

## **APPENDIX C**

### **THE ZEV INVESTMENT COMMITMENT**

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#### **APPENDIX C**

##### **THE ZEV INVESTMENT COMMITMENT**

This Appendix sets forth the requirements for Settling Defendants to direct \$2 billion of investments over a period of up to 10 years into actions that will support increased use of zero emission vehicle (“ZEV”) technology in the United States, including, but not limited to, the development, construction, and maintenance of zero emission vehicle-related infrastructure. These efforts will be directed pursuant to two separate investment planning processes, one for the State of California and the other for the rest of the United States. The State of California Air Resources Board (“CARB”) will manage the process relating to California and the United States Environmental Protection Agency (“EPA”) will manage the process for the rest of the United States.

#### **I. DEFINITIONS**

Terms used in this Appendix C that are defined in Section III (Definitions) of the Consent Decree shall have the meaning set forth in Section III (Definitions) of the Consent Decree. In addition, and unless otherwise provided, the following terms when used in this Appendix C shall have the following meanings:

1.1. “Appendix C” shall mean this Appendix, and any modifications, revisions, or amendments to it.

1.2. “California ZEV Investment Plan” shall mean the CARB-approved plan developed by the Settling Defendants and implemented in four 30-month cycles, with \$200 million invested in each such cycle, for implementation in the State of California, resulting in the investment of \$800 million over a period of up to 10 years, pursuant to Section III of this Appendix C, and any CARB-approved revisions, modifications, or amendments to it.

1.3. “California Creditable Cost Guidance” shall mean a guidance document prepared by Settling Defendants, for review and approval by CARB, which establishes the requirements regarding the Settling Defendants’ accounting for, and documentation of, costs incurred in the implementation of the California ZEV Investment Plan. The requirements for the California Creditable Cost Guidance are set forth in Appendix C-1 to this Appendix.

1.4. “Creditable Costs” shall mean costs incurred by Settling Defendants for the planning, installation, operation, and maintenance of a ZEV Investment identified in an approved National ZEV Investment Plan or California ZEV Investment Plan that satisfies the criteria set forth in the National Creditable Cost Guidance or California Creditable Cost Guidance, as applicable. Creditable Costs shall include costs incurred by the Settling Defendants after the date of lodging of the Consent Decree to the extent those costs fall within the definition of Creditable Costs. Creditable Costs shall not include any expenditure that: (i) was approved by a Board of Management of any Settling Defendant prior to September 18, 2015; (ii) was required by a contract entered into by any of the Settling Defendants prior to the date of lodging of the

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Consent Decree; or (iii) is part of a joint effort by Settling Defendants and other automobile manufacturers to create ZEV infrastructure.

1.5. “National Creditable Cost Guidance” shall mean a guidance document prepared by Settling Defendants that establishes the requirements regarding the Settling Defendants’ accounting for, and documentation of, costs incurred in the implementation of the National ZEV Investment Plan. The requirements for the National Creditable Cost Guidance are set forth in Appendix C-1 to this Appendix.

1.6. “National ZEV Investment Plan” shall mean the EPA-approved plan developed by the Settling Defendants for the investment of \$1.2 billion in 30-month investment cycles in areas of the United States other than the State of California pursuant to Section II of this Appendix C, and any revisions, modifications, or amendments to the EPA-approved National ZEV Investment Plan.

1.7. “Paragraph,” unless otherwise specified, shall mean a paragraph or a subparagraph of this Appendix C designated by a number.

1.8. “Section,” unless otherwise specified, shall mean a section of this Appendix C designated by an upper case Roman numeral.

1.9. “ZEV” or “zero emission vehicle” shall mean any:

1.9.1. on-road passenger car or light duty vehicle, light duty truck, medium duty vehicle, or heavy duty vehicle that produces zero exhaust emissions of all of the following pollutants: non-methane organic gases, carbon monoxide, particulate matter, carbon dioxide, methane, formaldehyde, oxides of nitrogen, or nitrous oxide, including, but not limited to, battery electric vehicles (“BEV”) and fuel cell vehicles (“FEV”);

1.9.2. on-road plug-in hybrid electric vehicle (“PHEV”) with zero emission range greater than 35 miles as measured on the federal Urban Dynamometer Driving Schedule (“UDDS”) in the case of passenger cars, light duty vehicles and light duty trucks, and 10 miles as measured on the federal UDDS in the case of medium- and heavy-duty vehicles; or

1.9.3. on-road heavy-duty vehicle with an electric powered takeoff.

ZEVs shall not include: zero emission off-road equipment and vehicles; zero emission light rail; additions to transit bus fleets utilizing existing catenary electric power; or any vehicle not capable of being licensed for use on public roads.

1.10. “ZEV Investment” shall mean an investment of money by the Settling Defendants that promotes and advances the use and availability of ZEVs within the categories of actions set forth below. The specific types of ZEV investments that may be implemented under the National ZEV Investment Plans are to be determined by reference to the provisions of this Appendix C relating to those Plans. ZEV Investments may include:

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1.10.1. Design/planning, construction/installation, operation, and maintenance of ZEV infrastructure. That infrastructure should support and advance the use of ZEVs in the United States by addressing an existing need or supporting a reasonably anticipated need. Such expenditures may include the installation of: (i) Level 2 charging at multiunit dwellings, workplaces, and public sites, (ii) DC fast charging facilities accessible to

all vehicles utilizing non-proprietary connectors, (iii) new heavy-duty ZEV fueling infrastructure (in California); (iv) later generations of the types of charging infrastructure listed in i, ii, and iii; and (v) ZEV fueling stations;

1.10.2. Brand-neutral education or public outreach that builds or increases public awareness of ZEVs. As used here, “brand-neutral” means that the educational or outreach efforts, materials or activities do not feature or favor Settling Defendants’ vehicles or services. Such educational or outreach efforts, materials or activities may contain a statement that they are “sponsored by Volkswagen,” but that statement shall not be prominently displayed, and the efforts, materials or activities shall not feature, favor, or advertise Settling Defendants’ services or vehicles;

1.10.3. Programs or actions to increase public exposure and/or access to ZEVs without requiring the consumer to purchase or lease a ZEV at full market value, *e.g.*, the operation of ZEV car sharing services, or ZEV ride hailing services, including, but not limited to, ZEV autonomous vehicles, and, in California, scrap and replace with ZEV vehicles;

1.10.4. The “Green City” initiative in California, including, but not limited to: the operation of ZEV car sharing services, zero emission transit applications, and zero emission freight transport projects. The selection of the city (*e.g.*, Los Angeles) will be made by the Settling Defendants in consultation with appropriate local authorities in California.

ZEV Investments shall exclude any investments that are related to projects or activities that the Settling Defendants are or will be required to perform pursuant to any federal, state, or local laws. The excluded projects include, but are not limited to, any aspects of injunctive relief required by this Consent Decree and any of its Appendices other than this Appendix C, any ongoing or potential legal enforcement action, any part of an existing settlement or order in any legal action, or any current or future federal, state, or local legal requirement. Provided, however, a federal, state or local requirement that becomes effective after the approval of a National ZEV Investment Plan or a California ZEV Investment Plan will not preclude a cost from qualifying as a Creditable Cost unless such requirement was reasonably anticipated to become effective during the period covered by such approved Plan.

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## **II. NATIONAL ZEV INVESTMENT PLAN**

**2.1. National ZEV Investments:** Within 10 years after the Effective Date, or such additional time as may be approved by EPA in writing, Settling Defendants shall spend \$1.2 billion in Creditable Costs on ZEV Investments in areas of the United States other than the State of California (“National ZEV Investments”). These expenditures shall be structured so that Settling Defendants shall spend \$300 million in Creditable Costs every 30 months unless otherwise agreed to in writing by EPA. National ZEV Investments to be made during the first 30-month period following the Effective Date shall be made in accordance with this Section and the timelines set forth in this Section. National ZEV Investments to be made during the remaining three 30-month periods shall be made in accordance with the National ZEV Investment Plan requirements set forth herein and the specific plans that shall be submitted by

the Settling Defendants 30 months, 60 months, and 90 months from the Effective Date, respectively. Settling Defendants may incur Creditable Costs under the National ZEV Investment Plan only for the types of ZEV Investments described in Paragraphs 1.10.1., 1.10.2., and 1.10.3., except for new heavy-duty ZEV fueling infrastructure and scrap and replace with ZEV vehicles. Settling Defendants are solely responsible for every aspect of selecting the National ZEV Investments, including, but not limited to, the category or combination of the three categories of investments listed above, as well as the timing and locations of any National ZEV Investment. Notwithstanding the preceding, costs incurred in connection with ZEV charging infrastructure installed at or adjacent to Settling Defendants' dealerships shall not constitute Creditable Costs. Costs incurred for programs or actions to increase public exposure and access to ZEVs may only qualify as Creditable Costs if the program or action is specifically agreed to in writing by EPA in advance of its implementation, and any necessary amendments to the National Creditable Cost Guidance for determining the specific costs allowable have been agreed to by Settling Defendants and EPA.

