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EV Charging Stations: Considerations for Dealers and Dealer Landlords

By Victor Danhi, Robert Koonin and Gordon Sung, *ArentFox Schiff*


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By the end of 2023, total U.S. electric vehicles ("EV") sales are expected to reach 10% of light-duty vehicle sales. That's approximately 1.4 million new cars, trucks, and vans that need charging nearly every day. With EV adoption more widespread than ever, many auto dealers and dealership landlords are exploring, or are in the process of, installing charging stations on their properties.

For some, consumers are fueling the demand for charging stations. For certain dealers, OEM franchisors are pushing for the installations. For instance, Ford, General Motors, Lexus, among others, all have varying levels of requirements with respect to the installation of chargers. Similarly, BMW Group, General Motors, Honda, Hyundai, Kia, Mercedes-Benz Group and Stellantis intend to build a network of 30,000 fast chargers together, which will be available for use by owners, regardless of the brand of their vehicle. Indeed, installing charging stations can have many benefits. First, they encourage EV owners to visit the establishment and spend money while their vehicles are charging. Second, the EV charging stations themselves can be monetized and provide income to the landowner. Lastly, they may help the establishment meet certain sustainability goals and guidelines such as LEED accreditation.

The legal and non-legal issues related to EV charging stations are constantly evolving. This article provides a high-level overview and some practical considerations. It should be noted, however, that regulations and incentive programs vary greatly from state to state.

EV Charging 101

To begin, it is important to understand that there are three categories of EV charging: Level 1, Level 2, and Level 3 (DC fast charging).

Level 1 is the slowest method of charging and uses charging cables that plug into a standard 120-volt AC outlet. Level 1 charging adds approximately 3.5 – 6.4 miles of driving range per hour of charge time.

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Level 2 charging is faster and requires the installation of a charging station and a dedicated 240-volt or 208-volt electrical circuit, similar to what is required for higher powered appliances. Level 2 charging can add 14-35 miles of range per hour of charge time.

Level 3 DC fast charging, also known as Supercharging, requires a 480-volt connection. Most commercial landowners and dealership owners will primarily be interested in installing this type of charging station. Depending on various factors, DC fast charging can add up to 100 miles of range in about 30 minutes of charge time.

Incentives

Installing DC fast charging stations can be expensive, with some dealers spending $500,000 or more to install the necessary infrastructure, which could include having to install transformers, switchgear and electrical panels at the property. Fortunately, there are numerous government sponsored incentive programs that landowners can take advantage of to offset these installation costs. In New York, for example, the New York State Energy Research and Development Authority provides a number of incentives that should be considered. The Electric Charging Station Programs allow businesses to claim an income tax credit of up to $5,000 per station, and the Charge Ready NY incentive offers a rebate of up to $4,000 per charging station. The program was so popular that multiple offerings have been exhausted and over $20M has been distributed.

Similarly, the California Electric Vehicle Infrastructure Project (CALeVIP) provides funding for installing publicly available EV charging stations. CALeVIP is funded through the California Energy Commission's Clean Transportation Program and has already paid out over $32 million in rebates for various development projects. To take advantage of CALeVIP, landowners need to apply and meet program eligibility requirements.

Deployment Considerations

Some non-dealership landowners opt to lease space on their property to a third-party charging station operator where such operator retains ownership, responsibility to manage, and most of the financial upside of the charging stations. Many dealers or their landlords, however, have primarily chosen to install the charging stations themselves with the assistance of electrical engineering contractors, thereby retaining ownership over the stations and the financial upside.

While dealers are generally well versed and experienced with facility improvements, whether in connection with major facility upgrades or image program compliance, there are unique considerations involved with the installation of EV chargers. For instance, dealers will need to carefully consider the locations it is has selected for the station, including consulting with experienced engineers to ensure electrical output is sufficient to support the charging stations and satisfy any permitting considerations.

Moreover, the regulatory requirements related to charging stations vary by jurisdiction. For example, in New Jersey, DC fast charging stations require a full site plan review with the local authorities and Phase 1 or 2 environmental review. In some states, a land use attorney may be required to represent the owner and charging station company at certain hearings. Consideration also must be given to the capacity available from your local electric company to determine whether additional supply capacity will be required at the property, implicating additional permitting considerations. Additionally, obtaining necessary approvals, permits, and agreements from local authorities and utility companies and the lack of standardized procedures across different jurisdictions can create difficulties and delays, as well as increase costs for installing charging infrastructure.

