

August 2, 2018

## **EPA & NHTSA ISSUE SAFE VEHICLES RULE, PROPOSING CHANGES TO VEHICLE GHG LIMITS AND REVOCATION OF CALIFORNIA WAIVER**

To Our Clients and Friends:

On August 2, 2018, the U.S. Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) issued a notice of proposed rulemaking (NPRM), the *Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks* (SAFE Vehicles Rule), relating to the national automobile fuel economy and greenhouse gas (GHG) emissions standards set by EPA for cars and light-duty trucks.[1]

The proposed SAFE Vehicles Rule is the expected next step in the Trump Administration's efforts to reevaluate fuel economy and emissions standards set by the Obama Administration. In 2012, the Obama Administration set GHG and fuel economy standards for passenger cars and light-duty trucks for model years 2017 to 2025, but EPA and NHTSA committed in that rulemaking to "a comprehensive midterm evaluation and agency decision-making process for the MYs 2022–2025 standards." [2] This "midterm evaluation" was to be completed by April 1, 2018.[3]

On December 6, 2016, the Obama EPA published a "proposed determination," finding that the standards set in the October 2012 rule should remain in place,[4] and on January 12, 2017, the agency issued a final determination to that effect.[5] In March 2017, the Trump EPA announced its intention to reconsider that final determination.[6] And in April 2018, the agency formally withdrew the Obama Administration's January 2017 final determination and announced that it would initiate a notice and comment rulemaking to evaluate the appropriate standards for MYs 2022–2025.[7]

The SAFE Vehicles Rule is the first step in the rulemaking process to evaluate the appropriate future GHG emissions and fuel economy standards for light-duty vehicles. The proposed rulemaking includes several important developments of interest for the automotive industry:

- The proposed rulemaking includes several alternative regulatory proposals for fuel economy and tailpipe carbon dioxide (CO<sub>2</sub>) standards that would be applicable to vehicles sold in MYs 2021 to 2026.
  - The alternative preferred by EPA and NHTSA would freeze fuel economy and CO<sub>2</sub> standards at MY 2020 levels for MYs 2021 through 2026.
  - The agencies are inviting comments on seven other options presented in the NPRM. These options include maintaining the regulatory plan promulgated under the Obama Administration, or implementing increasingly stringent fuel economy and CO<sub>2</sub> requirements at varying rates between MYs 2020 and 2026.

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- EPA and NHTSA are also seeking comment on the compliance flexibilities associated with the fuel economy and CO<sub>2</sub> programs, including whether to require some level of public disclosure for credit trading, or whether to eliminate credit trading in the CAFE program altogether.
- EPA is proposing to change CO<sub>2</sub> targets after MY 2021 to remove the adjustments related to refrigerant and the offsets for nitrous oxide and methane emissions. In practice, this would increase the applicable threshold for CO<sub>2</sub> requirements for MYs 2020 and 2021.
- The NPRM also proposes to create a single 50-state standard for GHG emissions. This would be accomplished by withdrawing California's waiver of preemption under the Clean Air Act for the GHG and Zero Emissions Vehicle (ZEV) requirements of California's Advanced Clean Cars program.
  - California does not have authority to regulate fuel economy directly, as the Energy Policy and Conservation Act of 1975 (EPCA), as amended by the Energy Independence and Security Act of 2007 (EISA), preempts state standards relating to fuel economy.[8]

The SAFE Vehicles Rule will be published in the Federal Register in the coming weeks, and will be open for public comment for a period of 60 days after publication. In addition, EPA and NHTSA will hold three public hearings on the rule in Washington, DC, Detroit, MI, and Los Angeles, CA. The dates for these hearings will be announced in a forthcoming notice in the Federal Register.

If the agencies' preferred proposals are adopted and the rule becomes final, it is virtually certain that the revised standards and the withdrawal of California's waiver authority will be challenged in court by California and other states, and by the environmental community.

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[1] The official version of the SAFE Vehicles Rule will be published in the Federal Register in the coming weeks. Until it is published, the proposed rule is available at <https://www.epa.gov/sites/production/files/2018-08/documents/safe-my-2021-2026-cafe-ld-ghg-nhtsa-epa-nprm-2018-08-02.pdf>.

[2] *2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards*, 77 Fed. Reg. 62,624, 62,628 (Oct. 15, 2012).

[3] *Id.* at 62,784.

[4] *Proposed Determination on the Appropriateness of the Model Year 2022–2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards Under the Midterm Evaluation*, 81 Fed. Reg. 87,927 (Dec. 6, 2016).

[5] *Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards Under the Midterm Evaluation* (Jan. 12, 2017), *available at* <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100QQ91.pdf>.

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[6] *Notice of Intention to Reconsider the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light Duty Vehicles*, 82 Fed. Reg. 14,671 (Mar. 22, 2017).

[7] *Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles*, 83 Fed. Reg. 16,077 (Apr. 13, 2018). Gibson Dunn is currently representing the Association of Global Automakers as movant-intervenors before the Court of Appeals for the District of Columbia Circuit in *California v. EPA*, No. 18-1114, California's challenge to the withdrawal of the January 2017 final determination.

[8] From 2006 to 2008, Gibson Dunn represented the Association of Global Automakers in litigation regarding the EPCA preemption of GHG motor vehicle emissions standards adopted by several states.



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