**2.2. National Creditable Cost Guidance:** Within 30 Days after the Effective Date, Settling Defendants shall submit to EPA for review and approval in accordance with Section V (Approval of Submissions and EPA/CARB Decisions) of the Consent Decree a proposed National Creditable Cost Guidance developed in accordance with the requirements set forth in Appendix C-1. EPA and the Settling Defendants shall meet and confer as soon as practicable after that submission to discuss the proposed National Creditable Cost Guidance. The final National Creditable Cost Guidance shall be developed by the Settling Defendants in accordance with the requirements set forth in Appendix C-1, taking into account feedback received from EPA during the meet-and-confer session. Unless otherwise agreed in writing with EPA, Settling Defendants shall submit the final National Creditable Cost Guidance within 60 days after the Effective Date.

**2.3. National ZEV Outreach Plan:** Within 15 days after the Effective Date, Settling Defendants shall submit to EPA for review and approval in accordance with Section V (Approval of Submissions and EPA/CARB Decisions) of the Consent Decree a detailed plan that addresses how Settling Defendants will solicit input from interested States, municipal

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governments, federally-recognized Indian tribes ("Tribes"), and federal agencies relevant to Settling Defendants' development of each 30-month phase of the National ZEV Investment Plan (the "National ZEV Outreach Plan"). The National ZEV Outreach Plan shall include a description of how Settling Defendants will provide information sufficient to allow States, municipal governments, Tribes, and federal agencies to offer meaningful input on the development of the National ZEV Investment Plan, or an update thereto, including the identification of opportunities within States, municipal governments, Tribes, and federal agencies to make National ZEV Investments where most needed. Although this Consent Decree does not impose upon Settling Defendants any obligation to act upon or respond to any suggestions received, Settling Defendants shall provide a reasonable opportunity for suggestions on the development of the National ZEV Investment Plan. Upon approval of the National ZEV Outreach Plan, the Settling Defendants shall implement it. To this end, at a minimum, the National ZEV Outreach Plan shall:

2.3.1. Describe how Settling Defendants will provide States, municipal governments, Tribes, and federal agencies with notice and opportunities to provide suggestions, observations, and offers of assistance or support for actions that the Settling Defendants may take under the National ZEV Investment Plan. At a minimum, Settling Defendants shall provide reasonable notice of these opportunities on a website established by the Settling Defendants in accordance with Paragraph 32 of the Consent Decree. Settling Defendants shall accept for consideration comments by States, municipal governments, Tribes, and federal agencies in advance of submitting a Draft National ZEV Investment Plan to EPA;

2.3.2. Describe the manner in which States, municipal governments, Tribes, and federal agencies will be given an opportunity to offer input on the development of the National ZEV Investment Plan or an update thereto, including specifying the lead time provided for such input and any relevant guidance to facilitate transmission and receipt of such input (*e.g.*, web-based submission, transmittal of hard copy document, preferred document and data formats, etc.); and

2.3.3. Provide a timeline for the implementation of the National ZEV Outreach Plan, including the proposed begin and end dates for the acceptance of comments.

**2.4. Submission of Draft National ZEV Investment Plan:** Within 120 Days after the Effective Date or 30 Days after the end of the comment acceptance period under the National ZEV Outreach Plan in Paragraph 2.3., whichever occurs later, Settling Defendants shall submit a Draft National ZEV Investment Plan to EPA that describes proposed National ZEV Investments that will be implemented for at least the next 30 months. Settling Defendants shall provide an Executive Summary of the Draft National ZEV Investment Plan that does not contain confidential business information (“CBI”), that could be made public upon request, and that would include all key elements of the Draft National ZEV Investment Plan, as well as a general summary of comments received and how the Settling Defendants considered such

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comments. EPA and the Settling Defendants shall meet and confer as soon as practical after the submission in order to discuss the Draft National ZEV Investment Plan. The purpose of the meet and confer is for EPA to provide Settling Defendants with preliminary views on the Draft National ZEV Investment Plan in advance of Settling Defendants’ submission of the National ZEV Investment Plan.

**2.5. Submission and Content of National ZEV Investment Plan:** Within 30 Days after the meet and confer on a Draft National ZEV Investment Plan, Settling Defendants shall submit a National ZEV Investment Plan to EPA for EPA’s review and approval as consistent with the requirements of this Appendix C in accordance with Section V (Approval of Submissions and EPA/CARB Decisions) of the Consent Decree. To the extent that the Plan contains any CBI, Settling Defendants shall provide a version of it that contains all the key elements and that can be posted on a website established by the Settling Defendants in accordance with Paragraph 32 of the Consent Decree. Following EPA’s approval, Settling Defendants shall publish a link to the National ZEV Investment Plan on the website specified above. The National ZEV Investment Plan shall include at the minimum:

2.5.1. Both types of ZEV Investments described in Paragraphs 1.10.1. and

1.10.2., except for new heavy-duty ZEV fueling infrastructure;

2.5.2. A specific description of the National ZEV Investments, and the associated timelines (with interim milestones), to be implemented within the 30 months covered by the National ZEV Investment Plan that shall result in the expenditure of \$300 million in Creditable Costs during that period;

2.5.3. A projection of anticipated Creditable Costs associated with each National ZEV Investment, on an itemized basis, with items of cost broken down into at least the following categories: (1) personnel costs (including salaries and fringe benefits); (2) travel expenses; (3) office rent; (4) company vehicles; (5) office fixtures and equipment; (6) insurance; (7) office supplies; (8) taxes and governmental fees (excluding corporate income taxes); (9) information technology expenses (including infrastructure, hardware, and software); (10) utilities; (11) services - - such as accounting, human resources, legal, and procurement - - obtained from affiliated companies pursuant to service level agreements; and (12) goods and services obtained via contracts with third parties. Settling Defendants shall not obtain services from affiliated companies pursuant to service level agreements if services of equal quality that meet Settling Defendants' specifications and requirements are available from a third party at a materially lower cost. The approval of any National ZEV Investment Plan by EPA does not constitute approval of any anticipated costs set forth therein, and a good faith failure of Settling Defendants to include a cost does not preclude such cost from qualifying as a Creditable Cost;

2.5.4. The location(s) and type(s) (*e.g.*, Level 2 or DC fast charging) of any infrastructure that Settling Defendants will construct or cause to be constructed under a

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National ZEV Investment Plan; the quantities of sites that will be constructed, chargers or ZEV fueling stations per site, costs per site, and the type and number of connectors per charger or site; dates by which each specific construction will commence; specific or estimated dates of completion of such construction; a plan to provide for maintenance of ZEV charging infrastructure for a period of not less than 10 years after the Effective Date, which includes a requirement of periodic maintenance and provides that the charging equipment be marked with a toll-free number for maintenance issues that will be answered by a live operator who is subject to Settling Defendants' control; peerreviewed research reports or summaries of such reports, to the extent applicable, that provide supporting evidence that such infrastructure type and location can be reasonably expected to advance the use of ZEVs; and an explanation of how such infrastructure meets a reasonable need and advances the use of ZEVs. Any charging infrastructure proposed by the Settling Defendants shall have the ability to service all plug-in ZEVs using non-proprietary connectors as the field evolves by: (i) if necessary, using multiple connectors; and/or (ii) using charging protocols and approaches that anticipate and address the evolving field of vehicle charging. Settling Defendants are free to support evolving standards in the field of non-proprietary connectors, and are not obligated to provide equal support for different types of non-proprietary connectors;

2.5.5. With the exception of the first 30-month National ZEV Investment Plan, any programs or actions to increase public exposure or access to ZEVs, including

measures to increase access in underserved areas. Such programs or actions may include, but will not be limited to: partnering with rental fleet and car-share providers to make ZEVs available at no incremental cost to customers; creating new ZEV car-share programs; hosting “ride and drive” events or donating ZEVs to such events; or facilitating other opportunities for members of the public to drive a ZEV other than through purchase or planned purchase. Provided, however, that any such program or action must be specifically approved in writing by EPA, and EPA and the Settling Defendants must agree to any necessary amendments to the National Creditable Cost Guidance prior to incurrence of any costs for such program or action for the costs to qualify as Creditable Costs;

2.5.6. A description of the brand-neutral media activities that Settling Defendants will initiate to provide education and raise awareness regarding ZEVs and ZEV technology, such as: identities of Settling Defendants’ third party partners; the media, platforms or fora in which information will be provided (*i.e.*, television, smartphones, print, websites, etc.); geographic placement of any physical advertisements; and quantity and length of placement of any television, radio, or online advertisements. Unless otherwise agreed to in writing by EPA, Settling Defendants shall spend no less than \$25 million and no more than \$50 million on such activities during each 30-month investment cycle;

