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SUBMITTED VIA https:// www.regulations.gov
Agency/Docket Number: REG-113064-23

RE: REQUEST FOR COMMENTS ON Agency/Docket Number: REG-113064-23

On behalf of our millions of members and supporters, the undersigned organizations respectfully submit these comments in response to the Notice of Proposed Rulemaking IRS and IRS-2023-0048-0001 related to the Transfer of Clean Vehicle Credits Under Section 25E and Section 30D. We appreciate the thoughtful approach the IRS has taken in providing guidance for taxpayers and dealers on the transferability of the Federal Tax Credits for qualifying new clean vehicles and previously owned clean vehicles.

We especially appreciate the Treasury and the IRS recognizing the importance of making tax credits available to clean vehicle buyers regardless of tax liability. This is a huge win for equity, as these credits and the cost savings of driving electric are now accessible to more low- or fixed-income Americans who have the most to gain from low operating costs and reduced maintenance and repair expenses that EVs offer.

The availability of a credit for the sale of a previously owned clean vehicle can also allow moderate and low-income Americans access to a tax credit for the purchase of a clean vehicle. There are several parts of the proposed guidance that we respectfully request be modified to clarify and expand access to the used clean vehicle tax credits and the transfer of credits for both 30D and 25E. Broad authority to develop guidance on the Transfer of Credit is granted to Treasury and the IRS through **I.R.C. § 30D(g)(1).**

First Transfer Rule For Previously Owned Vehicles
The proposed limitation to allow the credit only for, "...the first transfer since August 16, 2022, as shown by vehicle history, of a previously-owned clean vehicle after the sale to the person with whom the original use of such vehicle commenced," could severely limit the applicability of the used vehicle credit. Such an interpretation is overly broad in excluding transactions from eligibility in comparison to the language, and our understanding of the intent, of the statute.

The statute defines the term "qualified sale" as 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.

The proposed rule goes further, stating that it must be the first sale of the vehicle after the sale to the original user. Such an interpretation would exclude a sale of a used clean vehicle from eligibility, even though it had never previously been sold to a qualified buyer. The most straightforward way to determine if a car had previously been sold to a qualified buyer would be to exclude vehicles for which a credit under 25E had previously been claimed.

Many clean vehicles are initially leased.[1] As EVs come off leases (typically after three years) they are perfect candidates for the 25E tax credit. However, a substantial number of EVs coming off a three-year lease will not meet the $25,000 price limit. This interpretation of the first transfer rule will ensure that many EVs coming off leases will never be eligible for the 25E tax credit. Instead, as mentioned in "Example 2: Multiple transfers since enactment of section 25E" on page 62 of the guidance, the first transfer for a sale price of over $25,000 will render the vehicle ineligible for subsequent transfers.

Interpreting the code in this way creates the intent of statute **I.R.C. § 25E(c)(2)** simply to ensure that the used clean vehicle tax credit is only applied once per vehicle. Amending the guidance to clarify that a "qualified sale" includes the use of the 25E tax credit, simplifies the interpretation, and allows for the tax credit to be applied more broadly. Many vehicles, including clean vehicles, change hands multiple times throughout their useful lives. Simply allowing one clean used vehicle tax credit per VIN, while meeting other statutory obligations, will allow more hardworking Americans to enjoy the benefits of driving electric.

Interpreting the code based on intent creates more clarity and allows millions of Americans, particularly those with lower incomes, to be able to access the 25E used clean vehicle tax credit and partake in the affordability, climate, and health benefits of driving electric.

Sale Price

Transferability of a credit at the time of sale from a car-buying taxpayer to a car dealer registered as an eligible entity provides funding to consumers at the time they need it and provides eligibility for the credit to moderate and low-income families. However, it also offers a greater opportunity for a dealer to capture a larger portion of the credit as dealer profit rather than making

[1] Kristen Lanzavecchia, *COMMENTARY: Future of new & used EVs brightens as product equivalency nears,* Auto Remarketing, Tuesday, Sep. 19, 2023 (49% of EVs are leased)..

clean vehicles more affordable. The potential capture of the credit by the dealer reduces the

effectiveness of the credit in making clean vehicles more affordable. As a greater percentage of the benefit is captured by dealers, rather than becoming more affordable, eligible clean vehicles simply become more lucrative for dealers to sell.

