

CAFE Standards and Calif.—Agreement May Have Far-Reaching Effects

**By Aaron Nelson, The Legal Intelligencer*

On July 25, four automobile manufacturers—BMW, Ford, Honda and Volkswagen—and California agreed to a framework (emissions agreement) under which their national fleet of vehicles meet emissions standards that are much more stringent than the standards recently proposed by the Environmental Protection Agency (EPA) and National Highway Traffic Safety Administration (NHTSA). This emissions agreement between one state and companies occupying one third of the passenger car market has the potential to establish or greatly influence the emission standards for every passenger car or light truck sold in the United States over the next few years.

Under the Clean Air Act (CAA), the EPA is required to generate motor vehicle emissions rules concerning any air pollutant “which may reasonably be anticipated to endanger public health or welfare.” In establishing such standards, the EPA must consider technical feasibility and cost, and must provide sufficient time “to permit the development and application of the requisite technology.”

In 2009, the EPA determined that carbon dioxide (CO₂) may reasonably be anticipated to endanger the public welfare and public health. As a result, the EPA established national motor vehicle CO₂ emissions standards.

Section 209 of the CAA prohibits states from adopting emissions standards for new motor vehicles, but requires the EPA to grant a waiver of this section to California so long as the state’s standards are, “in the aggregate, at least as protective of public health and welfare” as the federal standards. The EPA may, however, deny a waiver to California if the state “does not need such ... standards to meet compelling and extraordinary circumstances.” But if California has obtained a waiver through the above provisions of the CAA, any state may adopt and enforce identical standards.

When the EPA adopts motor vehicle CO₂ emissions standards under the CAA, it frequently does not act alone. Under the Energy Policy and Conservation Act, NHTSA, with the EPA's involvement, is required to generate corporate average fuel economy (CAFE) standards. Because tailpipe CO₂ emissions standards are inherently related to fuel economy standards, and because these standards would apply to the same fleet of vehicles, NHTSA and the EPA propose these standards together. The CAFE standards must be “the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year.” NHTSA must consider, among other things, technological feasibility and economic practicability when determining the maximum average fuel economy for a given model year.

In 2012, the EPA and NHTSA finalized rules that set CAFE and CO₂ emission standards for passenger cars and light trucks for model years 2017 through 2021. The EPA also set CO₂ emission standards for model years 2022 through 2025 in the same rulemaking. Because NHTSA is prohibited from establishing fuel efficiency standards for more than five model years in a single rulemaking, NHTSA merely produced “augural” fuel efficiency standards for model years 2022 through 2025. These “augural” standards were hastily approved by the Obama administration in early January 2017, but by March 2017, the Trump administration had rescinded the standards and announced its intention to reevaluate the CAFE standards for model years 2022 through 2025.

On Aug. 24, 2018, NHTSA and the EPA proposed the safer affordable fuel-efficient (SAFE) vehicles rule for passenger cars and light trucks, see “The Safer Affordable Fuel Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks,” 83 Fed. Reg. 42,986 (Aug. 24, 2018). Even though NHTSA is prohibited from “prescribing” CAFE standards for more than five model years in a single rulemaking, this rule purportedly seeks to amend or establish CAFE and CO₂ standards for six total model years, 2021 through 2026. Instead of a gradual annual increase in stringency over that span, as contemplated by the “augural” standards, the SAFE rule would preserve the 2020 CAFE and CO₂ standards until 2026.

Significantly, the proposed rule seeks to revoke the waiver the EPA gave California in 2013. *Id.* Pursuant to the CAA, the EPA granted a waiver to California in 2013 for its own vehicle emissions standards, and twelve states and the District of Columbia adopted at least part of the California standards. In the proposed SAFE rule, the EPA argues that California did not and does not need such a standard to meet “compelling and extraordinary circumstances” and therefore California should not have been given a waiver in 2013. In addition to invalidating California’s vehicle emissions standards, the SAFE rule would also invalidate the adoption of the California standards by the 12 other states because their adoption of California vehicle emissions standards is predicated on California’s having obtained a waiver.

The emissions agreement California reached with BMW, Ford, Honda, and Volkswagen—four of the largest automobile manufacturers in the country—is a proposed framework which would, if later implemented by the California Air Resources Board, establish the manufacturers’ fuel efficiency standards for model years 2022 through 2026. The framework provides for revised emissions standards that would become more stringent, much like the standards set in 2012, albeit at a slower rate. Because BMW, Ford, Honda, and Volkswagen sell only about one third of the total passenger cars and light trucks sold annually in the United States, a significant portion of the market still has not agreed to the California framework. Additionally, because the SAFE rule has proposed to revoke the waiver given to California’s emissions standards in 2013, it is likely the EPA will also attempt to deny a waiver for the standards provided in the framework should California eventually attempt to adopt them.

The emissions agreement between the motor vehicle manufacturers and California represents a dilemma for the Trump administration. The SAFE rule proposes the establishment of CAFE standards, and CAFE standards must be “the maximum feasible average fuel economy” achievable. In making the determination of what is achievable, NHTSA must consider, among other things, technological feasibility and economic practicability based on what “the manufacturers can achieve.” The emissions agreement shows that a large portion of the

passenger car and light truck market believes that the standards within the agreement are not only technologically feasible, but also economically practicable and achievable.

In addition, in determining CO₂ standards, the EPA must consider technical feasibility and cost. The emissions agreement likewise reveals that a large portion of the market agrees that its standards are technically feasible and cost effective. To finalize the SAFE rule as proposed, not only must NHTSA demonstrate that the maximum feasible average fuel economy that manufacturers can achieve is appreciably lower than that which a considerable share of automobile manufacturers have just agreed they can achieve, but the EPA must similarly show how its more relaxed CO₂ emissions standards are justified when a considerable share of car manufacturers have agreed that a higher standard is technologically feasible and cost effective.

Thus, while it is still possible NHTSA and the EPA follow through with the SAFE rule as proposed, the emissions agreement presents obstacles to finalizing the SAFE rule, and could lead the agencies to adopt the standards to which the manufacturers have agreed. Therefore, this emissions agreement between a single state and a fraction of the passenger car and light truck market could greatly influence the emissions standards for every passenger car and light truck in the United States for the next few years.

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