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2.5.7. An explanation, taking into account relevant literature from academia, industry, and government, if available, that each National ZEV Investment, to the extent applicable: increases the use of ZEVs in the United States; addresses a clearly existing need or supports a reasonably anticipated need; has a high likelihood of utilization and provides accessibility/availability where most needed and most likely to be regularly used; supports and/or advances the market penetration of ZEVs in the United States; helps build positive awareness of ZEVs; is intended for, and compatible with, ZEV technology brands that are not limited to the Settling Defendants and/or their subsidiaries; and uses non-proprietary or multiple connectors or charging protocols that anticipate technological changes; and

2.5.8. A certification, in accordance with Paragraph 33 of the Consent Decree, that none of the proposed projects or activities: (1) was approved by the Board of Management of any Settling Defendant prior to September 18, 2015, was required by a contract entered into by the Settling Defendants prior to the date of lodging of the Consent Decree, or is part of a joint effort by Settling Defendants and other automobile manufacturers to create ZEV infrastructure; or (2) is one that the Settling Defendants either are required to perform by any federal, state, or local law, or anticipate will be required to perform during the planned 30-month period.

**2.6.** Settling Defendants shall start implementing the National ZEV Investment Plan upon its approval and shall maintain or provide for maintenance of any ZEV charging infrastructure for a period of not less than ten (10) years from the Effective Date.

**2.7. Independent Third Party Review of Creditable Costs and Attestation for National and California ZEV Investment Plans:** Settling Defendants shall retain, upon

approval by the United States, after consultation with CARB, a person or entity to serve as the independent third-party certified public accounting firm (“Third-Party Reviewer”) to: (i) audit and review costs asserted by Settling Defendants to be Creditable Costs in the Annual National ZEV Investment Reports or the Annual California ZEV Investment Reports; (ii) perform duties as required by Paragraphs 2.7.4. and 3.4.2.; and (iii) provide an attestation as provided in Paragraphs 2.9.3. and 3.4.1. and the Attestation Requirements listed in Appendix C-1. Settling Defendants or the Third-Party Reviewer shall develop the proposed attestation agreement consistent with the National Creditable Cost Guidance and the California Creditable Cost Guidance, as applicable, developed pursuant to Appendix C-1 and this Appendix. EPA or CARB, as applicable, will approve or disapprove the attestation agreement in accordance with Section V (Approval of Submissions and EPA/CARB Decisions) of the Consent Decree.

2.7.1. Recommendation of Candidates for the Third-Party Reviewer. Within 30 days of the Effective Date, Settling Defendants shall submit to the United States and CARB a list of three candidates for the position of the Third-Party Reviewer. Settling Defendants shall:

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2.7.1.1. Submit a resume, biographical information, and any relevant material concerning each of the candidate firms and its competence and qualifications to serve as Third-Party Reviewer; the selected staff assigned to perform the review in California must be licensed in California and the selected firm must maintain an office in California;

2.7.1.2. Describe any past, present, or future business or financial relationship that the candidate has with the Settling Defendants, EPA, or CARB. A candidate may not be an employee or an agent of the Settling Defendants, Settling Defendants’ subsidiaries, the United States, or California, nor may the candidate be currently engaged in any work for, or in representation of, Settling Defendants;

2.7.1.3. Verify that, to the Settling Defendants’ best knowledge and based on the reasonably available information, either the candidate has no conflicts of interest with regard to this matter or any actual or apparent conflict has been waived by the Settling Defendants, CARB, and the United States;

2.7.1.4. Verify that the candidate has agreed not to be employed by any Settling Defendant, or its subsidiary, for a minimum of two years after the termination of its term as the Third-Party Reviewer; and

2.7.1.5. Accompany all of the information listed above in Paragraph 2.7.1.1 through Paragraph 2.7.1.4. with a certification in accordance with Paragraph 33 of the Consent Decree.

2.7.2. Selection of the Third-Party Reviewer. After receiving the list of candidates from the Settling Defendants, the United States, after consultation with CARB, shall select a Third-Party Reviewer from among the candidates, and notify the Settling Defendants of such selection. If the United States does not select any of the candidates submitted by the Settling Defendants, the process under Paragraph 2.7.1. shall be repeated until the Third-Party Reviewer is selected.

2.7.3. Vacancy in the Position of the Third-Party Reviewer. In the event that the

Third-Party Reviewer, once selected, is unable or unwilling to fulfill its duties as the Third-Party Reviewer, the processes under Paragraphs 2.7.1. and 2.7.2. shall be used to select a new Third-Party Reviewer.

2.7.4. Duties of the Third-Party Reviewer. Within 30 days of selection, the Third-Party Reviewer shall develop a plan that will establish a checklist of relevant compliance requirements, procedures for the exchange of any documents and information that the Third-Party Reviewer needs to perform its duties, and any other terms that the Third-Party Reviewer may deem necessary to effectuate its duties.

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2.7.5. Information and Access Rights Accorded to Third-Party Reviewer.

Settling Defendants shall provide the Third-Party Reviewer with any information that the Reviewer requests or may reasonably need to fulfill the duties listed in Paragraph 2.7.4. and Paragraph 3.4.2., including, but not limited to: any information regarding the National ZEV Investments or the California ZEV Investments; any costs associated with any National ZEV Investment or any California ZEV Investment; and access to any employees of the Settling Defendants that the Third-Party Reviewer may need to gain to gather further information in the fulfillment of its duties.

2.7.6. Compensation of the Third-Party Reviewer. Settling Defendants shall be responsible for compensating the Third-Party Reviewer for the performance of its duties in accordance with the terms agreed upon by the Settling Defendants and the selected Third-Party Reviewer. Such terms of agreement shall clarify that the Third-Party Reviewer is not an employee or an agent of the Settling Defendants. Upon EPA's or CARB's request, any agreements between the Settling Defendants and the Third-Party Reviewer shall be made available for EPA's or CARB's review. None of the costs incurred by the Settling Defendants in connection with the selection, retention, or compensation of the Third-Party Reviewer are Creditable Costs within the meaning of Appendix C.

**2.8. EPA's Approval of Costs:** Settling Defendants shall include in their Annual National ZEV Investment Reports submitted in accordance with Paragraph 2.9. a request for a determination of Creditable Costs expended for approved ZEV Investments during the period covered by the applicable Report. EPA will approve or disapprove such claimed costs as Creditable Costs as soon as practicable in accordance with the National Creditable Cost Guidance after the receipt of the applicable Annual National ZEV Investment Report and all information listed in Paragraph 2.9.3.

**2.9. Annual National ZEV Investment Reports:** No later than April 30 of each year following EPA's approval of the first National ZEV Investment Plan, Settling Defendants shall submit an annual report regarding the status of each National ZEV Investment. Annual National ZEV Investment Reports shall be submitted in addition to any other reporting obligations under the Decree or any other federal, state, or local law, regulation, permit, or other requirement. Annual National ZEV Investment Reports may be submitted as a part of the Settling Defendants' reports under Section VI (Reporting and Certification Requirements) of the Consent Decree. Each annual report shall include at the minimum:

2.9.1. A description of completed activities/projects and a comparison of the

completed activities/projects with the activities/projects described in the approved National ZEV Investment Plan;

2.9.2. Utilization rates of the new ZEV infrastructure, including the percentage of time that each connector is attached to a vehicle, energy dispensed per charger per day, [Case 3:15-md-02672-CRB Document 2103-1 Filed 10/25/16 Page 157 of 225](#)

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and any other metrics that indicate the maximum, minimum, and average utilization of a charging station, including trends in usage over time;

2.9.3. For the costs incurred for activities completed in the period covered by the applicable Report that the Settling Defendants claim as Creditable Costs: (i) a description of actual costs incurred in connection with implementation of a specific completed action identified in an approved National ZEV Investment Plan; (ii) supporting documentation required by and listed in the approved National Creditable Costs Guidance; and (iii) an attestation report by the Third-Party Reviewer that contains an attestation that the costs claimed to be Creditable Costs are consistent with the requirements of this Appendix C and the National Creditable Cost Guidance. The supporting documentation shall include a list of completed activities or projects, locations and descriptions of any charging elements placed into service, and copies of any advertisements or other materials disseminated as a part of the activities, and a description of any programs or actions to increase public access and exposure to ZEVs;

2.9.4. Descriptions of any issues or problems encountered in implementing the projects, including issues with maintenance of infrastructure, working with project partners, acquiring necessary property or equipment, and technical aspects of projects;

2.9.5. Each Annual National ZEV Investment Report shall be certified in accordance with Paragraph 33 of the Consent Decree.

