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December 22, 2025

Submitted via Regulations.gov

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CC:PA:01:PR (Notice 2025-70)
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RE: Notice 2025-70 (IRS-2025-0466); Request for Comments on Individual Tax Credit for Qualified Contributions to Scholarship Granting Organizations

On behalf of the Council for American Private Education (CAPE), thank you for the opportunity to submit comments for the Department's consideration as it undertakes rulemaking on the Federal Scholarship Tax Credit (FSTC).

The FSTC was created as part of the FY2025 reconciliation act (P.L. 119-21), also known as the One Big Beautiful Bill Act (OBBBA), which was signed into law by President Trump on July 4, 2025. The text of the FSTC law contains several ambiguities in need of clarification well before the FSTC's statutory launch on January 1, 2027. Indeed, it is essential that scholarship granting organizations (SGOs) in particular have a clear understanding of the rules they will be operating under long before January 1, 2027, in order for them to have an infrastructure in place ready to receive donations and provide scholarships. Our recommendations are as follows.

PUBLIC LAW 119–21

SEC. 70411. TAX CREDIT FOR CONTRIBUTIONS OF INDIVIDUALS TO SCHOLARSHIP GRANTING ORGANIZATIONS.

SEC. 25F. QUALIFIED ELEMENTARY AND SECONDARY EDUCATION SCHOLARSHIPS.

(b)(1) – Potential Marriage Penalty

The relevant language of Section 25F provides:

*(a) In the case of an **individual** who is a citizen or resident of the United States... there shall be allowed as a credit... the aggregate amount of qualified contributions made by the taxpayer during the taxable year."*

*(b)(1) "The credit allowed under subsection (a) to any **taxpayer** for any taxable year shall not exceed **$1,700**.*

The law does not directly address married couples filing jointly, but its use of the phrases "an individual" and "any taxpayer" suggest that the credit applies to each person, rather than each tax return.

The IRS recognizes that one joint tax return consists of two taxpayers. For example, 26 CFR §1.6013-4(b) affirms, "there are **two taxpayers** on a joint return." Had Congress intended for the FSTC credit allowance to be limited per return, such language would have been expressly included in the statute, as is routinely done when the law is intended to treat joint filers as one taxpayer. For example, under the Casualty Loss Deduction (26 U.S. Code §165(h)(4)(B)), the law specifically clarifies, "*For purposes of this subsection, a husband and wife making a joint return for the taxable year shall be treated as 1 individual.*"

We would ask Treasury to ensure that donors to the FSTC are not subject to a marriage penalty. This interpretation has precedent with other tax credits, like the clean vehicle credit (26 U.S. Code § 30D). The language of that statute was silent on its application to married joint filers, and yet two credits were allowed. Under that credit, each spouse was legally entitled to a $7,500 credit to purchase an electric vehicle, allowing them to claim $15,000 in electric vehicle credits on their joint return.

(c)(3) – Students Solely within the State

The requirement that SGOs only provide scholarships for "*eligible students solely within the State*" needs clarification. We recommend Treasury clarify that students who reside in a qualified SGO's state while attending school in a state that has not opted in are eligible for FSTC scholarships from that SGO. Likewise, students who attend school in a qualified SGO's state but reside in state that has not opted in should also be eligible to receive scholarships from that SGO. In Notice 2025-70 issued November 25, 2025, Treasury suggests that scholarship recipients will need to reside in a qualified SGO's state, however the statute does not say "reside." The statute is less restrictive. The statutory language – "*students solely within the State*" – should be understood to mean students residing, or attending school, within the state.

(c)(4) – Qualified Elementary or Secondary Education Expense

According to the statute, "*The term 'qualified elementary or secondary education expense' means any expense of an eligible student which is described in section 530(b)(3)(A).*" 530(b)(3)(A) makes clear that expenses at religious schools are qualified education expenses. Nonetheless, Treasury's rulemaking should explicitly state that no imposition of any conditions or requirements that would exclude educational expenses at private or religious elementary and secondary education institutions from being considered qualified expenses is permitted. Any

discrimination against any elementary or secondary education institution with respect to qualified elementary or secondary education expenses at that institution, based in whole or in part on the institution's religious character or affiliation, including religiously based or mission-based policies or practices, is impermissible. Reference to Supreme Court precedent in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, *Espinoza v. Montana Department of Revenue*, and *Carson v. Makin* would be helpful.

