategy. The company has said it's spending $35 billion to build 30 EVs by 2025. It's breaking into the market by appealing to high-end customers with pricey EVs from Hummer and Cadillac and offering lower-priced models to fleet buyers…")

[5] See 40 CFR § 600.002. Sport utility vehicle (SUV) means a light truck with an extended roof line to increase cargo or passenger capacity, cargo compartment open to the passenger compartment, and one or more rear seats readily removed or folded to facilitate cargo carrying. Light truck means an automobile that is not a passenger automobile, as defined by the Secretary of Transportation at 49 CFR 523.5. This term is interchangeable with "non-passenger automobile."

[6] See 49 CFR § 523.2 and § 523.5.

[7] 49 CFR § 523.5(b).

(ii) Breakover angle of not less than 14 degrees.
(iii) Departure angle of not less than 20 degrees.
(iv) Running clearance of not less than 20 centimeters.
(v) Front and rear axle clearances of not less than 18 centimeters each.

Treasury and IRS should not allow manufacturers to avoid classification of their vehicles as cars just in order to be eligible for the tax credit despite charging more for the vehicle. Treasury and IRS should ensure that vehicles seeking to be exempted from classification as a car are truly capable of off highway operation, carry more than 10 people, or have an open bed for transport. Because EVs are in general heavier than ICE vehicles, weight should not be included as an optional criteria. All non-car vehicles eligible for credits with higher prices should have either an open bed for transport, carry more than 10 people, or, have 4-wheel drive, and at least four of the five stated criteria such as running clearance and axle clearance.

(b) What criteria employed by the Environmental Protection Agency and Department of Energy, or other factors (for example, Department of Transportation motor vehicle type classification) should be considered in determining the designation of such vehicles?

As stated in response to question 10(a) above, in order to determine vehicle classifications, EPA defines vehicles as Vans and SUVs if they are light trucks and not passenger cars. In order to decide whether something is either a passenger car or light truck, EPA looks to the DOT. DOT allows vehicles to be non-passenger automobiles based upon a number of criteria such as transporting more than 10 people or including living quarters or having an open bed for transport.[8] The way that manufacturers most often use to avoid being classified as a passenger vehicle is an automobile capable of off-highway operation[9], as indicated by the fact that it:

(1)(i) Has 4-wheel drive; or
(ii) Is rated at more than 6,000 pounds gross vehicle weight; and
(2) Has at least four of the following characteristics calculated when the automobile is at curb weight, on a level surface, with the front wheels parallel to the automobile's longitudinal centerline, and the tires inflated to the manufacturer's recommended pressure -
(i) Approach angle of not less than 28 degrees.
(ii) Breakover angle of not less than 14 degrees.
(iii) Departure angle of not less than 20 degrees.
(iv) Running clearance of not less than 20 centimeters.
(v) Front and rear axle clearances of not less than 18 centimeters each.

[8] 49 CFR § 523.5 - Non-passenger automobile.
[9] 49 CFR § 523.5(b).

Treasury and IRS should not allow manufacturers to avoid classification of their vehicles as cars just in order to be eligible for the tax credit despite charging more for the vehicle. Treasury and IRS should ensure that vehicles seeking to be exempted from classification as a car are truly capable of off highway operation, carry more than 10 people, or have an open bed for transport. Because EVs are in general heavier than ICE vehicles, weight should not be included as an optional criteria. All non-car vehicles eligible for credits with higher prices should have either an open bed for transport, carry more than 10 people, or, have 4-wheel drive, and at least four of the five stated criteria such as running clearance and axle clearance.

(c) Is guidance needed to clarify how the manufacturer's suggested retail price is calculated?

Manufacturer's Suggested Retail Price is defined under 49 CFR § 599.102 as the base Manufacturer's Suggested Retail Price, excluding any dealer accessories, optional equipment, taxes and destination charges. The intent of the MSRP cap in IRA is to cap the price of vehicles eligible for the credit. Currently, however, EVs are often sold above the stated MSRP. Treasury and IRS should consider guidance to define MSRP. Without such a definition, dealers and manufacturers will be encouraged to game the system by having a stated MSRP that makes the vehicle eligible for the credit but then charge consumers a higher actual sale price.

