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BY ELECTRONIC MAIL

The Honorable Janet Yellen
Secretary
United States Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

To: Internal Revenue Service, Response to Request for Comments, on Credits for Clean Hydrogen and Clean Fuel Production, Notice 2022-58

The below comments are submitted on behalf of the RFS Power Coalition (“Coalition”), an advocacy organization created in 2019. The Coalition is comprised of associations dedicated to promoting the use of electricity as a transportation fuel. The Coalition is led by the Biomass Power Association and the American Biogas Council. Each of these associations is composed of member companies who convert biogenic material into renewable electricity. More information about the Coalition can be found at <https://rfspower.com>.

To date, the activities of the Coalition have focused on assuring a level playing field for sustainably produced transportation fuels across all federal programs. A recent example is the Renewable Fuel Standard (“RFS”) where Congress determined that any fuel (liquid, gaseous, or electricity) would qualify under the RFS if it is suitable for transportation and otherwise meets the requirements of the statute. When Congress enacted 45Z as part of the Inflation Reduction Act (IRA), it followed a similar approach to the RFS by repealing any previous limitation on the physical characteristics of a fuel. The

primary concern of the Coalition is to assure that Treasury and IRS adopt a broad definition of “transportation fuel” that is consistent with the plain language of the IRA and the intent of Congress.

A. *The Definition of “Any Transportation Fuel”*

Section 45Z(d)(5) defines “transportation fuel” as a “fuel” which meets a three-part test, as follows:

- (i) is suitable for use as a fuel in a highway vehicle or aircraft;
- (ii) has an emissions rate which is not greater than 50 kilograms of CO₂e per mmBTU, and
- (iii) is not derived from coprocessing an applicable material (or materials derived from an applicable material) with a feedstock other than biomass.

The Coalition requests guidance on the types of fuels deemed to be “suitable for use as a fuel in a highway vehicle.” For the reasons below, the definition of “transportation fuel” should include *any* type of fuel – liquid, gaseous, or in the form of electricity – that is “suitable for use” as a “fuel.”

First, the scope of the credit is broad, and applies to “*any transportation fuel*” that is both produced and sold in the manner set forth in Section 45Z(a)(1)(A). The statute makes no mention of limiting “fuel in a highway vehicle” to certain types of fuel or physical characteristics.¹ The fuel must be “suitable” for use in transportation, and nothing more. Merriam-Webster Dictionary defines “suitable” as “adopted to a use or purpose.” If “*any transportation fuel*” is “suitable for use” for transportation, it is a “transportation fuel” under 45Z(d)(5). A wide variety of transportation fuels are “suitable for use” in transportation, ranging from natural gas in CNG or LNG truck fleets to electricity in electric vehicles.² There is no basis to conclude that non-liquid transportation fuels are excluded from 45Z or that Congress intended such a result.

¹ This is in contrast to other tax credits for transportation fuels under existing laws that will be repealed by the IRA effective January 1, 2025. For example, the second-generation biofuel tax credit is limited to “any **liquid fuel**” derived from biomass, see 26 USC Section 40(b)(6). See also 26 USC Section 6426, which is limited to certain specific liquid and non-liquid fuels. 45Z contains no such limitations as to type of fuels of physical characteristics.

² In fact, the IRS recognizes CNG and LNG as an “alternative fuel” that qualifies for a refundable tax credit for the sale of such fuel in a motor vehicle. IRS Notice 2013-26

Second, it is significant that 45Z(a)(3)(B) does, in fact, limit the type of fuels to “liquid fuels.” In that section, the special rate for “sustainable aviation” applies when the aviation fuel is a “liquid fuel.” There is no such limitation for other aviation fuels and none found in the definition of transportation fuels used for motor vehicles. In fact, as the Internal Revenue Service has concluded in determining the scope of other tax credits for fuel, “Congress knows how to limit a credit to fuels in a motor vehicle” if they had so intended.³

Third, effective January 1, 2025, 45Z is intended to repeal the existing second-generation biofuel credit. That credit, which expires on December 31, 2024, applies only to liquids (“second generation biofuel means any liquid fuel”).⁴ Section 45Z clearly and unequivocally repealed the “liquid” requirement of the second-generation biofuels by removing any reference to “liquid” in the definition of “transportation fuel” produced on or after January 1, 2025. The repeal of the “liquid” requirement underscores that the definition of “transportation fuel” be broad and include non-liquid fuels.

