APPEALS

DOMESTIC OPERATIONS

APPEALS SETTLEMENT GUIDELINES

(Revision)

ISSUE:	**New Qualified Plug-In Electric Drive Motor Vehicle Credit**
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UIL NO:	**30D.00-00**
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The attached document has been approved as the Appeals Settlement Guidelines and is effective from the date shown below until withdrawn or superseded by subsequent Appeals Settlement Guidelines.

APPROVED:

Reinhard Schmuck — DATE
Director, Domestic Operations

/s/ *Nancy C. Wright* — **7 August 2013**

Nancy C. Wright — DATE
Acting Director, Specialty Operations

EFFECTIVE DATE: June 18, 2013

APPEALS SETTLEMENT GUIDELINES

New Qualified Plug-In Electric Drive Motor Vehicle Credit

STATEMENT OF ISSUES

ISSUE 1: Acquisition Date of the Motor Vehicle

Did taxpayers who paid for low-speed vehicles on or before December 31, 2009 acquire the vehicles on the Bill of Sale, Certificate of Origin date or when the motor vehicles were delivered in 2010 for purposes of claiming the New Qualified Plug-In Electric Drive Motor Vehicle Credit under Internal Revenue Code (I.R.C.) § 30D?

ISSUE 2: Definition of Motor Vehicle under I.R.C. § 30D

Did the vehicles meet the definition of a “motor vehicle” under I.R.C. § 30D, as amended, in the American Recovery and Reinvestment Act of 2009 (ARRA) for vehicles acquired after December 31, 2009?

If the vehicles did not meet the definition of a motor vehicle under I.R.C. § 30D, as amended, do the vehicles qualify for the Plug-In Electric Vehicle Credit under I.R.C. § 30?

COMPLIANCE POSITION

Compliance has disallowed the I.R.C. § 30D credit in 2009 and allowed a reduced credit under I.R.C. § 30 in 2010 based on the following arguments:

- Low-speed vehicles qualify for the I.R.C. § 30D credit if the vehicles were acquired on or before December 31, 2009.
- Under Notice 2009-89, 2009-26 C.B. 1124, vehicles are acquired when title passes as determined by state law. Title passage rules fall within the state’s commercial law. All states have adopted some version of the Uniform Commercial Code (U.C.C.) However, Louisiana is the only state which has not adopted Article 2 covering the sale of goods and adopted its own civil law that governs the sale of goods.
- Under Article II of the U.C.C. § 2-105(2) (2003), title does not pass unless the goods are both existing and identified. Goods that are not both existing and identified are “future” goods.
- The vehicles were not in existence prior to January 1, 2010. Therefore, title could not have passed in 2009 under U.C.C. § 2-105(2).

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- As the vehicles were not acquired before January 1, 2010 or placed in service in 2009, taxpayers do not qualify for the tax credit under I.R.C. § 30D for the 2009 tax year.

- Since taxpayers do not meet the definition of a motor vehicle for years after December 31, 2009, as defined in I.R.C. § 30D, as amended, Taxpayers are not entitled to the credit. A key requirement of this section, is that a vehicle qualifies as a motor vehicle under Title II's motor vehicle definitions found in the Clean Air Act (42 U.S.C. § 7550(2)) (1990) and the 40 C.F.R. § 85.1703 (2010). Taxpayers' vehicles do not qualify as motor vehicles under these definitions.

- The Plug-In Electric Vehicle Credit under I.R.C. § 30 is available to taxpayers for the 2010 tax year.

TAXPAYER POSITION

Taxpayers claim they are entitled to the I.R.C. § 30D credit in 2009 or alternatively in 2010 based on the following:

- The sellers/dealers identified the vehicles on the Certificate of Origin and Bill of Sale by Vehicle Identification Number (VIN). The taxpayers accepted such identification and paid for the vehicles in 2009.

- The Bill of Sale states that the seller sells, conveys, and transfers title to the taxpayer upon the issuance of the Certificate of Origin prior to December 31, 2009. A Certificate of Origin was issued before the stated deadline, and under applicable state law, title passed upon the issuance of the Certificate of Origin.