(d)(1)(B) – 90% of SGO Income

We believe it is clear Congress intended for this provision to require SGOs to spend 90% of income from FSTC donations on FSTC scholarships. We would urge Treasury to clarify that this provision does not mean SGOs must spend 90% of their entire organizational income from any sources on FSTC scholarships. The restriction against co-mingling of funds in (c)(5)(B) makes plain that Congress intended for existing SGOs participating in existing state tax credit scholarship programs to be able to provide FSTC scholarships as well. Yet, it would be impossible for SGOs receiving funds through state level program donations to provide 90% of their income from all sources to FSTC scholarships. If they were required by Treasury regulations to do so, existing SGOs interested in providing FSTC scholarships would feel compelled to each create a new 501(c)(3) for FSTC purposes. There is nothing in the OBBBA to suggest that was Congress's intent with respect to the FSTC, and this would be extremely burdensome both to SGOs and to the Department of the Treasury.

According to Notice 2025-70, "The Treasury Department and the IRS anticipate that the forthcoming proposed regulations would provide that the income of the organization includes all income of the organization, including unrelated business income, and is not limited to qualified contributions segregated in the separate account(s) described in § 25F(c)(5)(B)." We respectfully request that Treasury reconsider this interpretation, which is not workable for SGOs with multiple income streams, including state tax credit scholarship programs, or donations unrelated to any state or federal program.

We also recommend that Treasury allow for the 90% requirement to be calculated on a rolling, three-year average. This will be necessary to accommodate start-up costs that will be borne by new SGOs. Moreover, many donors make their charitable contributions at the end of the calendar year. Without the flexibility of a rolling multiyear average, it will be impossible for SGOs to disburse scholarship funds donated, for instance, on the evening of December 31. A rolling, multi-year average would help mitigate difficulties deriving the fact that the school year does not align with the calendar year.

(d)(1)(C) – SGOs and Qualified Expenses

We believe this provision is intended to ensure that SGOs spend FSTC donations on educational expenses authorized by the FSTC statute. In the event a state program allows SGOs to provide scholarships for purposes not included in the list of qualified FSTC expenses, we do not believe Congress intended for an SGO interested in participating in the FSTC to have to establish a new 501(c)(3). An SGO that provides state program scholarships for expenses authorized by a state, and FSTC scholarships for expenses authorized by the FSTC statute, should be understood to be

in compliance with (d)(1)(C), as long as those funds are properly segregated according to the requirements of (c)(5)(B). Treasury may have had this situation in mind when it included the following language in Notice 2025-70: "In addition, there are organizations that operate in States with State tax credits similar to the § 25F credit that may want to qualify as SGOs described in § 25F(c)(5) but currently have structures or operations not expressly addressed in this notice. The Treasury Department and the IRS request additional information regarding such organizations and whether they could satisfy all of the requirements of § 25F(c)(5)."

(d)(2)(B) – Disqualified Person

In Notice 2025-70, Treasury contemplates modifying its current definition of what constitutes a "substantial contributor" and thus a disqualified person, by disqualifying the child of any person who contributes more than 2 percent of an SGO's total contributions from receiving a scholarship. However, this could prevent smaller SGOs with small donor pools from operating. Treasury should retain its current "substantial contributor" criteria, meaning those who give at least $5,000 to an SGO, if such amount is more than 2% of the SGO's total contributions.

(g)(1) – State SGO List

The law says: "*a State that voluntarily elects to participate under this section shall provide to the Secretary a list of the scholarship granting organizations that meet the requirements described in subsection (c)(5) and are located in the State.*" We believe a plain reading of the statute makes clear that the governor (or any other state authority operating under (g)(1)(B)) of a participating state must include any SGO on the list that complies with the requirements of subsection (c)(5) and is located in the state. States are not authorized to place additional requirements upon SGOs or to leave SGOs off of the list at the governor's (or other authority's) discretion. If a governor or other state authority were to leave an SGO off the list that was qualified under the requirements of (c)(5), that would be a violation of federal law. <u>Clarification of this point is absolutely essential.</u> We very much appreciate that Treasury proposed this interpretation in Notice 2025-70, saying "The Treasury Department and the IRS anticipate that the forthcoming proposed regulations would provide, consistent with § 25F(g)(1)(A), that the State list must include all organizations located in the State that have requested to be designated as an SGO and that meet the § 25F(c)(5) statutory requirements."