Settling Defendants shall make each Annual National ZEV Investment Report available on a website established in accordance with Paragraph 32 of the Consent Decree. To the extent that any Annual National ZEV Investment Report contains CBI, Settling Defendants shall submit to EPA for its review a summary version that can be made publicly available.

**2.10. Remaining Costs:** If EPA concludes, based on the review of information submitted in the Annual National ZEV Investment Reports pursuant to Paragraph 2.9., that Settling Defendants did not spend \$300 million in Creditable Costs on ZEV Investments during any 30-month phase of the National ZEV Investment Plan, any remaining money shall be invested in the implementation of the next 30-month investment cycle of the National ZEV Investment Plan. EPA and the Settling Defendants shall meet and confer in the event that the Settling Defendants do not spend or anticipate not spending \$1.2 billion at the end of the final, fourth 30-month phase of the National ZEV Investment Plan.

**2.11. Dispute Resolution:** Any dispute regarding obligations established in this Section II of Appendix C shall be resolved in accordance with Dispute Resolution provisions set forth in Section IX of the Consent Decree. Any dispute arising under Paragraph 2.5. of Appendix C regarding EPA's approval of the National ZEV Investment Plan and brought pursuant to Paragraph 63 of the Consent Decree shall be subject to the standard of review set forth in Paragraph 65.a of the Consent Decree. Any other dispute arising under Section II of

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Appendix C and brought pursuant to Paragraph 63 of the Consent Decree shall be subject to the standard of review set forth in Paragraph 65.b of the Consent Decree.

**2.12. Stipulated Penalties:** The following stipulated penalties shall apply to failures to comply with the requirements of this Section II of this Appendix C. All stipulated penalties listed below shall be payable to the United States in accordance with Section VII (Stipulated Penalties and Other Mitigation Trust Payments) of the Consent Decree.

2.12.1. If the Settling Defendants fail to invest a total of \$600 million in EPA approved Creditable Costs during the first two 30-month investment cycles as provided in Paragraph 2.1. of Appendix C, as reported in the first five Annual National ZEV Investment Reports submitted under Paragraph 2.9., the Settling Defendants shall pay a stipulated penalty amounting to the difference between \$600 million and the cumulative total amount that EPA approved as Creditable Costs after reviewing the first five Annual National ZEV Investment Reports. The Settling Defendants shall pay this stipulated penalty in addition to investing any amounts of money that were unspent or remaining from one 30-month cycle during the next 30-month investment cycle as required by Paragraph 2.10.

2.12.2. If the Settling Defendants fail to invest a total of \$1.2 billion in EPA approved Creditable Costs within 10 years of the Effective Date as provided in Paragraph 2.1. of Appendix C, Settling Defendants shall pay a stipulated penalty amounting to the difference between \$1.2 billion and the cumulative total amount that EPA approved as Creditable Costs after reviewing the Settling Defendants' final Annual National ZEV Investment Report.

2.12.3. If the Settling Defendants fail to submit the National Creditable Cost Guidance in accordance with Paragraph 2.2. and Appendix C-1, Settling Defendants shall pay stipulated penalties per each day on which the National Creditable Cost Guidance is overdue or submitted not in accordance with the requirements set forth in Paragraph 2.2. or Appendix C-1:

Duration of compliance failure Stipulated penalty

1st through 14th Day \$1,000

15th through 30th Day \$5,000

31st Day and beyond \$20,000

2.12.4. If the Settling Defendants fail to submit the National ZEV Outreach Plan in accordance with Paragraph 2.3., Settling Defendants shall pay stipulated penalties per each day on which the National ZEV Outreach Plan is overdue or submitted not in accordance with requirements set forth in Paragraph 2.3.:

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Duration of compliance failure Stipulated penalty

1st through 14th Day \$1,000

15th through 30th Day \$2,500

31st Day and beyond \$10,000

2.12.5. If the Settling Defendants fail to implement the EPA-approved National ZEV Outreach Plan in accordance with Paragraph 2.3., Settling Defendants shall pay stipulated penalties per each day on which the National ZEV Outreach Plan is not implemented in accordance with the EPA-approved timelines as provided in Paragraph 2.3.3. and other requirements of the EPA-approved National ZEV Outreach Plan:

Duration of compliance failure Stipulated penalty

1st through 14th Day \$1,000

15th through 30th Day \$5,000

31st Day and beyond \$10,000

2.12.6. If the Settling Defendants fail to submit the Draft National ZEV Investment Plan in accordance with Paragraph 2.4., Settling Defendants shall pay stipulated penalties per each day on which the Draft National ZEV Investment Plan is overdue:

Duration of compliance failure Stipulated penalty

1st through 14th Day \$1,000

15th through 30th Day \$5,000

31st Day and beyond \$10,000

2.12.7. If the Settling Defendants fail to submit the first National ZEV Investment Plan in accordance with Paragraph 2.5., Settling Defendants shall pay stipulated penalties per each day on which the first National ZEV Investment Plan is overdue or submitted not in accordance with the requirements of Paragraph 2.5., including without limitation each requirement set forth in Paragraph 2.5.1. through Paragraph 2.5.8.:

Duration of compliance failure Stipulated penalty

1st through 14th Day \$2,000

15th through 30th Day \$10,000

31st Day and beyond \$50,000

2.12.8. If the Settling Defendants fail to submit the remaining three National ZEV Investment Plans: (i) in accordance with the deadlines set forth in Paragraph 2.1., (ii) containing all the required elements set forth in Paragraph 2.5. and, if applicable, expenditures of remaining costs under Paragraph 2.10., and (iii) having undergone all other procedures applicable to the preparation of National ZEV Investment Plans set forth

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in Section II, including without limitation Paragraphs 2.2., 2.3., 2.4. and 2.5., Settling Defendants shall pay stipulated penalties per each day on which each National ZEV Investment Plan is overdue or submitted not in accordance with the above-listed requirements:

Duration of compliance failure Stipulated penalty

1st through 14th Day \$2,000

15th through 30th Day \$10,000

31st Day and beyond \$50,000

2.12.9. If the Settling Defendants fail to maintain or provide for maintenance of installed ZEV charging infrastructure as required by Paragraph 2.6. and the maintenance plan of their approved National ZEV Investment Plan, Settling Defendants shall pay

stipulated penalties per each day for each failure to implement the approved maintenance plan:

Duration of compliance failure Stipulated penalty

1st through 14th Day \$2,000

15th through 30th Day \$10,000

31st Day and beyond \$50,000

2.12.10. If the Settling Defendants fail to submit a list of candidates for the Third-Party Reviewer in accordance with Paragraph 2.7.1., and if applicable Paragraphs 2.7.2. and 2.7.3., Settling Defendants shall pay stipulated penalties per each day on which the list of candidates is overdue or submitted not in accordance with the requirements set forth in Paragraph 2.7.1.:

Duration of compliance failure Stipulated penalty

1st through 14th Day \$1,000

15th through 30th Day \$5,000

31st Day and beyond \$10,000

2.12.11. If the Settling Defendants fail to submit Annual National ZEV Investment Reports in accordance with Paragraph 2.9., Settling Defendants shall pay stipulated penalties per each day on which the Annual National ZEV Investment Reports are overdue or submitted not in accordance with the requirements set forth in Paragraph 2.9.:

Duration of compliance failure Stipulated penalty

1st through 14th Day \$2,000

15th through 30th Day \$10,000

31st Day and beyond \$50,000

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**2.13. Modifications:** This Section II of Appendix C may be modified in accordance with Section XVI (Modification) of the Consent Decree. The following modifications shall be considered non-material for the purpose of Paragraph 91 of the Consent Decree:

(a) modifications of any schedules established under this Section II by less than one year; (b) modification of a requirement that the Settling Defendants spend \$300 million dollars in each 30-month investment cycle of the National ZEV Investment Plan; and (c) modifications, revisions, or amendments to the Appendix C-1 to this Appendix C and/or National Creditable Cost Guidance.

**2.14. Enforcement:** EPA, represented by the U.S. Department of Justice, is responsible for the enforcement of any requirements under this Section II.

### **III. CALIFORNIA ZEV INVESTMENT PLAN**

**3.1. California ZEV Investments:** Settling Defendants shall spend \$800 million in Creditable Costs within 10 years of the Effective Date on ZEV Investments to be implemented in the State of California (“California ZEV Investments”). Unless otherwise approved by CARB in writing, Settling Defendants shall spend \$200 million in Creditable Costs on ZEV Investments in California during each 30-month period covered by each California ZEV Investment Plan.