- Vehicles were certified by the manufacturers to meet the requirements of I.R.C. § 30D for the 2009 tax year by the submission of IRS acknowledgement letters and certification requests for the vehicles pursuant to Notice 2009-54, 2009-26 I.R.B. 112 and I.R.C. § 30D.

- Notice 2009-89 does not apply to these transactions.

- In at least one case, the taxpayer obtained a license plate from the respective Secretary of State prior to December 31, 2009. Therefore, the taxpayer acquired the vehicle in 2009.

- If the credit is not allowable in 2009, the taxpayers maintain that they qualify for the I.R.C. § 30D credit in 2010 as the vehicles meet the requirements of I.R.C. § 30D(d), as amended, for tax years beginning after December 31, 2009.

DISCUSSION

Background

Compliance has identified a significant number of cases where taxpayers have claimed the New Qualified Plug-In Electric Drive Motor Vehicle Credit under I.R.C. § 30D on their 2009 U.S. Federal income tax returns.

Taxpayers purchased low-speed vehicles (also described as street-legal golf carts) on or before December 31, 2009 and typically made full payment for the vehicles at the time of order. The dealers provided the taxpayers a Certificate of Origin and a Bill of Sale which included the Terms and Conditions of the Sale. The Certificate of Origin was issued by the manufacturer to the dealer for the listed vehicles as having a Gross Vehicle Weight Rating (GVWR) of 2,150 lbs with a maximum speed of 25 miles per hour. The Terms and Conditions accompanying the Bill of Sale provided that the vehicle would be built and available for delivery approximately two calendar quarters from when the dealer accepted the order. The Certificate of Origin, a title document and VIN were issued by the dealer to the taxpayers. The vehicle with the matching VIN was ultimately delivered to the taxpayer in 2010. The shipping terms were free on board (FOB) destination on the order confirmation statement. Taxpayers did not present any evidence that the vehicles were actually manufactured or delivered prior to December 31, 2009, and in many instances, the taxpayers did not receive delivery of the vehicles until the third or fourth quarter of 2010.

Legal Analysis

I.R.C. § 30D for New Qualified Plug-In Electric Drive Motor Vehicles Acquired Prior to January 1, 2010

The New Qualified Plug-In Electric Drive Motor Vehicle Credit, I.R.C. § 30D, was originally enacted in the Energy Improvement and Extension Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765. It was effective for qualifying vehicles acquired prior to January 1, 2010.

I.R.C. § 30D, as applicable to tax years beginning after December 31, 2008 and before January 1, 2010, provides a credit for new qualified plug-in electric drive motor vehicles placed in service during the taxable year equal to the sum of:

(1) $2,500, plus
(2) $417 for each kilowatt hour of traction battery capacity in excess of 4 kilowatt hours.

The maximum allowable credit for a vehicle with a GVWR of not more than 10,000 pounds is limited to $7,500.

Notice 2009-54, 2009-1 C.B. 1124 provides a general discussion of the credit under I.R.C. § 30D for new qualified plug-in electric drive motor vehicles acquired before January 1, 2010. Section 3 “SCOPE OF NOTICE” provides that certain types of vehicles, including low-speed vehicles, can qualify for the Plug-In Electric Drive Motor Vehicle Credit if they:

> (1) Are placed in service by the Taxpayer in a taxable year beginning after December 31, 2008;
> (2) Are acquired by the taxpayer on or before December 31, 2009; and
> (3) Are otherwise compliant with the requirements of § 30D.

I.R.C. § 30D for New Qualified Plug-In Electric Drive Motor Vehicles Acquired After December 31, 2009

The American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115, amended I.R.C. § 30D and became effective for vehicles acquired after December 31, 2009.

For tax years after December 31, 2009, I.R.C. § 30D provides a credit for new qualified plug-in electric drive motor vehicles placed in service during the taxable year equal to the sum of:

> (1) $2,500 plus
> (2) for a vehicle which draws propulsion energy from a battery with at least 5 kilowatt hours of capacity, $417, plus an additional $417 for each kilowatt hour of capacity in excess of 5 kilowatt hours (not to exceed $5,000).