Another developing concern is the availability of qualified technicians and service personnel to repair and maintain EV chargers. In fact, it was recently reported by Automotive News that nearly 4,000 public charging stations with more than 7,000 ports were out of service as of early October, according to the U.S. Department of Energy. This could create issues for dealers where manufacturers are requiring a certain number of operating chargers, and thus care should be taken in negotiating contracts with the OEMs to account for factors beyond the dealership's control.

Dealership Specific Considerations

Automotive manufacturers have steadily increased their EV offerings to satisfy consumer demand while also increasingly encouraging their dealers to install EV charging stations on their dealerships. As noted earlier, installing charging stations can be quite expensive, however, and some of the programs that OEMs have pushed onto their franchisees can be quite burdensome for many.

The legal issues related to these EV charging programs is rapidly evolving. For example, a Ford Motor Company program that required its dealers to install EV charging stations in its dealership in order to have access to selling and servicing certain Ford EVs was found by a New York state court to be a "modification" of the franchise agreement, such that under New York law the dealers who contested the modification were entitled to an immediate stay of the proposed modification until a final judgment has been rendered on whether such modifications are lawful under New York law. *See Premier Ford N.Y., Inc. et al. v. Ford Motor Co., Index No. 206893/2022* (N.Y. Sup. Ct. Suffolk County, decided Sept. 20, 2023).

In California, Assembly Bill 473 was passed on October 7, 2023 which amended the California Vehicle Code, effective January 1, 2024, by adding a provision that prohibits OEMs from implementing a program or policy that "coerces or requires" dealers to install direct current fast charging stations, unless, e.g., the OEM reimburses the dealer for one-half of all costs to install and maintain the station, if the dealer pays the OEM one-half of the net income generated from the ongoing use of the stations.

Dealers impacted by these issues should follow the developments closely with the assistance of their legal advisors.

Victor Danhi is a Partner in ArentFox Schiff's Transportation & Mobility Group. He represents national and regional automotive and trucking clients in consumer class actions and complex litigation, federal and state regulatory matters, unfair competition claims, commercial and consumer litigation, and franchise disputes. Victor has successfully defended clients at trial before juries, judges, and arbitrators. He has extensive experience in the effective resolution of high-stakes litigation, litigation avoidance and regulatory compliance.

Gordon Sung is Counsel ArentFox Schiff's Transportation & Mobility. He specializes in advising clients on emerging technology regulatory issues, with a particular focus on autonomous and electric vehicles and AI. As the former US General Counsel of one of the top international autonomous vehicle companies in the industry, Gordon has a deep understanding of the regulatory issues framing autonomous driving technology and business matters. In addition, he provides regulatory advice to a wide range of automotive clients including EV makers, logistics companies, and online retailers.

Robert Koonin is a Partner and Practice Co-Leader of ArentFox Schiff's Real Estate Group. He handles the purchase, sale, financing, leasing, and development of real estate in various sectors, including automotive, healthcare, multifamily, senior living, industrial, cannabis, self-storage, hotel, and shopping center. Rob and his colleagues advise lenders and investors at all levels of the capital stack on senior and mezzanine loans, and preferred equity and debt investments, covering a broad range of projects across virtually all asset classes.

Executive Director's Message

Erin H. Murphy
NADC Executive Director

The NADC Fall Conference—held October 22-24—in Chicago was by all accounts a great success! It was clear that NADC members were thrilled to be together—learning from colleagues, catching up with old friends and meeting new ones! Attendees of the Fall Conference enjoyed a return to the Ritz-Carlton, Chicago and ten informative (2 sets of concurrent sessions), timely educational sessions as well as a Dealer Counsel 101 program and an in-house counsel roundtable lunch. Once again, the conference piggy backed the ATAE Conference in an effort to accommodate folks attending both meetings. In fact, ATAE attendees were invited to attend our last session of the day—an Update on Ford EV Program Litigation. There were an outstanding 245+ NADC members in attendance…. our highest attendance in the history of NADC meetings and conferences! We were so thrilled to see so many of you in Chicago!!

NADC members who were not in attendance can benefit from the conference materials that have been uploaded to our website at www.dealercounsel.com. Please look under the "Discussions and Publications" section of the website under "Documents and Discussions" and please search "Conference Presentations". If you have questions, please contact Jennifer Polo-Sherk at jpolo-sherk@dealercounsel.com.

