Keep Green Initiatives Focused on the Environment

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The House-passed version of the Build Back Better Act has proposed raising tax credits for electric vehicles in a way that would favor American-made and union-built EVs over others. Akin Gump attorneys say the proposal could run afoul of international trade agreements and warn against trying to tie other policy objectives to climate change measures. They propose some policy alternatives.

As lawmakers continue to design ways to achieve climate change and environmental policy priorities, they must consider U.S. international trade obligations that may hinder the implementation of proposed measures.

To ensure compliance with international trade rules while achieving the intended climate change outcomes, lawmakers should draft all measures that respond to environmental issues solely with the intent to promote and achieve these objectives, and not also to address other policy priorities.

In the House-passed version of the Build Back Better (BBB) Act, Democrats—in a purported effort to promote green technology and cut emissions—proposed raising the federal electric vehicle (EV) tax credit from the existing maximum credit of $7,500 to a maximum credit of $12,500, provided that (among other requirements) the consumer purchases a qualified EV manufactured in an American factory where workers are represented by a union and the car's battery meets domestic content requirements.

The maximum credit is only $8,000, however, if the vehicle is not finally assembled at a unionized U.S.-plant, and only $7,500 if the car's battery is not U.S.-made. Further, the bill fully excludes imported vehicles from credit eligibility starting in 2027.

While this language would support some of House Democrats' other policy objectives, including strengthening unions, these modifications to the tax credit not only undercut their climate goals, but would, in fact, violate U.S. obligations of "national treatment," i.e., not to discriminate against goods from other countries, a commitment the U.S. has made in World Trade Organization and other bilateral trade treaties.

If the U.S. offers a higher tax credit only for cars produced at union facilities in the U.S. with U.S.-made batteries, the result could be retaliatory tariffs targeting U.S. exports imposed by trading partners.

Some may argue that, if parts of a measure address environmental concerns, this is sufficient to shield the U.S. from any international treaty obligations. But it is not that simple: To successfully rely on environmental exemptions included in these agreements, the measure has to be very narrowly crafted.

Labor has no relationship to the environment, and tying the EV tax credit to labor requirements makes the credit appear to be "a means of arbitrary or unjustifiable discrimination" or a "disguised trade restriction on international trade."

Alternative Policy Proposals

Below, we suggest policy alternatives to the federal tax credit proposed in the BBB Act that would focus solely on expediting the switch to EVs and achieving environmental and emissions reduction

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goals, thereby not running afoul of U.S. international trade commitments or otherwise risking watering down the impact of the measure:

1. Provision of a tax credit to EV consumers that is singularly focused on encouraging EV purchases.

As indicated above, the federal government currently offers a $7,500 tax credit to consumers when they purchase an EV. This tax credit, however, is subject to a phase-out threshold per automaker and is unavailable for EVs produced by automakers that have already hit the cap of 200,000 EVs sold.

The simplest way to effectuate an expanded tax credit would be to remove or lift the cap on the existing tax credit provided for purchases of EVs, ensuring that it remains available for all vehicles and consumers.

Alternatively, the federal government could expand the EV tax credit in a manner similar to the proposal in the BBB Act (which also eliminated the cap), as long as such action did not also include provisions related to other policy goals, such as tying the credit to production in U.S. unionized factories and excluding the EVs of our trading partners.

2. Additional support for and promotion of the development of EV infrastructure.

The Infrastructure Investment and Jobs Act (IIJA), signed into law in November 2021, included $7.5 billion for investments in EV-charging infrastructure that will help develop a nationwide charging network, including in rural, disadvantaged, and hard to reach areas. However, significant additional funding and policy updates—at both the state and federal level— are required to ensure that the build out of residential charging infrastructure and public charging networks is sufficient to support the shift to EVs, and to convince Americans that they will not be inconvenienced by purchasing an EV as opposed to a gas-powered vehicle.

These proposals, in our view, would directly achieve the objectives related to emissions reductions, and protect the environment more generally, through the promotion of EVs while not running afoul of international trade laws. Otherwise, our trading partners may view the policies merely as a means of discrimination against their products or a disguised restriction on global trade.

Comporting with these trade requirements will be critical for developing long-term, effective, and sustainable policies to actually promote green initiatives in the U.S.

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