The maximum allowable credit for all vehicles is limited to $7,500, and the types of vehicles to which the credit applies are more limited.

I.R.C. § 30D(d)(1)(D), as amended, defines a “new qualified plug-in electric drive motor vehicle,” in part, as a vehicle which is treated as a motor vehicle for purposes of Title II of the Clean Air Act. The applicable section is 42 U.S.C.A. § 7550(2) and related regulations are 40 C.F.R. § 85.1703 (2010).

> 42 U.S.C.A. § 7550(2) provide:
>> “(2) The term “motor vehicle” means any self-propelled vehicle designed for transporting persons or property on a street or highway.”
>
> 40 C.F.R. § 85.1703 (2010) defines a motor vehicle, in part, as follows:
>> (a) For the purpose of determining the applicability of section 216(2), a vehicle which is self-propelled and capable of transporting a person or persons or any material or any permanently or temporarily affixed apparatus shall be deemed a motor vehicle, unless any one or more of the criteria set forth below are met, in which case the vehicle shall be deemed not a motor vehicle:
>> (1) The vehicle cannot exceed a maximum speed of 25 miles per hour over level, paved surfaces;

This provision eliminated low-speed vehicles from eligibility for the new qualified plug-in electric drive motor vehicle credit.

Notice 2009-89, 2009-2 C.B. 714, provides a procedure which allows manufacturers or importers of vehicles to certify to the IRS under penalties of perjury that their vehicles meet the requirements of I.R.C. § 30D. That notice provides general information regarding the credit under I.R.C. § 30D for new qualified plug-in electric drive motor vehicles acquired after December 31, 2009. Section 3 "SCOPE OF NOTICE" provides the credit applies to plug-in electric drive motor vehicles that:

(1) Are placed in service by the Taxpayer in a taxable year beginning after December 31, 2009;
(2) Are acquired by the taxpayer after December 31, 2009; and
(3) Are otherwise compliant with the requirements of § 30D.

Notice 2009-89, Section 4.04 defines a *Motor Vehicle* as follows:

> The term "motor vehicle" means any vehicle that is manufactured primarily for use on public streets, roads, and highways . . . and which has at least 4 wheels. For purposes of this notice, the term "motor vehicle" does not include a low-speed vehicle within the meaning of section 571.3 of Title 49 of the Code of Federal Regulations (C.F.R.), or a vehicle that is manufactured primarily for off-road use, such as primarily for use on a golf course.

Section 571.3 of Title 49 C.F.R. provides that a low-speed vehicle means a motor vehicle (1) that is 4-wheeled, (2) whose speed attainable in 1 mile is more than 20 miles per hour and not more than 25 miles per hour on a paved level surface, and (3) whose GVWR is less than 3,000 pounds.

I.R.C. § 30 Applicability to Qualified Plug-In Electric Vehicles Acquired After December 31, 2009

Certain qualified plug-in vehicles are eligible for a credit under I.R.C. § 30. The credit is an amount equal to 10 percent of the cost of a qualified plug-in vehicle placed in service by the taxpayer during the tax year. Section 30(b) limits the amount of the credit allowed for a vehicle to $2,500.

I.R.C. 30(d)(1) defines a qualified plug-in electric vehicle in general as a "specified vehicle" that meets certain requirements. The definition of a "specified vehicle" under I.R.C. § 30(d)(2) is any vehicle which, "(A) is a low-speed vehicle within the meaning of section 571.3 of title 49, Code of Federal Regulations . . . , or (B) has 2 or 3 wheels."

Notice 2009-58, 2009-2 C.B. 163 contains certain general information regarding the I.R.C. § 30 qualified plug-in electric vehicle credit.

Appeals Analysis

ISSUE 1: When is a Vehicle Acquired for I.R.C. § 30D Purposes?

A taxpayer is entitled to claim an I.R.C. § 30D credit based on (1) the established rate applicable to the year in which the taxpayer acquires the vehicle and (2) the year in which the taxpayer places it into service. The acquisition date of the vehicle is a factual determination.