I would like to thank all of our event sponsors for their contributions to the Fall Conference. Many thanks to:

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It is with the help of our sponsors that we are able to elevate the quality of the conference while keeping the cost low for members.

I would also like to thank the Program Planning Committee for putting together an excellent line up of sessions. Thank you to:

Jami Farris, Parker Poe Adams & Bernstein LLP

Scott Silverman, DSR Motor Group

Shari Patish, MileOneAuto Group

Evan Nahmias, City Enterprises

Johnnie Brown, Pullin, Fowler, Flanagan, Brown & Poe

Kate Kelley, CarMax

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Tim Robinett, Manning, Leaver, Bruder, and Berberich, LLP

Sarah Seedig, Holland & Knight

And last, but not least, I would like to thank our many speakers who took the time to put together highly informative sessions for all of our attendees:

Johnnie Brown, Pullin Fowler Flanagan Brown & Poe PLLC

Lance Kinchen, Breazeale, Sachse & Wilson, LLP

Shari Patish, MileOne Autogroup

Andy Koblenz, NADA

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I would like to thank Johnnie Brown, Lance Kinchen and Shari Patish for presenting our Dealer 101 program – which had great attendance! This program is designed for those attorneys relatively new to dealership operations and issues, or those more experienced attorneys who may be very knowledgeable about one legal area and wish to gain knowledge of other legal exposures faced by motor vehicle dealers. This particular session focused on Buy-Sell Transaction Basics.

Please save the date for the 2024 NADC Annual Member Conference—April 14-16—at the Silverado Resort & Spa in Napa Valley, CA. The conference will be a two day program designed to provide you with updates, best practices, lessons learned and other useful information. If you are interested in submitting a session proposal for the conference please send the following information to jpolo-sherk@dealercounsel.com:

- Session Topic
- Outline and/or short description of session
- Names and bios of presenters
- Requested length of time

Please check the website www.dealercounsel.com for more information and hotel reservation instructions in the "Upcoming Events" section. We look forward to seeing you at the Annual Member Conference in 2024!

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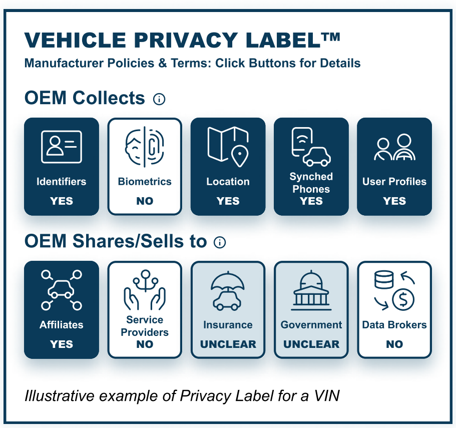

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Treasury, IRS Release Proposed Regulations and Procedures for Clean Vehicle Credit Transfers

Internal Revenue Code Procedures Apply to New and Previously Owned Vehicles

By Nicole M. Elliott, Mary Kate Nicholson, and Amish Shah, *Holland & Knight LLP*

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Nicholson

Shah

The U.S. Department of the Treasury and IRS on Oct. 6, 2023, released proposed regulations on the transfer of clean vehicle credits under Internal Revenue Code Section 25E (for previously owned clean vehicles) and Section 30D (for new clean vehicles), along with Revenue Procedure 2023-33, which provides procedures for the transfer of these credits from the taxpayer who elects to transfer such credit to an eligible entity for credits transferred beginning in 2024. The IRS also updated its series of frequently asked questions regarding the new, previously owned and qualified commercial clean vehicle credits. Highlights of the proposed regulations and revenue procedure are below.

Making the Transfer Election

The transfer election allows a taxpayer purchasing a new clean vehicle or previously owned clean vehicle after 2023 to transfer the credit to a registered dealer in exchange for a financial benefit equal to the amount of the credit. The financial benefit may be in cash, in the form of a partial payment or as a down payment for the purchase of such a vehicle. The transfer is entirely voluntary, but if a taxpayer chooses to transfer the credit, the entire amount of the credit must be transferred.

A taxpayer may make up to two elections to transfer a clean vehicle credit each tax year. A taxpayer could elect to transfer either A) two clean vehicle credits; or B) one clean vehicle credit and one previously owned clean vehicle credit. A taxpayer cannot transfer two previously owned clean vehicle credits. Spouses can each transfer no more than two clean vehicle credits each tax year.