**3.2. California Creditable Cost Guidance:** Within 30 Days after the Effective Date, Settling Defendants shall submit to CARB for review and approval in accordance with Section V

(Approval of Submissions and EPA/CARB Decisions) of the Consent Decree a proposed California Creditable Cost Guidance developed in accordance with the requirements set forth in Appendix C-1. CARB and the Settling Defendants shall meet and confer as soon as practicable after that submission to discuss the proposed California Creditable Cost Guidance. The final California Creditable Cost Guidance shall be developed by the Settling Defendants in accordance with the requirements set forth in Appendix C-1, taking into account feedback received from CARB during the meet-and-confer session. Unless otherwise agreed in writing with CARB, Settling Defendants shall submit the final California Creditable Cost Guidance within 60 days after the Effective Date. In addition to costs specifically excluded in Appendix C-1, Settling Defendants agree not to propose, as California Creditable Costs, costs incurred in connection with ZEV charging infrastructure installed at or adjacent to Settling Defendants' dealerships.

### **3.3. California ZEV Investment Plan Submission and Approval Process.**

3.3.1. California ZEV Investment Plans Submission Timing. Within 120 Days of the Effective Date, Settling Defendants shall submit to CARB, for CARB's review and approval, the first \$200 million California ZEV Investment Plan covering a period not to exceed 30 months that is consistent with the terms of this Appendix C. Settling Defendants shall submit subsequent California ZEV Investment Plans 29 months after submission of the then-current plan. Settling Defendants shall prepare a public version of each Draft and Approved 30-month California ZEV Investment Plan, that includes all [Case 3:15-md-02672-CRB Document 2103-1 Filed 10/25/16 Page 162 of 225](#)  
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key elements of the Plan; each version will be posted by the Settling Defendants on a website established by the Settling Defendants in accordance with Paragraph 32 of the Consent Decree. Unless otherwise authorized by CARB in writing, each 30-month California ZEV Investment Plan must include the elements listed in Paragraph 3.3.2.

3.3.2. Draft California ZEV Investment Plan Contents and Draft Submittal Process. At least 20 days before submitting any Draft California ZEV Investment Plan for approval, Settling Defendants shall meet and confer with CARB to determine what additional information, other than listed below, to include in the California ZEV Investment Plan submission. As part of this process, CARB may provide the Settling Defendants with information regarding ZEV Investment opportunities that are consistent with the objectives and criteria set forth in Appendix C. Unless otherwise authorized by CARB in writing, this Draft California ZEV Investment Plan must be consistent with this Appendix C and must include, at a minimum, all of the following:

3.3.2.1. A description of all California ZEV Investments that the Settling Defendants will make, including infrastructure, access, and education, as well as including measures to increase access in underserved areas, though each California ZEV Investment need not contain all four components;

3.3.2.2. An explanation of how each California ZEV Investment makes progress toward and/or meets one or more of the goals identified;

3.3.2.3. An estimated schedule for implementing each California ZEV Investment and milestones in 6-month intervals applicable to each specific California ZEV Investment;

3.3.2.4. A projection of anticipated Creditable Costs associated with each

California ZEV Investment, on an itemized basis, with items of cost broken down into at least the following categories: (1) personnel costs (including salaries and fringe benefits); (2) travel expenses; (3) office rent; (4) company vehicles; (5) office fixtures and equipment; (6) insurance; (7) office supplies; (8) taxes and governmental fees (excluding corporate income taxes); (9) information technology expenses (including infrastructure, hardware, and software); (10) utilities; (11) services -- such as accounting, human resources, legal, and procurement -- obtained from affiliated companies pursuant to service level agreements; and (12) goods and services obtained via contracts with third parties. Settling Defendants shall not obtain services from affiliated companies pursuant to service level agreements if services of equal quality that meet Settling Defendants' specifications and requirements are available from a third party at a materially lower cost. The approval of any California ZEV Investment Plan by CARB does not constitute approval of any anticipated costs set forth therein and a good faith

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failure of Settling Defendants to include a cost does not preclude such cost from qualifying as a Creditable Cost;

3.3.2.5. For infrastructure, an estimation of the following, to the extent possible: the geographic regions and type(s) (*e.g.*, Level 2 AC charging or DC fast charging) of any infrastructure that Settling Defendants will construct, or cause to be constructed under a California ZEV Investment Plan, which must include a variety of cities, metro areas, types of locations (workplace, multi-family, etc.); the quantities of sites that will be constructed, chargers or ZEV fueling stations per site, costs per site, and the type and number of connectors per charger or site; specific or estimated dates of completion of such construction; operating model and utilization statistics to be collected; a plan to provide for maintenance of ZEV charging infrastructure for a period of not less than 10 years after the Effective Date, which includes a requirement of periodic maintenance and provides that the charging equipment be marked with a toll-free number for maintenance issues that will be answered by a live operator who is subject to Settling Defendants' control; and an explanation of how such infrastructure meets a reasonable need and advances the use of ZEVs. Any charging infrastructure proposed by the Settling Defendants shall have the ability to service all plug-in ZEVs using non-proprietary connectors as the field evolves by: (i) if necessary, using multiple connectors; and/or (ii) using charging protocols and approaches that anticipate and address the evolving field of vehicle charging. Settling Defendants are free to support evolving standards in the field of non-proprietary connectors, and are not obligated to provide equal support for different types of non-proprietary connectors. Settling Defendants shall maintain or provide for maintenance of any ZEV charging infrastructure for a period of not less than ten (10) years from the Effective Date;

3.3.2.6. For any brand-neutral media activities the Settling Defendants will initiate in California, in addition to the requirements set forth in this Section III, Settling Defendants must address the requirements in the National ZEV Investment

Plan in Paragraph 2.5.6., except for the spending requirements, and describe how the proposed National and California activities are related and/or differ;

3.3.2.7. A certification, in accordance with Paragraph 33 of the Consent Decree, that none of the proposed projects or activities: (1) was approved by the Board of Management of any Settling Defendant prior to September 18, 2015, was required by a contract entered into by the Settling Defendants before the date of lodging of the Consent Decree, or is part of a joint effort by Settling Defendants and other automobile manufacturers to create ZEV infrastructure; or (2) is one that the Settling Defendants either are required to perform by any federal, state, or local law, or anticipate will be required to perform during the planned 30-month period;

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3.3.2.8. An explanation that all the ZEV Investments are not concentrated in one area of California;

3.3.2.9. ZEV Investments do not include funding for research, such as university research or inductive wireless charging research;

3.3.2.10. A description of how Settling Defendants will monitor and maintain each ZEV Investment; and

3.3.2.11. Any other information that CARB may reasonably request during the meet and confer under Paragraph 3.3.2.

3.3.3. California ZEV Investment Plan Review and Determination. CARB shall review each California ZEV Investment Plan. CARB may, in its discretion, approve or disapprove each California ZEV Investment Plan, in whole or in part. CARB shall notify Settling Defendants of its approval or disapproval in writing and, if not approved in whole, of which parts were approved. Settling Defendants may begin implementing any approved portions immediately. If CARB disapproves the California ZEV Investment Plan, in whole or in part, CARB and Settling Defendants shall meet and confer within 10 days of Settling Defendants' receipt of CARB's disapproval. Settling Defendants may resubmit a new version of the disapproved portions of the California ZEV Investment Plan, in whole or in part, to CARB, for CARB's approval, within 10 days of receiving CARB's disapproval.

#### **3.4. Independent Third-Party Review.**

3.4.1. Annual Third-Party Review of California Creditable Costs and Attestation. Settling Defendants shall retain, upon approval by the United States pursuant to Paragraph 2.7., after consultation with CARB, a person or entity to serve as the independent Third-Party Reviewer to: (i) audit and review costs asserted by Settling Defendants to be Creditable Costs in the Annual California ZEV Investment Reports; (ii) perform duties as required by Paragraph 2.7.4. and Paragraph 3.4.2.; and (iii) provide an attestation as provided in this Paragraph, Paragraph 2.9.3., and the Attestation Requirements listed in Appendix C-1. Settling Defendants or the Third-Party Reviewer shall develop the proposed attestation agreement consistent with the California Creditable Cost Guidance developed pursuant to Appendix C-1 and this Appendix. CARB will approve or disapprove the attestation agreement. The Third-Party Reviewer will have access rights and information request rights as outlined in Paragraph 2.7.5. The Settling

Defendants shall be responsible for the compensation of the Third-Party Reviewer as outlined in Paragraph 2.7.6.