Notice 2009-89 provides the following definition of the term acquired for the I.R.C. § 30D credit: ". . . a vehicle is considered 'acquired' when title to the vehicle passes under state law." For vehicles acquired prior to January 1, 2010, section 9 of Notice 2009-89 further amplifies Notice 2009-54 by providing that "a vehicle is considered 'acquired' when title to that vehicle passes under state law."

In order to determine when the vehicles were acquired, Appeals analyzed:

a) U.C.C. title passage provisions,
b) State specific laws on title passage, and
c) Federal income tax principles of the benefits and burdens of ownership.

a. "Acquired" Per U.C.C. Title-Passing Provisions

As noted earlier, all states have adopted some version of the Uniform Commercial Code (U.C.C.) However, Louisiana is the only state which has not adopted Article 2 and adopted its own civil law that governs the sale of goods. The U.C.C. governs numerous areas of commercial law and is most often used to resolve contract disputes for the sale of goods. Article 2 of the U.C.C. applies to the sale of goods (Sales).

Several U.C.C. provisions are relevant to the title passage analysis.

Section 2-105(2) of the U.C.C. addresses transferability in future goods and states that a sale of future goods is deemed to be a "contract to sell" (executory contract) as opposed to "a contract of sale" (present sale). It provides that for "a contract of sale" the following two conditions must be met before any interest in specific goods can pass from seller to buyer:

- The goods must be in *existence*, and
- The goods must be *identified* as the specific goods designated in the contract.

The terms "existence" and "identified" are not fully defined by the U.C.C. However, the issue of whether goods constitute future goods is frequently addressed in court cases. It is a preliminary step to determine whether the goods have been identified in the contract.

U.C.C. Section 2-501 - Insurable Interest in Goods; Manner of Identification of Goods, addresses the identification of goods as follows:

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(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs:

(a) when the contract is made if it is for the sale of goods already existing and identified;
(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;
Paragraph (c) refers to crops planted or unborn young animals and is irrelevant to our discussion.

Therefore, if goods "exist," they may be identified by the parties at any time and in any manner explicitly agreed to by the parties. However, where the contract is for the sale of future goods, identification only occurs when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers.

Section 2-401(1) of the U.C.C. clarifies that **"Title to goods cannot pass under a *contract for sale* prior to their identification to the contract (§ 2-501) . . ."** (Emphasis added). The Official Comments under U.C.C. § 2-401 state: "2. 'Future' goods cannot be the subject of a present sale. Before title can pass, the goods must be identified in the manner set forth in U.C.C. § 2-501.. The parties, however, have full liberty to arrange by specific terms for the passing of title to goods which are existing."

A "contract for sale" is defined in U.C.C. § 2-106(1) as both a present sale of goods and a contract to sell at a future time. The Official Comments under § 2-106 state that the term "a contract for sale" is employed as a general concept throughout Article 2.

Under the U.C.C. provisions noted above, title passage for future goods is based upon the time when the seller has finally committed to the fulfilling of the contract obligation. For example, in a "shipment contract", title passes when goods are shipped. If the terms of the contract, required the goods to be picked up at the seller's warehouse, fulfillment would occur upon the pick-up of the goods.

Taxpayers assert in their protest letters that title to the vehicles passed when the taxpayers paid for the vehicles and received VINs per the Terms and Conditions of the Bill of Sale. However, documentation show vehicles were not in existence at the time of sale even though the VIN existed. For future goods, title passes to the buyer when goods are in existence, "shipped, marked or otherwise designated by the seller as goods to which the contract refers," (U.C.C. § 2-501(1)(b)). Thus, even if the identification requirement was met due to the VIN being assigned, the vehicles were not "in existence" prior to January 1, 2010.

The distinction between a contract of sale (present sale) and a contract to sell has been addressed in various Federal tax cases. Historically, courts have relied on 1936/1937 cases that address whether title passed in the context of future goods.

In Perata v. Comm'r., 89 F.2d 550, 552 (9th Cir. 1937), where the court considered a contract to sell stock, the court held, "[a] contract to sell is merely a promise of an executory nature, and until it is executed gives merely a right of action for its breach, or specific performance, and does not pass the property in goods or chattels. . ."