Dealers are in a position to capture a large portion of the credit because car sales transactions are so complex and consumers are simultaneously negotiating the price of the vehicle, the price of any add-ons, the cost of the credit they will likely obtain from the dealer, as well as the amount they will receive for any trade-in they bring to the transaction. Dealers can change any one or more of these numbers and alter the others to compensate. A car purchase is arguably "the most complicated transaction a consumer ever faces, even more so than a home purchase."[2]

One way to reduce the possibility that the credit simply adds to dealer profit, rather than making clean vehicles more affordable, is to ensure that for section 25E the sale price reflects the actual cost to the consumer to purchase the vehicle. Proposed §1.25E–1(b)(9) would define the ''sale price'' of a previously owned clean vehicle as the total sale price agreed upon by the buyer and dealer in a written contract at the time of sale, including any delivery charges and after the application of any incentives, but excluding separately stated taxes and fees required by law. The proposal states that the sale price is determined before the application of any trade-in value. This definition creates the opportunity to exclude part of the true cost to the car buyer.

The exclusion of government taxes and fees is proper. The discussion of Alternatives Considered mentions that the Treasury Department and the IRS decided to include non-governmental fees as part of the sale price to avoid the possibility that part of the actual sale price would be recharacterized as a fee not included in the sale price. Such a rule is useful as without it there would be strong incentives to recharacterize the actual sale price of the vehicle as something else, rendering vehicles that are ineligible because of their sale price as eligible.

However, the Explanation of Provisions states that "[t]his proposed definition does not include separate financing, extended warranties, insurance, or maintenance service charges." This language, while not reflected in the actual proposed rule, could be interpreted to exclude many, if not all, add-ons from the sale price. Excluding add-ons such as service contracts or extended warranties from the sale price would allow the same undesirable possibilities that the proposed rule avoids by not excluding non-government fees. Dealers have tremendous discretion when setting the price of add-ons.[3] They can easily charge $5,050 for an add-on that costs $50 and

[2] Adam J. Levitin, The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses, 108 Geo. L.J. 1257, 1262 (2020), available at https://www.law.georgetown.edu/georgetown-law-journal/wpcontent/uploads/sites/26/2020/05/Levitin_The-Fast-and-the-Usurious-Putting-the-Brakes-on-Auto-LendingAbuses.pdf.

[3] See John W. Van Alst, Carolyn Carter, Marina Levy, and Yael Shavit, National Consumer Law Center, Auto Add-Ons Add Up: How Dealer Discretion Drives Excessive, Arbitrary, and Discriminatory Pricing (Oct. 2017), available at https://www.nclc.org/issues/auto-Add-ons-add-up.html.

change the sale price under the proposed definition of a $30,000 car to $25,000 while still getting

$30,000 for the car. Alternatively, the dealer could sell a $25,000 car to a consumer, have the consumer transfer the credit to the dealer, and include a $4,050 add-on in the deal. The consumer would receive no affordability benefit from the credit and the dealer would have an additional $4,000 of profit. Such add-ons are often included without a consumer's knowledge.[4] To deter these possibilities the rule should include within the sale price add-ons that are sold with the vehicle.

The proposed definition of sale price should be amended to include the total transaction amount, less any government-imposed taxes or fees. The sale price should include all add-ons and non-government fees that are included in the sale.

Recapture From a Consumer/Taxpayer

The proposed rule would create a tax liability for taxpayers in the amount of the credit if their income exceeds the relevant Modified Adjusted Gross Income (MAGI) under §§25E(b) or 30D(f)(10). The proposed rule would also require taxpayers to file an income tax return for the year that a credit is obtained under section 25E or 30D along with Form 8936 or successor forms.§§ 1.25E–2(f) and 1.30D–4(h). These requirements pose a particular problem when a consumer/taxpayer transfers their credit to a dealer.

As described above, dealers could benefit from the existence of a tax credit in a transaction as they could capture some, if not all, of the benefit of the credit. If the dealer is unscrupulous and retains part or all of the value of the tax credit by including add-ons in the transaction, the dealer could benefit from the sale even if the consumer ends up not being eligible for the credit. The

[4] See Press Release, Office of the New York Att'y Gen., Attorney General James Secures More Than $125,000 For Consumers After Car Dealerships Illegally Overcharged For Bogus Anti-Theft Product (July 26, 2019), available at https://ag.ny.gov/press-release/2019/attorney-general-james-secures-more-215000-consumers-after-cardealerships (consumers charged for etch, in many cases without the knowledge or consent of consumers); Complaint, Federal Trade Comm'n v. Liberty Chevrolet, Inc. d/b/a Bronx Honda, Cace No. 20-CV-3945 (S.D.N.Y. May 21, 2021), available at https://www.ftc.gov/system/files/documents/cases/bronx_honda_complaint_0.pdf (alleging unauthorized Add-on included in consumers' transactions); Complaint, Federal Trade Commission v. Universal City Nissan, Inc., Case 2:16-cv-07329 (Sept. 29, 2016) (alleging Add-ons included in consumers' transactions without authorization); Mark Gokavi, Jeff Schmitt Auto Group accused of 'deceptive' business practices, Dayton Daily News, Aug. 5, 2013. Press Release, Office of the New York Att'y Gen., A.G. Schneiderman Announces Lawsuit Against Staten Island Auto Dealerships for Alleged Deceptive Practices that Illegally Inflated Car Prices (July 28, 2016), available at https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-lawsuit-against-staten-island-auto-dealerships-alleged (detailing add-ons applied without the knowledge of the car buyer, sometimes exceeding costs of $2,000 per consumer); Press Release, Office of the New York Att'y Gen., A.G. Schneiderman Announces Settlements with Four Auto Dealer Groups for Deceptive Practices that Resulted in Inflated Car Prices (Apr. 21,2016), available at https://ag.ny.gov/press-release/agschneiderman-announces-settlements-four-auto-dealer-groups deceptive-practices (announcing loan-packing settlements with four dealership groups).