3.4.2. Duties of the Third-Party Reviewer.

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3.4.2.1. The Third-Party Reviewer shall provide results of its review and a report by April 30 of each year to CARB and Settling Defendants simultaneously, in a format to be determined by CARB, including a determination as to whether Settling Defendants are complying with Section III of Appendix C of the Consent Decree, in whole or in part, in California, and, if in part, with which parts of the Consent Decree Settling Defendants are not complying; and a recommendation as to whether Settling Defendants' expenditures in California qualify as Creditable Costs; and

3.4.2.2. Perform any other duties which are reasonably necessary to ensure compliance with Appendix C.

3.4.3. Review of Third-Party Reviewer Reports and/or Results. CARB and Settling Defendants shall review the Third-Party Reviewer results and/or reports. If the Third-Party Reviewer determines that Settling Defendants are not complying with the Consent Decree, in whole or in part, Settling Defendants shall meet and confer with CARB within 10 days of receiving the Third-Party Reviewer's results to discuss what Settling Defendants shall do to comply.

### **3.5. California Creditable Costs**

3.5.1. CARB Approval of California's Creditable Costs. Settling Defendants shall include in their Annual California ZEV Investment Reports submitted in accordance with Paragraph 3.6. a request for a determination of Creditable Costs expended for approved ZEV Investments during the period covered by the applicable Report. CARB will approve or disapprove such claimed costs as Creditable Costs as soon as practicable in accordance with the California Creditable Cost Guidance after the receipt of the applicable Annual California ZEV Investment Report, receipt of all information listed in Paragraph 3.6., and receipt of the Third-Party Reviewer's Report and Attestation as provided in Appendix C-1 and Paragraph 3.4.

3.5.2. Remaining Costs. If CARB concludes, based on the review of information submitted in the Annual California ZEV Investment Reports pursuant to Paragraph 3.6., California Creditable Cost Guidance, or Third-Party Reviewer information, that Settling Defendants did not spend \$200 million in Creditable Costs on ZEV Investments during any 30-month phase of the California ZEV Investment Plan, any remaining money shall be invested in the implementation of the next 30-month investment cycle of the California ZEV Investment Plan. CARB and the Settling Defendants shall meet and confer in the event that the Settling Defendants do not spend or anticipate not spending \$800 million at the end of the final, fourth 30-month phase of the California ZEV Investment Plan.

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### **3.6. California ZEV Investment Plan Reports and Meetings**

3.6.1. Semi-annual Meetings. An official of Settling Defendants shall meet with a California official no later than May 1 and November 1 of each year to provide information on the approved California ZEV Investment Plan and its implementation. Settling Defendants shall also designate an official who will serve as the point of contact for California related to any matter concerning the California ZEV Investments.

3.6.2. Annual and Final Reporting Dates. No later than April 30 of each year following CARB's approval of the California ZEV Investment Plan, Settling Defendants shall submit an annual report regarding the status of each ZEV Investment included in the approved California ZEV Investment Plan. No later than 120 days after 10 years from the Effective Date, Settling Defendants shall submit a final report to CARB regarding the status of each ZEV Investment included in the approved California ZEV Investment Plan. Settling Defendants shall make each Annual California ZEV Investment Report and the final report available on a website established by the Settling Defendants in accordance with Paragraph 32 of the Consent Decree. To the extent that any annual or final report for the California ZEV Investment Plans contains confidential business information, Settling Defendants shall submit to CARB for its review and approval a version that can be made publicly available. Reports under this Section shall be in addition to any other reporting obligations under the Decree, or any other federal, California, or local law, regulation, permit, or other requirement.

3.6.3. Report Contents. Each annual report and the final report shall include, at a minimum:

3.6.3.1. The status of each ZEV Investment identified in the California ZEV Investment Plan, including a description of project activities/actions and completed activities/projects, and a comparison of the completed activities/projects with the activities/projects described in the approved California ZEV Investment Plan;

3.6.3.2. Utilization rates of the new ZEV infrastructure, including the percentage of time that each connector is attached to a vehicle, energy dispensed per charger per day, and any other metrics that indicate the maximum, minimum, and average utilization of a charging station, including trends in usage over time;

3.6.3.3. Descriptions of any issues or problems encountered in implementing the projects, including issues with maintenance of infrastructure, working with project partners, acquiring necessary property or equipment, and technical aspects of projects;

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3.6.3.4. Any other information pertaining to the California ZEV Investment Plan that CARB reasonably requests at least 30 days prior to the due date of any report;

3.6.3.5. A certification in accordance with Paragraph 33 of the Consent Decree;

3.6.3.6. For the costs incurred for activities completed in the period

covered by the applicable Report that the Settling Defendants claim as Creditable Costs: (i) a description of actual costs incurred in connection with implementation of a specific completed action identified in an approved California ZEV Investment Plan; (ii) supporting documentation required by and listed in the approved California Creditable Costs Guidance; and (iii) an attestation report by the Third-Party Reviewer that contains an attestation that the costs claimed to be Creditable Costs are consistent with the requirements of this Appendix C, Appendix C-1, and the California Creditable Cost Guidance. The supporting documentation shall include a list of completed activities or projects, locations, and descriptions of any charging elements placed into service, copies of advertisements or other materials disseminated as a part of the activities, a description of any programs or actions to increase public access and exposure to ZEVs, supporting documentation for all programs or actions encompassed in the “Green City” initiative, as well as any other documentation requested by CARB at least 10 days prior to the due date of any report.

3.6.4. Reporting Costs. Settling Defendants shall bear the expense of all reporting, and said expenses shall not be included in the calculation of Settling Defendants’ eight hundred million dollar (\$800,000,000) commitment.

**3.7. Dispute Resolution:** Any dispute regarding obligations established in this Section III of Appendix C shall be resolved in accordance with Dispute Resolution provisions set forth in Section IX of the Consent Decree. Any dispute arising under Paragraph 3.3. of Appendix C regarding CARB’s approval of the California ZEV Investment Plan and brought pursuant to Paragraph 63 of the Consent Decree shall be subject to the standard of review set forth in Paragraph 65.a of the Consent Decree. Any other dispute arising under Section III of Appendix C and brought pursuant to Paragraph 63 of the Consent Decree shall be subject to the standard of review set forth in Paragraph 65.b of the Consent Decree.

**3.8. Stipulated Penalties:** The following stipulated penalties shall apply to failures to comply with the requirements of Section III of this Appendix C. All stipulated penalties listed below shall be payable to CARB and deposited in the Air Pollution Control Fund in accordance with Section VII (Stipulated Penalties and Other Mitigation Trust Payments) of the Consent Decree.

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3.8.1. If the Settling Defendants fail to invest a total of \$400 million in CARB approved Creditable Costs during the first two 30-month investment cycles as provided in Paragraph 3.1. of Appendix C, as reported in the first five Annual California ZEV Investment Reports submitted under Paragraph 3.6., the Settling Defendants shall pay a stipulated penalty amounting to the difference between \$400 million and the cumulative total amount that CARB approved as California Creditable Costs after reviewing the first five Annual California ZEV Investment Reports. The Settling Defendants shall pay this stipulated penalty in addition to investing any amounts of money that were unspent or remaining from one 30-month cycle during the next 30-month investment cycle as required by Paragraph 3.5.2.

3.8.2. If the Settling Defendants fail to invest a total of \$800 million in CARB approved

Creditable Costs within 10 years of the Effective Date as provided in Paragraph 3.1. of Appendix C, Settling Defendants shall pay a stipulated penalty amounting to the difference between \$800 million and the cumulative total amount that CARB approved as Creditable Costs after reviewing the Settling Defendants' final Annual and Final California ZEV Investment Reports.

3.8.3. If the Settling Defendants fail to submit the California Creditable Cost Guidance in accordance with Paragraph 3.2. and Appendix C-1, Settling Defendants shall pay stipulated penalties per each day on which the California Creditable Cost Guidance is overdue or submitted not in accordance with the requirements set forth in Paragraph 3.2. or Appendix C-1:

Duration of compliance failure Stipulated penalty

1st through 14th Day \$1,000

15th through 30th Day \$5,000

31st Day and beyond \$20,000

3.8.4. If the Settling Defendants fail to submit any of the four California ZEV Investment Plans in accordance with Paragraph 3.3.1. or Paragraph 3.3.2., Settling Defendants shall pay stipulated penalties per each day on which any of the California ZEV Investment Plans is overdue or submitted not in accordance with the requirements of Paragraph 3.3.1. or Paragraph 3.3.2., including without limitation each requirement set forth in Paragraph 3.3.2.1 through Paragraph 3.3.2.11.:

Duration of compliance failure Stipulated penalty

1st through 14th Day \$2,000

15th through 30th Day \$10,000

31st Day and beyond \$50,000

3.8.5. If the Settling Defendants fail to submit a list of candidates for the Third-Party Reviewer in accordance with Paragraph 3.4.1., Paragraph 2.7.1, and if applicable

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Paragraphs 2.7.2. and 2.7.3., Settling Defendants shall pay stipulated penalties per each day on which the list of candidates is overdue or submitted not in accordance with the requirements set forth in Paragraph 2.7.1.:

Duration of compliance failure Stipulated penalty

1st through 14th Day \$1,000

15th through 30th Day \$5,000

31st Day and beyond \$10,000

3.8.6. If the Settling Defendants fail to attend any of the meetings or fail to submit any of the Annual California ZEV Investment Reports in accordance with Paragraph 3.3.3, Paragraph 3.4.3., Paragraph 3.5. or Paragraph 3.6., Settling Defendants shall pay stipulated penalties per each day on which the meetings or Annual California ZEV Investment Reports are overdue or submitted not in accordance with the requirements set forth in Paragraph 3.3.3, Paragraph 3.4.3., Paragraph 3.5. or Paragraph 3.6.:

Duration of compliance failure Stipulated penalty

1st through 14th Day \$2,000

15th through 30th Day \$10,000

31st Day and beyond \$50,000

3.8.7. If the Settling Defendants fail to maintain or provide for maintenance of installed ZEV charging infrastructure as required by Paragraph 3.3.2.5. and the maintenance plan of their approved California ZEV Investment Plan, Settling Defendants shall pay stipulated penalties per each day for each failure to implement the approved maintenance plan:

Duration of compliance failure Stipulated penalty

1st through 14th Day \$2,000

15th through 30th Day \$10,000

31st Day and beyond \$50,000

3.8.8. Aggregation of Penalties. Each penalty in each subparagraph in this Paragraph 3.8. shall be in addition to any other penalty in any other Paragraph in this or any other portion of the Consent Decree.

**3.9. Modifications:** This Section III of Appendix C may be modified in accordance with Section XVI (Modification) of the Consent Decree. The following modifications shall be considered non-material for the purpose of Paragraph 91 of the Consent Decree:

(a) modifications of any schedules established under this Section III by less than one year;

(b) modification of a requirement that the Settling Defendants spend \$200 million dollars in each 30-month investment cycle of the California ZEV Investment Plan; and (c) modifications,

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revisions, or amendments to the Appendix C-1 to this Appendix C and/or the California Creditable Cost Guidance.

**3.10. Enforcement:** The California Air Resources Board and California Office of the Attorney General may enforce the requirements of Section III.

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## **APPENDIX C-1**

### **Creditable Cost Guidance and Attestation Requirements for the National and California ZEV Investment Plan Commitments**

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#### **APPENDIX C-1**

#### **CREDITABLE COST GUIDANCE**

#### **AND ATTESTATION REQUIREMENTS FOR**

#### **THE NATIONAL AND CALIFORNIA ZEV INVESTMENT PLAN COMMITMENTS**

This Appendix C-1 further elaborates on the requirements for the National Creditable Cost Guidance (“NCCG”) and the California Creditable Cost Guidance (“CCCG”) (collectively,

the Creditable Cost Guidances (“CCG”), and Attestation Requirements pursuant to Appendix C of the Consent Decree, and sets forth the requirements for costs incurred by Settling Defendants to qualify as Creditable Costs in connection with the National and California ZEV Investment Plans. The requirements for Creditable Costs are organized and presented in three sections, as follows:

Section I - Statement of Objectives, Definitions, and Limitations.

Section II - Accounting procedures for the accounting for, substantiation, and reporting of Creditable Costs.

Section III - Attestation Requirements to establish whether an expenditure is a Creditable Cost.

## **I. STATEMENT OF OBJECTIVES, DEFINITIONS, AND LIMITATIONS**

**Objectives** - The objectives of the CCG are to ensure that the costs Settling Defendants submit as Creditable Costs are not specifically excluded below and are otherwise (a) reasonable, (b) necessary, and either (c) directly connected or directly allocable to eligible ZEV Investment projects or activities in the National and California ZEV Investment Plans approved by EPA or CARB, as applicable, pursuant to procedures set out in Appendix C of the Consent Decree. The definitions and limitations below will guide the determination of whether a cost meets this objective.

**Definitions and Limitations** - In order to qualify as Creditable Costs, costs must be:

(1) “reasonable,” “necessary,” and either “directly connected” or “directly allocable,” as defined in Paragraph 1 (Requirements) below; (2) not expressly excluded as a Creditable Cost in the cost categories set out in Paragraph 2 (Excluded Categories of Costs) below; and (3) within the limitations set forth in Paragraph 4 (Specific Limitations on Certain Cost Categories) and Paragraph 5 (General Limitations on All Personnel, Overhead, and Service Level Agreement Costs) below.

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### **1. Requirements**

For the purposes of the CCG and Attestation Requirements, the following definitions in Paragraphs 1.1 through 1.4 shall apply.

1.1. Reasonable - A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. What is reasonable depends upon a variety of considerations and circumstances, including: (1) whether the cost is the type of cost generally recognized as ordinary and necessary for implementation of ZEV Investment projects or activities in the Settling Defendants’ approved National or California ZEV Investment Plan; (2) generally accepted sound business practices (consistent with Settling Defendants’ existing procurement policies), arm’s-length bargaining, and Federal, State, and local laws and regulations; (3) any significant deviations from the Settling Defendants’ established practices; and (4) comparison to the costs of similar projects or project components of the same size, in the same industry, or in the same geographic area at or near the time that the expenditure was made.

1.2. Necessary - A cost is necessary if the ZEV Investment projects or activities approved as part of the National or California ZEV Investment Plan could not

have been accomplished without incurrence of the cost.

1.3. Directly Connected - A cost is directly connected if it is incurred for the sole purpose of implementing approved ZEV Investment projects or activities as part of the National or California ZEV Investment Plan.

1.4. Directly Allocable - A cost is allocable if it is either directly connected or if some portion of the cost can be directly attributed to implementation of the ZEV Investment projects or activities in the Settling Defendants' approved National or California ZEV Investment Plan on an equitable basis that takes into account the causal/beneficial relationship of the attributed cost to the activities to which it is attributed.

## **2. Excluded Categories of Costs**

Costs that are excluded from Creditable Costs in this Paragraph 2 shall not qualify as Creditable Costs under any other cost principle.

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2.1. Disallowed Overhead - A cost incurred by any entity or distinct business group created by Settling Defendants to carry out a National or California ZEV Investment Plan, which is neither Directly Connected nor Directly Allocable to an approved ZEV Investment project or activity included in that National or California ZEV Investment Plan, is not a Creditable Cost.

2.2. Electricity Costs - Unless otherwise agreed to in writing by EPA or CARB, as applicable, the costs for electricity for charging ZEVs are not Creditable Costs.

2.3. Entertainment Expenses - Costs of amusement, diversion, social activities, and any directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities are not Creditable Costs. Costs of membership in social, dining, or country clubs or other organizations having the same purposes are not Creditable Costs, regardless of whether the cost is reported as taxable income to the employees.

2.4. Fines and Penalties - Costs of fines and penalties resulting from violations of, or failure of the Settling Defendants to comply with, Federal, State, local, or foreign laws and regulations, are not Creditable Costs.

2.5. General and Administrative Costs - General and Administrative costs are costs incurred by the parent of the entity or distinct business group created to implement the projects or activities in the Settling Defendants' approved National or California ZEV Investment Plan for the support of the parent's overall organization. General and Administrative costs are not Creditable Costs.

2.6. Income Taxes - All income taxes, with the exception of payroll taxes, are not Creditable Costs.

2.7. Interest and Other Financial Costs - Interest on borrowings (however represented), bond discounts, and costs of financing and refinancing capital (net worth plus long-term liabilities), are not Creditable Costs.

2.8. Legal Costs - Costs for legal services related to issues of Settling Defendants' compliance with the requirements of Appendix C or the Consent Decree are not Creditable Costs.

2.9. Pass-through Costs - Discrete items of cost -- such as surcharges imposed by electric utilities or fees imposed by local governments -- that are imposed by a third party and passed through or transferred by Settling Defendants to an end user, customer

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or other third party on a clearly-stated, one-for-one basis -- or are otherwise borne by the end user, customer or other third party -- are not Creditable Costs.

2.10. Trademark - Costs incurred in connection with the establishment and defense of any trademark or other intellectual property are not Creditable Costs.

### **3. General Guidance on Costs**

3.1. Federal Acquisition Regulations - In developing their proposed Creditable Cost Guidances, Settling Defendants may draw from provisions of the Federal Acquisition Regulations, 48 C.F.R. Chapter 1, Subchapter E, Part 31, Subpart 31.205, to the extent appropriate and not inconsistent with the definitions and limitations set forth in this Appendix C-1.

### **4. Specific Limitations on Certain Cost Categories.**

4.1. Land or Facility Rental; Real Estate Acquisition - Subject to the expressed limitations, the following costs may qualify as Creditable Costs.