Commissioner v. East Coast Oil Co., 31 B.T.A. 558, aff'd 85 F.2d 322 (5th Cir., 1936), cert. denied, 299 U.S. 608 (1936), addressed contract recitals on a issue whether income from certain sales of Mexican oil were "from sources within the United States." The court states, "[b]ut such terms are not necessarily controlling in a contract of sale. They do not necessarily evidence the actual consummation of the sale; they cannot transpose an executory contract covering unascertained goods into an instrument of present sale."

In summary, the time and place of title passage is at the time and place where the last act was done to cause the passing of title. In cases before Appeals, the Bill of Sale and the Terms and Conditions require the seller to ship the goods via a carrier to a designated destination and relieve the seller of liability for the goods once they have been delivered to the designated destination. Therefore, it is Appeals position that the title passes to the buyer at the time when the goods arrive at the designated destination as noted in the signed Bill of Sale and the Terms and Conditions of sale.

b. "Acquired" Per State Laws Relating to Title-Passing Provisions

State law provisions are often established based on adoption of U.C.C. § 2-105 especially in deciding whether a contract is deemed to be a contract of sale or contract to sell future goods. Court cases, addressing different situations, have consistently ruled that so long as the goods were future goods, no interest in goods could pass.

For instance in C.B. Transportation Services, Inc., et al. v. Bus and Bodies, Inc., et al. (August 15, 1994), Butler App. No. CA 94-02-030, the Court of Appeals of Ohio, Twelfth District, Butler County, held that where a buyer entered into a contract with a bus manufacturer to purchase 62 school buses, the contract was for "future" goods under U.C.C. §2-105(1), enacted in Ohio as Ohio Rev. Code Ann. §1302.01(8). The buyer was provided with the buses' vehicle identification numbers at the time the contract was made, but the buses were not to be manufactured until after the contract was formed. The appellate court recognized that the plaintiff's contracts were for "future" goods, inasmuch as the school buses were not in existence when the contract was made. The court pointed out that the sale was really a present sale of future goods which operates as a "contract to sell" rather than a "contract of sale."

In another case, Carman, 399 B.R. 158 (Bankr. D. Md. 2009), a boat builder signed a contract to build a motorboat for a customer, and more than 2½ years later, the boat builder filed for Chapter 7 bankruptcy. The Bankruptcy Court determined at the time the

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contract was entered into the boat was a "future" good under U.C.C. § 2-105(1), codified in Maryland as Md. Code Ann., Com. Law § 2-105(2), and title could not have passed to the customer pursuant to U.C.C. § 2-401(3)(b), enacted in Maryland as Md. Code Ann., Com. Law § 2-401(3)(b). When the bankruptcy case was filed, the boat was with the builder impending completion even though the customer had paid most of the amount for the boat purchase. The customer objected to the boat being sold at auction on the grounds that he had held title to the boat since the time the contract was signed pursuant to U.C.C. § 2-401(3)(b). The court held that at the time the customer and builder entered into the contract, the boat was "at best a future good" since the boat did not exist nor was it identifiable in the contract. Therefore, title had not passed.

In Appeals cases, taxpayers claim the vehicles were acquired due to the VIN assignment received upon execution of the 2009 agreement. While this is a factor to determine whether the goods were identified at the time the agreement was entered into, the taxpayers have provided no evidence that establishes the vehicles were in existence when the Bill of Sale and the Terms and Conditions of the sale were executed. Therefore, the Taxpayers' Bill of Sale and the Terms and Conditions of the sale were "contracts to sell" rather than "contracts of sale."

While most states have adopted the U.C.C. and require goods to be in existence prior to a contract of sale, some states issue license plates for vehicles without verifying ownership and the vehicles' existence. States issue license plates to assist in the enforcement of traffic laws and not to establish title passage under contract law. This local administrative procedure would not supersede the well-established U.C.C. provisions or state laws regarding the title passage requirements.

c. "Acquired" Per Federal Income Tax Principle of Benefits and Burdens

Under Federal income tax principles, in order for there to be an actual transfer of property, there must be a shifting of the benefits and burdens of ownership from a seller to a buyer. Courts do not recognize executory contract rights as property rights because the executory contract merely represents a transitional step en route to certain property acquisition. See Estate of Johnston v. Comm'r., 51 T.C. 290 (1968), aff'd, sub nom. Dettmers v. Comm'r.,430 F.2d 1019 (6th Cir. 1970).