The setting of MSRP by manufacturers is not well regulated. MSRP is not well defined with actual limits related to the prices charged to consumers. Absent some restrictions on manufacturers setting the MSRP artificially low in order to be eligible for the credit, the intention of the statute to limit the price of EVs that are eligible for the credit will not be effective. The MSRP should at a minimum be equivalent to the actual "out-the-door" price paid by the consumer for the clean vehicle. For the purposes of 30D credit, MSRP should be limited so that the average cash price paid by consumers does not exceed the MSRP set by manufacturers.

(11) Election to Transfer and Advance Payments.

(a) What factors should be considered in determining the time and manner of the taxpayer's election under § 30D(g) to transfer the § 30D credit to an eligible entity?

Taxpayers should only be permitted to elect to transfer the 30D credit to an eligible entity after all terms of the purchase transaction have been negotiated. Terms of the transaction, including the price of the purchased vehicle, the amount given for any trade in, the pricing of any add-on or other product, and the cost of financing including the interest rate and other terms, should not be dependent upon the transfer of the credit.

(b) Is guidance needed regarding the definition of "taxpayer," such as whether non-individual taxpayers are eligible for the credit under § 30D?

Treasury and IRS should ensure that tax exempt entities are eligible for the credit, especially non-profits that may provide clean vehicles to low-income households.. The credit could be used against liability for unrelated business income or could be eligible for transfer to an eligible entity if the tax exempt entity lacks tax liability to enable them to make use of the credit themselves.

In defining the taxpayer so as to allow non-individual, tax exempt entities to obtain the credit, Treasury and IRS should avoid allowing any for-profit, non-individual taxpayer from eligibility as the income eligibility requirements should preclude such entities from receiving the credit.

(c) If an election to transfer the credit is made by the taxpayer, what issues should be considered regarding the transfer of the § 30D credit?

Dealers registered as eligible entities will have every incentive to encourage non-eligible car shoppers to claim the credit and transfer it to the dealer, expecting that if the consumer turns out to be ineligible because of their income, the consumer taxpayer will be the entity pursued for recapture. The dealer could derive more profit from the transaction with the extra cash on the table at the time of the purchase and yet avoid any responsibility for excess payment because of income ineligibility.

This could be avoided by having a program that would allow taxpayers to have a certificate sent directly from Treasury or IRS to the eligible entity showing simply that the taxpayer's Adjusted Gross Income (AGI) from the previous tax year was low enough so as to make the taxpayer eligible for the credit provided their modified adjusted gross income under 30D or 25E did not exceed their AGI. Eligible entities could rely on this certificate to show their reasonable efforts to determine that the taxpayer was eligible for the credit.

If a taxpayer's income was high enough such that they would have not been eligible for the credit based upon the previous tax year's income, the transfer would be disallowed as the buyer is likely to be ineligible and subject to recapture. If transfer was prohibited in this case, a buyer could still claim the credit on their next tax return if their income was lower in the year when the purchase occurred.

If a transaction is ineligible for the credit for any reason except income of the taxpayer, the eligible entity/dealer should be responsible to pay back to Treasury any excess payment made under the transfer program.

(e) For purposes of § 30D(g), what guidance, if any, is needed regarding a determination by an eligible entity regarding whether a credit is allowable to the taxpayer?

Guidance is needed to ensure that eligible entities take reasonable steps to ensure that the transaction did in fact result in a credit eligible of being transferred to the eligible entity.

Treasury and IRS could consider setting up a program that would allow taxpayers to have a certificate sent directly from Treasury or IRS to the eligible entity showing that the taxpayer's Adjusted Gross Income (AGI) from the previous tax year is low enough so as to make the taxpayer eligible for the credit provided their modified adjusted gross income under 30D or 25E did not exceed their AGI. Eligible entities could rely on this certificate to show their reasonable efforts to determine eligibility for the credit.

(12) Recapture.
(a) Is guidance needed to coordinate the application of the excess payment provision under §30D(g)(7)(B) and the recapture provision under § 30D(g)(10) as between the transferors and transferees of the credit under § 30D(g)?

Payments made as a result of a transfer of a credit by a consumer taxpayer to an eligible entity that are later determined to be the result of a credit for which the transaction is not eligible should be treated as excess payments and the responsibility of the eligible entity to repay unless the eligible entity shows that it took reasonable measures to ensure that the transaction would in fact result in a credit eligible of being transferred to the eligible entity. Thes reasonable measures include obtaining a certificate of the taxpayers income eligibility as described in 11(e) above as well as assuring themselves that the vehicle and the transaction are eligible. We recommend Treasury and IRS provide guidance on how recapture works for leased vehicles. If the credit is transferred to the lessor, rather than the lessee receiving and using the credit against the lessee's tax liability, then the lessor should be responsible for any recapture.