dealer would already have obtained some or all of the amount of the credit, even if the car buyer later wound up being subject to recapture.

The relevant MAGI is not an easy number to determine for a car shopper not familiar with the requirements. No one unfamiliar with the taxpayer's specific situation can tell them to look at a particular line on their previous year's tax return and find the relevant number. While addressing various claimed deductions necessary to determine the relevant MAGI might already have been done by some portion of car buyers for purposes of determining eligibility for the premium tax credit if a consumer purchases a plan from a state of federal Health Insurance Marketplace or to determine eligibility for a Roth IRA, some consumers will have no experience with this. Additionally, while few taxpayers' eligibility will be affected by foreign-earned income and housing costs or income from sources within Guam, American Samoa, the Northern Mariana Islands, or Puerto Rico, without knowing how these issues might affect the consumer, their eligibility can not be determined. This is assuming the sale transaction occurs after the taxpayer has already filed the previous year's tax return and will be based on the previous tax year's MAGI.

A related issue concerns car buyers who transfer a credit to a dealer but then do not file a tax return or fail to file a Form 8936. Dealers would have little incentive to discuss things the consumer would have to do in the future for the credit. Many households do not file a tax return or fail to claim a credit. Many seniors who only receive Social Security do not do so. As the IRS states in IRS TAX TIP 2001-8, TAXABILITY OF SOCIAL SECURITY BENEFITS, "Generally, if Social Security benefits were your only income, your benefits are not taxable and you probably do not need to file a federal income tax return." The Social Security Administration, using MINT7 simulations, projects that about 28 percent of beneficiary families will not file an income tax return through 2030.[5] The Earned Income Tax Credit has shown that even when families would be eligible for cash-back from a tax credit, they all too often fail to file or fail to claim a credit.[6]

The current proposed rule does not specifically state that credits for which no return or Form 8936 is filed will constitute a taxpayer exceeding the modified adjusted gross income limitation such that the consumer taxpayer is subject to recapture. Given the likelihood that many eligible, and especially low and moderate-income, taxpayers will fail to file a return or file Form 8936 such a possibility is concerning. The rule should clarify that failing to file a return or Form 8936 does not constitute the taxpayer exceeding the modified adjusted gross income limitation and so does not make the taxpayer subject to recapture.

[5] Patrick J. Purcell, Income Taxes on Social Security Benefits, Issue Paper No. 2015-02 (released December 2015).

[6] "The Internal Revenue Service Should Consider Modifying the Form 1040 to Increase Earned Income Tax Credit Participation by Eligible Tax Filers". April 2, 2018, available at: https://www.treasury.gov/tigta/iereports/2018reports/2018IER004fr.pdf (estimating that 20% of eligible taxpayers fail to claim the EITC)

Branded Titles

Proposed § 1.25E–2(d) would provide that vehicles with a title brand indicating damage would still be eligible for a section 25E credit. While a variety of brands may not indicate damage to a vehicle that would impact reliability or safety, the 25E program should not be providing incentives for consumers to purchase unsafe or unreliable vehicles, such as those that have been determined to be a total loss, salvage, or junk.

To avoid incentivizing the purchase of such vehicles, eligible entities should be required to access the National Motor Vehicle Title Information System (NMVTIS) maintained by the United States Department of Justice which is easily and affordably accessible. All states, insurance companies, and junk and salvage yards are required by federal law to regularly report information to NMVTIS about vehicles that have been determined to be total loss, salvage, or junk. 99% of the U.S. DMV data is represented in the system based on the most current Federal Highway Administration Data (2020). We encourage Treasury and the IRS to consider adding protections to prevent the transfer of the previously-owned clean vehicle tax credit for the sale of vehicles that are unsafe or unreliable by excluding those identified as a total loss, salvage, or junk in NMVTIS .

Signed,

CALSTART
Coltura
Electric Vehicle Association
Environmental Defense Fund
GreenLatinos
League of Conservation Voters (LCV)
National Consumer Law Center on behalf of its low-income clients
Plug In America
Sierra Club
Southern Environmental Law Center
Union of Concerned Scientists