Notice 2025-70 also says: "The Treasury Department and the IRS interpret § 25F(g) as requiring each covered State to verify that each organization on the State's list satisfies all of the requirements of § 25F(c)(5)." We urge Treasury to reconsider this interpretation. The statute does not provide states with any investigative authority over SGOs. Such an arrangement would provide ample opportunity for state officials to discriminate against SGOs and private schools they do not prefer. Moreover, states are not in a position to properly audit SGOs as to their compliance with this federal law. Instead, Treasury should require SGOs to submit a sworn compliance affidavit attesting that they meet all statutory requirements. If the appropriate state authority under (g)(1)(B) has concerns over the legitimacy of an SGO's compliance with federal requirements, that authority should report those concerns to the IRS, which is the properly situated entity to audit an SGO's compliance. In any event, a process for appealing an SGO's exclusion or removal from the state list should be established. That appeals process should

extend to situations where a state elects to participate but fails to submit a list at all. Such a failure would violate the statutory requirement in (g)(1)(A) that participating states "*shall provide*" a list of qualified SGOs to the secretary.

(g)(1)(A) – Deadline for List Submission

Because of the need for SGOs, schools, donors, and parents to be able to prepare for the January 1, 2027 launch of the FSTC, we greatly appreciate Treasury's issuance of Revenue Procedure 2026-6 on December 12, 2025, allowing states to make an advance election to participate in the FSTC.

We would, however, ask Treasury to reconsider language in Notice 2025-70 indicating that each participating state will need to provide its list of qualified SGOs and the state's certification "**before** January 1, 2027." This language suggests a December 31 deadline, yet the statute indicates that the governor (or other state authority) shall provide the list of qualified SGOs to the secretary "***Not later than January 1*** *of each calendar year (or, with respect to the first calendar year for which this section applies, as early as practicable)*."

There are two issues here. First, under the language of the statute, each state should be able to provide its list of qualified SGOs either before January 1, or on January 1 itself. January 1 is a critical day, as some governors are traditionally sworn in on that day. Under the law, a new governor should be able to opt-in immediately after being sworn in on January 1.

The second issue concerns the "*as early as practicable*" language above. There is only one possible interpretation of this language: states will have a grace period extending beyond January 1, 2027 to make the election and provide the list in year one of the program. "*As early as practicable*" cannot mean a date before January 1, 2027, because the law already makes clear that states can make the election before January 1 each and every year. For the "as early as practicable in year one" language to have meaning, it must mean some point in time after January 1, 2027. This of course only applies to year one of the program. Beginning in 2028, there is no grace period in the law and January 1 will be the deadline.

(g)(1)(A) – SGO Located in the State

The law requires an SGO to be "*located in the State.*" Treasury should clarify that this means an SGO should be registered to do business in a state.

(g)(1)(B) – State Election to Participate

It would be helpful for Treasury to clarify that once a governor (or other state authority) elects to participate, there is no mechanism for the state to rescind that year's affirmative election. The law provides a mechanism for states to opt in to, but not to opt out of, participation. In this vein, we appreciate Treasury's assertion in Revenue Procedure 2026-6 that "Once a State's Advance Election for calendar year 2027 has been made, the only subsequent submission that will be processed by the Treasury Department and the IRS is the submission of the State SGO list (including all required certifications)."

Religious Liberty and Private School Autonomy

Treasury should make clear in any and all of its guidance and rulemaking pertaining to the FSTC that nothing in the law shall be construed to permit, allow, encourage, or authorize any federal, state, or local government entity, or officer or employee thereof, to mandate, direct, or control any aspect of any private or religious elementary or secondary school, or any scholarship granting organization. Reference to Supreme Court precedent in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, *Espinoza v. Montana Department of Revenue*, and *Carson v. Makin* would be helpful in defending these principles. Protecting the autonomy and religious liberty of private schools is of the utmost importance.

We respectfully submit these recommendations for your consideration and are pleased to answer any questions from staff at the Department. Thank you very much.

Sincerely,

Michael Schuttloffel
Executive Director