In the leading case on the benefits and burdens of ownership, Grodt & McKay Realty, Inc. v. Comm'r., 77 T.C. 1221 (1981), the court considered whether petitioners' transactions with a seller were bona fide arm's length sales for Federal income tax purposes, or whether they lacked the commercial, legal and economic substance of sales. The court noted that the intention of the parties must be assessed by reviewing the terms of the agreement in light of the facts and circumstances of the case. Applying the Federal income tax principle of benefits and burdens of ownership to the current cases would lead to the same outcome under the U.C.C. and state law analyses discussed above.

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ISSUE 2: Did the Vehicles in 2010 Meet the Definition of a "Motor Vehicle" Under I.R.C. § 30D, as amended, in the American Recovery and Reinvestment Act of 2009 (ARRA) for Vehicles Acquired After December 31, 2009?

If the vehicles were not acquired until 2010, an issue exists whether the taxpayers are still eligible for the I.R.C. § 30D credit, as amended.

I.R.C. § 30D was amended for vehicles acquired after December 31, 2009. The amended I.R.C. § 30D is only applicable to "motor vehicles" as defined by Title II of the Clean Air Act. Title II of the Clean Air Act and its associated regulations exclude low-speed vehicles from the definition of a motor vehicle. See 40 C.F.R. § 85.1703 (2010) where the definition of "motor vehicle" excludes a vehicle that cannot exceed 25 miles per hour over level paved surfaces. According to the Certificate of Origin for the taxpayers' vehicles, the vehicles have a maximum speed of 25 miles per hour. Since the taxpayers vehicles are low-speed vehicles, they do not fall within the Clean Air Act's definition of motor vehicles. Therefore, I.R.C. § 30D, as amended, is not applicable to the extent the vehicles were acquired after December 31, 2009.

Based on the ARRA legislative history regarding the I.R.C. § 30D amendment, Congress intended to eliminate the credit for low-speed vehicles. The Conference Report states, "[t]he conference agreement also eliminates the credit for low-speed plug-in vehicles and for vehicles weighing 14,000 pounds or more." H.R. Rep. No. 111-16, at 643 (2009).

Notice 2009-89's definition of a "motor vehicle" is consistent with this definition for vehicles acquired after December 31, 2009. Specifically, for the purposes of the Notice, the term "motor vehicle" does not include a low-speed vehicle within the meaning of § 571.3 of Title 49 C.F.R., which provides, in pertinent part, a low-speed vehicle means a motor vehicle whose speed attainable in 1 mile is more than 20 miles per hour and not more than 25 miles per hour on a paved level surface.

For low-speed vehicles acquired after December 31, 2009, I.R.C. § 30 offers a credit for qualifying vehicles. Compliance accepts that the vehicles in question are qualified plug-in electric vehicles and meet the qualifications under I.R.C. § 30. The available credit equals ten percent of the cost of any qualified plug-in electric vehicle placed in service by the taxpayers during the taxable year and limited to $2,500 per vehicle.

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Based on this analysis, the vehicles were not in existence at the time of sale and title passed when the vehicles were physically delivered. Since we conclude that the hazards of litigation for the Government's position are de minimis, Appeals recommends sustaining the Government's position that the vehicles were not acquired prior to January 1, 2010.

Further, taxpayers are not entitled to the credit under I.R.C. § 30D for vehicles acquired after December 31, 2009 as the vehicles do not meet the qualifications for the credit.. The Government's proposed position is to allow the taxpayers a credit under I.R.C. § 30 for the tax year 2010 as the taxpayers are eligible for this credit. Appeals concurs and recommend sustaining the Government's position.

These guidelines are subject to change in the event of any new court decision, ruling, change in statute, or other significant occurrence.

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