4.1.1. Rental costs under operating leases, to the extent that the rates are reasonable at the time of the lease decision, after consideration of (i) rental costs of comparable property, if any; (ii) market conditions of the area; (iii) the type, life expectancy, condition, and value of the property leased; (iv) alternatives available; and (v) other provisions of the agreement, may qualify as Creditable Costs.

4.1.2. Rental costs under a sale and leaseback arrangement may qualify as Creditable Costs only up to the amount the Settling Defendants would be allowed if the Settling Defendants had retained title.

4.1.3. Charges in the nature of rent for property between any divisions, subsidiaries, or organization under common control, to the extent that they do not exceed the normal costs of ownership, such as depreciation, taxes, insurance, facilities capital cost of money, and maintenance (excluding interest or other unallowable costs pursuant to Federal Acquisition Regulations, 48 C.F.R. Chapter 1, Subchapter E, Part 31, Subpart 31.205), provided that no part of such costs shall duplicate any other allowed cost.

Rental cost of personal property leased from any division, subsidiary, or affiliate of the Settling Defendants under common control that has an established practice of leasing the same or similar property to unaffiliated

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lessees may qualify as Creditable Costs in accordance with Paragraph

4.1.1. above.

4.1.4. Land and building acquisitions related to a ZEV Investment are not

Creditable Costs unless: (i) such acquisition is necessary to provide Settling Defendants with assurance that they will have access to such land or building for the ten-year period after the Effective Date, or (ii) such acquisition is materially less expensive than leasing the land or building for the ten-year period after the Effective Date.

4.2. Materials - A cost for the physical goods that are required to implement projects or activities in the Settling Defendants' approved National or California ZEV Investment Plan and taxes thereon may qualify as Creditable Costs.

4.3. Marketing - Projects or activities necessary to implement brand-neutral education or public outreach programs that are designed to build or increase public awareness of ZEVs may qualify as Creditable Costs. Costs incurred with marketing of Settling Defendants' products or services are not Creditable Costs.

4.4. National or California ZEV Investment Plan Project Management - A cost for the supervision, oversight, and management of project personnel, including Settling Defendants' employee and contractor or vendor personnel, which are required to implement projects or activities in the Settling Defendants' approved National or California ZEV Investment Plan, may qualify as Creditable Costs.

4.5. Personnel/FTE - Subject to the expressed limitations, the following costs may qualify as Creditable Costs.

4.5.1. Compensation for personnel includes all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the Settling Defendants during and for the implementation of the projects or activities in the Settling Defendants' approved National or California ZEV Investment Plan. This includes salaries; wages; bonuses; employee insurance; fringe benefits; contributions to pension plans; and allowances for off-site pay, incentive pay, location allowances, hardship pay, severance pay, and cost of living differential. Compensation for personnel may qualify as a Creditable Cost subject to the following general criteria.

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4.5.1.1. Compensation for personnel must be for work performed by the employee in the current year and must not represent a retroactive adjustment of prior years' salaries or wages.

4.5.1.2. The compensation in total must be reasonable and necessary for the work performed.

4.5.1.3. The compensation must be based upon and conform to the terms and conditions of the Settling Defendants' established compensation plan or practice followed so consistently as to imply, in effect, an agreement to make the payment.

4.5.1.4. No presumption will exist that compensation is a Creditable Cost where the Settling Defendants introduce major revisions of existing compensation plans or new plans and the Settling Defendants have not provided to EPA or CARB, as applicable, either before

initiating implementation or within a reasonable period after it, an opportunity to review the creditability of the changes.

4.5.2. Reasonableness. Compensation for personnel may be considered a Creditable Cost if the total compensation conforms generally to compensation paid by other firms of the same size, in the same industry, or in the same geographic area for similar services or work performed. This does not preclude EPA or CARB, as applicable, from challenging the reasonableness of an individual element of compensation where costs are excessive in comparison with compensation paid by other firms of the same size, same industry, or in the same geographic areas for similar services.

4.5.3. Domestic and foreign differential pay.

4.5.3.1. When personal services are performed in a foreign country, compensation may also include a differential that may properly consider all expenses associated with foreign employment such as housing, cost of living adjustments, transportation, bonuses, additional Federal, State, local or foreign income taxes resulting from foreign assignment, and other related expenses.

4.5.3.2. Although the additional taxes in Paragraph 4.5.3.1. above may be considered in establishing foreign overseas differential, any [Case 3:15-md-02672-CRB Document 2103-1 Filed 10/25/16 Page 178 of 225](#)

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increased compensation calculated directly on the basis of an employee's specific increase in income taxes is not a Creditable Cost. Differential allowances for additional Federal, State, or local income taxes resulting from domestic assignments are not Creditable Costs.

## **5. General Limitation on All Personnel, Overhead, and Service Level Agreement Costs**

5.1. In addition to having to meet all of the requirements set forth above, all costs incurred by Settling Defendants and any entity or distinct business group created by Settling Defendants to carry out a National or California ZEV Investment Plan for: (i) personnel, (ii) service-level agreements, and (iii) office space and services (direct or indirect overhead) for employees of Settling Defendants or a newly created entity, shall be limited to no more than fourteen (14) percent of the Creditable Costs incurred during the period covered by the first two Annual National ZEV Investment Reports required pursuant to Paragraph 2.9 of Appendix C, or the first two Annual California ZEV Investment Reports required pursuant to Paragraph 3.6 of Appendix C, as applicable, and shall be limited to ten (10) percent thereafter unless otherwise agreed to in writing by EPA or CARB, as applicable, in advance of such cost being incurred. As used herein, a service-level agreement cost is a cost for goods or services provided by an entity that is related to or controlled by Settling Defendants, their parents or subsidiaries (i.e., not a third-party vendor).

## **II. ACCOUNTING PROCEDURES FOR THE ACCOUNTING FOR, SUBSTANTIATION, AND REPORTING OF CREDITABLE COSTS**

In accordance with Paragraphs 2.2 and 3.2 of Appendix C of the Consent Decree, Settling Defendants shall, within thirty (30) days of the Effective Date, concurrently submit to EPA and CARB for review and approval a proposed separate Creditable Cost Guidance to assist in the determination of Creditable Costs under the National and California ZEV Investment Plans, respectively. The Creditable Cost Guidances shall provide the accounting procedures for the accounting, substantiation, and reporting of Creditable Costs under the respective ZEV Investment Plans. The Creditable Cost Guidances shall specify how Settling Defendants will segregate, describe, report, and substantiate costs in a manner that will allow for an independent certified public accountant firm (“Third-Party Reviewer”) retained by the Settling Defendants to attest that costs claimed by Settling Defendant as Creditable Costs satisfy all requirements set forth in the Consent Decree, Appendix C, and any approved Creditable Cost Guidances. In the Creditable Cost Guidances, Settling Defendants shall (a) specify any and all unique accounting cost centers and accounts to record and report Creditable Costs, and (b) identify the

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level and type of documentation that are appropriate to substantiate the incurrence of any cost and to demonstrate that such cost meets the standards articulated in Appendix C (and this Appendix C-1) for qualification of costs as Creditable Costs. The level of detail and support required shall be sufficient to meet the requirements of a Compliance Attestation performed in accordance with the Statement on Standards for Attestation Engagements (“Attestation Standards” or “AT”), as issued by the American Institute of Certified Public Accountants. (*See* AT Sections 101.201 and 601.) In order to satisfy the objectives set forth in Section I above, the procedures performed by the Third-Party Reviewer retained by Settling Defendants shall be agreed upon by the Settling Defendants, EPA, and CARB prior to the Compliance Attestation engagement and shall also be sufficient to meet the requirements of the Attestation Standards. Notwithstanding the preceding, nothing shall preclude the Third-Party Reviewer charged with providing the attestation described in Section III below from utilizing additional records or information to support the attestation.

### **III. ATTESTATION REQUIREMENTS**

In connection with Settling Defendants’ reporting obligations under the Consent Decree, Settling Defendants will retain a Third-Party Reviewer to perform a Compliance Attestation. The Compliance Attestation shall be performed in compliance with the Statements on Standards for Attestation Engagements, as issued by the American Institute of Certified Public Accountants.

The Attestation Report shall be submitted to EPA and CARB in connection with Settling Defendants’ Annual National and California ZEV Investment Reports. The Attestation Report shall be in a format similar to the following illustration:

Third-Party Reviewer’s Attestation Report

[*Appropriate Addressee*]

We have examined Settling Defendants’ management’s assertion that [*identify the assertion, which includes the subject matter and the criteria; for example, the accompanying schedule of ZEV Investments and Operations of Settling Defendants for the year ended December 31, 20XX, presents the Creditable Costs of Settling Defendants for the year ended December 31, 20XX, based on criteria set forth in*

*Appendix C and any approved Creditable Cost Guidance*]. Settling Defendants' management is responsible for its assertion. Our responsibility is to express an opinion based on our examination.

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