(13) Please provide comments on any other terms that may require definition or additional guidance.

The Treasury should provide guidance that nonprofits and other tax-exempt entities are eligible for the credit.

.02 Previously Owned Cleans Vehicle (§ 25E)
(1) What, if any, guidance is needed to address how a taxpayer can verify that a vehicle qualifies as a "previously-owned clean vehicle" as defined in § 25E(c)(1)?

§ 25E has the potential to allow numerous low and moderate income consumers that otherwise could not afford a clean vehicle to obtain a clean vehicle and a clean vehicle tax credit. It is important that protections are put in place to ensure that this benefits low and moderate income consumers by reducing their cost for a qualifying clean vehicle rather than the benefit being captured by dealers, or even worse that the promise of such a credit for which the transaction is not even eligible, be used to entice consumer taxpayers to the purchase of an ineligible vehicle.

The Treasury and IRS should create an accessible online VIN lookup tool, similar to the NHTSA recall tracker, that any dealer or consumer can access. This tool should verify whether or not a vehicle in question meets the requirements to qualify for the tax credit, including the age of the vehicle and that the tax credit has not previously been claimed by another taxpayer. (See further discussion of this issue in response to question 4 below.) This tool should clearly indicate to users if a vehicle will or will not be credit eligible if sold to a qualifying taxpayer, for a qualifying price, by a qualifying dealer.

In order to increase consumer awareness of the tax credit, and give another layer of protection for consumers, the Treasury and IRS should design a printable sticker that dealers can print and place on the vehicle clearly outlining the details of the tax credit eligibility for the specific vehicle. This sticker should include at least the make, model, trim, and VIN number of the vehicle, the amount of tax credit the vehicle is eligible for, and clearly outline any other requirements that must be met to qualify (including income and vehicle price). This sticker should also include a unique QR code that links directly back to the entry for this vehicle within the overall online VIN lookup tool so that consumers can easily and simply double check that the vehicle is indeed eligible for the credit. The QR code must be included in any advertisement of the vehicle. If the Treasury and IRS move forward with a sticker, it should be required and not at the option of the dealer. Enforcement to ensure they were being used and displayed correctly would be necessary.

(4) Please provide comments on any other terms that may require definition or additional guidance.

The statute defines qualified sale but does not define sale price for the purposes of 25E.

> "(2) QUALIFIED SALE.—The term 'qualified sale' means a sale of a motor vehicle—
> "(A) by a dealer (as defined in section 30D(g)(8)),
> "(B) for a sale price which does not exceed $25,000, and
> "(C) which is the first transfer since the date of the enactment of this section to a qualified buyer other than the person with whom the original use of such vehicle commenced.

Treasury and IRS should define "sale price" as the total amount paid by the taxpayer to the dealer in the vehicle purchase transaction excluding any amounts payable to a government entity. This will help avoid dealers, which have a tremendous amount of discretion in pricing of vehicles and ancillary products, attempting to have used car sales transactions that exceed the dollar limit prescribed by the statute be included by increasing the price of additional items other than the vehicle such as add-ons in order to maintain or increase profits for the dealer but qualify the transaction for the credit. Such a rule would also help to prevent dealers from taking the benefit of the credit entirely for themselves through increasing the price of items other than the vehicle.

Treasury and IRS should also issue guidance clarifying the definition of qualified sale. The statute indicates that a qualified sale is one which, among other things, is "the first transfer

since the date of enactment of this section to a qualified buyer other than the person with whom the original use of such vehicle commenced."

The only way to truly determine if a previous buyer of a particular vehicle was eligible is if they claimed the 25E credit for their purchase. If the credit was not claimed, there is no way to determine if a previous sale was to a qualified buyer or not. Accordingly, Treasury and the IRS should issue guidance that a qualified sale is one which the vehicle sold has not previously been sold with a resulting credit. In other words the 25E credit should only be available once per vehicle.

We thank Treasury and IRS for the opportunity to submit these comments. Should you have any questions, please contact John W. Van Alst or Olivia Wein, both of the National Consumer Law Center, a jvanalst@nclc.org and owein@nclc.org.