

Treasury Releases Guidance on Electric Vehicle Tax Credits

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On December 29, 2022, the US Treasury Department and the Internal Revenue Service (IRS) released guidance relating to the electric vehicle (EV) tax credit provisions of the Inflation Reduction Act of 2022, Public Law 117-169 (IRA). These EV tax credits include:

- the clean vehicle tax credit (Section 30D) for consumers;
- the commercial clean vehicle tax credit (Section 45W) for businesses; and
- the previously owned clean vehicle tax credit (Section 25E).

The guidance related to Section 45W and consumer leases may be of especially high interest to both the public and the EV industry. On December 12, 2022, Senator Joe Manchin sent a letter to the Secretary of the Treasury requesting that Section 45W not apply to "vehicles that will be leased, rented or used for ridesharing purposes." This letter stated that allowing Section 45W to provide a tax credit for such uses would allow manufacturers to evade the sourcing requirements of Section 30D, contrary to Congress's intent.

Treasury did not honor Senator Manchin's request. Rather, the December 29 guidance (in Fact Sheet 2022-42) states that the Section 45W credit will be available for a vehicle that is "acquired for use or lease by the taxpayer," specifically allowing leased vehicles to qualify for the Section 45W credit (which would be available to the lessor as the tax owner of the EV), and restated the other requirements contained within the text of Section 45W. Importantly, the guidance did not include among the Section 45W eligibility requirements any of the Section 30D requirements in the bulleted

list below.

Section 30D contains provisions stating that, to be eligible for the up to \$7,500 tax credit it provides, an EV must, among other requirements:

- be manufactured in North America;
- meet escalating content requirements regarding battery critical minerals and component manufacturing: a sufficient portion of the critical minerals must be produced in the United States or a country the United States has a free trade agreement with, or otherwise recycled in North America, while a sufficient portion of the components must be manufactured in North America;
- have a battery that must not contain, beginning in 2024, any components manufactured by, and, beginning in 2025, any critical minerals produced by, a "foreign entity of concern", which includes any entity under the jurisdiction of, or owned by, Russia or China;
- have a manufacturer's suggested retail price not in excess of \$80,000 for vans, SUVs or pickup trucks, or \$55,000 for other qualifying vehicles (cars and hatchbacks); and
- be sold at retail to an individual with a modified adjusted gross income no greater than \$150,000, \$225,000 if the purchaser files as a head of household, or \$300,000 if the purchaser files jointly.

While the text of Section 45W does require compliance with some specific subsections of Section 30D, none of those referenced subsections relate to the above bulleted requirements. Senator Manchin's request would have effectively incorporated these Section 30D requirements into Section 45W. The Treasury guidance confirms that the Section 45W commercial clean vehicle tax credit is available to lessors entering into consumer leases of vehicles that would otherwise not meet all of the Section 30D requirements. For example, an EV assembled in South Korea, with a Chinese manufactured battery, that has an MSRP of over \$80,000, and that is leased to an individual with an income of over \$300,000, could qualify for the \$7,500 commercial clean vehicle tax credit.

The December 29 guidance additionally includes Notice 2023-9, which provides a safe harbor relating to the "incremental cost" provision of Section 45W, which limits the maximum credit under such section to the excess of the purchase price of the qualifying EV to a "comparable vehicle" powered solely by an internal combustion engine. The Notice states that, while the "incremental cost" of "minicompact and subcompact cars" is less than \$7,500, for all other street vehicles weighing less than 14,000 pounds, the incremental cost provision "will not limit the available \$45W credit amount for vehicles placed in service in calendar year 2023" and that "the Treasury Department and IRS will accept a taxpayer's use of \$7,500 as the incremental cost for all" such vehicles. One implication of this Notice is that such safe harbor calculation of the "incremental cost" is likely to be examined annually by the IRS and will be subject to future annual Notices.

The December 29 guidance was not limited to the Section 45W commercial clean vehicle tax credit described above. A "white paper" on Section 30D contains additional details regarding Treasury's current intentions as to how to define various terms relating to the Section 30D battery requirements. These include the terms "extraction," "processing," "recycling," "constituent materials," "value," "value added," and perhaps most importantly, "free trade agreement." The document states that "free trade

agreement" encompasses, "at minimum," the agreements with "Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, South Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru and Singapore," that Treasury may identify additional such agreements as qualifying, and "will evaluate any newly negotiated agreements for proposed inclusion." This indicates that Treasury is seeking to take an expansive view of the provision, allowing more batteries to qualify. It now seems possible that a future regulation, perhaps in combination with a bare-bones agreement, might allow the European Union, which currently does not qualify, to be treated as having a free trade agreement with the United States for purposes of Section 30D's critical minerals requirement.

It is important to note that regulations regarding the EV provisions of the IRA have not been published, and that the December 29 guidance did not include formal proposed regulations. In fact, the title of the Treasury white paper, which included "Anticipated Direction of Forthcoming Proposed Guidance," makes clear that the white paper is not intended to be treated as "proposed guidance." It is therefore important for industry participants to stay apprised as to all coming regulatory developments.

Howard Schickler also contributed to this article.

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