Finally, the statutory language of “transportation fuel” is not only broad and unequivocal, but limiting the term to “liquids” would be at odds with the intent of 45Z to be a technology neutral program that subsumes all previous tax credits beginning January 1, 2025. For example, 26 USC Section 6426 provides a credit for the transportation use of natural gas, a non-liquid fuel, in the amount of \$0.50 per gallon equivalent. That provision expires on December 31, 2024 and is replaced with 45Z, thus allowing all the fuels described in 26 USC Section 6426 to qualify. There is no basis for Treasury or the IRS to now conclude that fuels previously considered “transportation fuels” under Section 6426 no longer are “transportation fuels” under 45Z simply because they are non-liquid, just like it there is no basis to

³ Memorandum of the Chief Counsel, June 28, 2010.

⁴ See Note 1. Also, 45Z(c) applies to “transportation fuel” that is “produced after December 31, 2024.

exclude electricity as a form of fuel when it otherwise meets the emission rates and other requirements of the statute.

Finally, to underscore Congress' intent to include non-liquid fuels, it is noteworthy that 45Z refers to "the applicable amount per gallon (or *gallon equivalent*) with respect to any transportation fuel..." If 45Z were limited to "liquid" gallons, there would be no purpose in adding the words "or gallon equivalent." Clearly, Congress added the words "equivalence value" so that non-liquid fuels would be included in 45Z.

B. Guidance on "Equivalence"

The applicable monetary amount of the credit is based on each gallon produced and sold, or its "gallon equivalent." Since electricity and gaseous fuels are not in a liquid form, they cannot be measured "per gallon." As a result, Treasury and the IRS need to determine the equivalence value of non-liquid fuels, just like the Environmental Protection Agency has made equivalency determinations for non-liquid fuels under the RFS.

Following enactment of EISA, EPA undertook rule-making to determine the gasoline gallon equivalence values of non-liquid fuels. Those values are set forth at 40 CFR 80.1415.⁵ Notably, for electricity, the Agency is proposing to change the original equivalency value of 22.6 kWh/GGE to 6.5 kWh/GGE, to more accurately reflect the efficiency of the electric drivetrain over the combustion engine. The Coalition urges Treasury and the IRS to adopt a similar equivalency value for electricity for 45Z, for all the reasons set forth in (cite new rulemaking).

C. "Use" Requirement

⁵ [[75 FR 14863](#), Mar. 26, 2010, as amended at [75 FR 26037](#), May 10, 2010; [77 FR 1355](#), Jan. 9, 2012; [79 FR 42159](#), July 18, 2014; [85 FR 7075](#), Feb. 6, 2020; [87 FR 39661](#), July 1, 2022]

To qualify for the credit, a fuel that meets the definition of 45Z(d)(5) must be “produced by the taxpayer at a qualified facility and sold by the taxpayer in a manner described in paragraph (4) during the taxable year.” To meet the sale requirements, the fuel must either be “(A) for use by such person in the production of a fuel mixture, (B) for use by such person in a trade or business, (C) who sells such fuel at retail to another person and places such fuel in the fuel tank of such other person.” There is no requirement of actual use for transportation. Provided that the fuel is “suitable” for transportation and is sold in a manner set forth in 45Z(a)(4), a credit is allowed.

D. Conclusion

Treasury and the IRS need to adopt guidance on the following issues: (1) the definition of transportation fuels; (2) the adoption of equivalency values for non-liquid fuels including electricity; and (3) a clear statement that actual use in transportation is not required, provided the fuel is “suitable” for such use. The Coalition appreciates the opportunity to address these issues and welcomes the opportunity to provide further information or insight upon request.

Thank you for taking these comments into consideration. If you have any questions, please contact us at 202-494-2493 or carrie@usabiomass.org.

Sincerely,

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