An electing taxpayer must file an income tax return for the taxable year in which the vehicle transfer election took place and must attach a completed Form 8936, Clean Vehicle Credits, to taxpayer Form 1040. If a taxpayer is ineligible for a credit that has been transferred (for example, the taxpayers modified adjusted gross income exceeds the limit to be eligible for the tax credit), the taxpayer must pay the amount received to the IRS. Certain information must be exchanged between the registered dealer and taxpayer prior to the transfer.

Treatment of the Tax Credit Transfer

The payment made by the registered dealer to the taxpayer in the form of cash, down payment or partial down payment is not included in the gross income of the taxpayer. Instead, the payment is treated as an advance payment of the credit to the taxpayer on behalf of the Treasury Department. The basis of the purchased vehicle must be reduced by the amount of such credit.

Advance payments received by the registered dealer are not included in the gross income of the dealer, and the payment made by the registered dealer to the buyer in exchange for the transferred credit is not deductible. Instead, the payment is treated as paid by the taxpayer to the registered dealer as part of the purchase price of the vehicle.

Registration for Dealers

For vehicles purchased after 2023, a taxpayer will be able to claim credits (and, electively, transfer such credits) only if the dealer has registered with the IRS and submits a seller report through IRS Energy Credits Online. The seller report must be done at the time of sale, and a copy must be provided to the taxpayer. The taxpayer must provide the seller identifying information, taxpayer identification number and valid identification for the dealer to submit the seller report. For the seller report to be accepted, the vehicle manufacturer must have submitted the vehicle identification number (VIN) to the IRS as an eligible vehicle.

Advanced Payment to Dealers

Dealers can claim the transferred tax credits only through the advance payment program on IRS Energy Credits Online. A dealer registration option is coming soon, and updates will be posted to the IRS Clean Vehicle Tax Credits internet page. Dealers will not be able to claim these tax credits on their tax returns.

A separate registration is required for the advance payment program. To be eligible for advanced payments, the dealer must be in compliance with federal tax laws—meaning, all required federal information and tax returns of the dealer have been filed, including for federal income and employment tax purposes, and that all federal tax, penalties and interest due of the dealer as of the time of sale have been paid. The IRS anticipates deposits will typically occur within 48 to 72 hours of a successfully submitted time of sale report and advance payment request.

Information contained in this article is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem, and it should not be substituted for legal advice, which relies on a specific factual analysis. Moreover, the laws of each jurisdiction are different and are constantly changing. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. If you have specific questions regarding a particular fact situation, we urge you to consult the authors of this publication, your Holland & Knight representative or other competent legal counsel.

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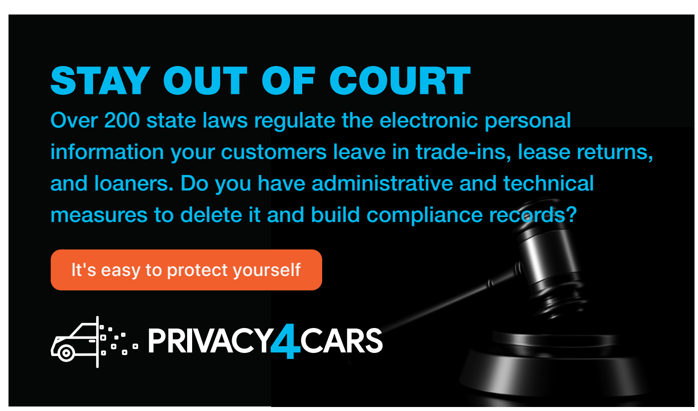
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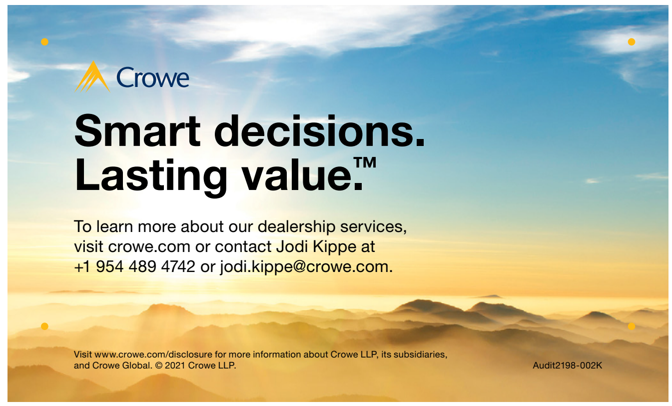
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