

Client Alert

Tort Litigation & Environmental Practice Group

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EPA Seeks Public Comment on Re-Opened Midterm Review of MY 2022-2025 Greenhouse Gas Standards and MY 2021 Standards

On August 21, 2017, the U.S. Environmental Protection Agency (“EPA”) and the National Highway Traffic Safety Administration (“NHTSA”) published a joint notice in the Federal Register requesting public comment on EPA’s reconsideration of its Final Determination of the Midterm Evaluation of greenhouse gas (“GHG”) emissions standards for model year (“MY”) 2022-2025 light-duty vehicles.ⁱ This action follows EPA’s March announcement that it would reconsider the Obama Administration’s decision to retain the MY 2022-2025 standards as originally promulgated.ⁱⁱ In addition, EPA is seeking comments on its GHG emissions standards for MY 2021. EPA will hold a public hearing, where members of the public may register to present oral comments, on September 6, 2017.ⁱⁱⁱ The deadline to submit written comments is October 5, 2017.

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Action Addresses Industry Dismay Over Obama EPA’s Haste

EPA first announced its finding that GHGs endanger public health and welfare within the meaning of Section 202(a) of the Clean Air Act in December 2009,^{iv} following the U.S. Supreme Court’s decision in *Massachusetts v. EPA*.^v A few months later, EPA and NHTSA finalized the first set of federal GHG emissions standards and fuel economy standards for light-duty vehicles, covering MY 2012-2016.^{vi} The agencies published updated standards in 2012 for MY 2017-2025.^{vii} In recognition of “the long time frame at issue in implementing standards for MY 2022-2015,” and associated uncertainties about whether the industry would develop technological improvements needed to meet later MY standards on the appropriate timeline, EPA committed to conducting a midterm evaluation of those standards.^{viii} The 2012 rule specified that EPA would issue a final decision on the midterm evaluation by April 1, 2018.

Notwithstanding this expected timeline, the Obama EPA rushed through a Final Determination following the November 2016 election of President Trump. EPA announced its proposed Final Determination in the Federal Register on December 6, 2016^{ix} and EPA Administrator Gina McCarthy finalized the proposal on January 12, 2017, just thirteen days after the comment period closed.^x Major automakers expressed dismay at the accelerated process, pointing out that industry support for the 2012 rule had been clearly premised on the need for a robust Midterm Evaluation with a

meaningful public comment process.^{xi} The Trump EPA's decision to reconsider the Midterm Evaluation is a direct response to these concerns.

What Is EPA Reconsidering?

In re-opening the Midterm Evaluation, EPA is reconsidering whether the MY 2022-2025 standards are appropriate under Section 202(a) of the Clean Air Act and the regulations established for the Midterm Evaluation. Given the statutory criteria, comments should primarily address the state of technology and expected compliance costs. In the August 21st notice, EPA also identified ten additional topics for consideration by commenters, several of which relate to how the standards square with consumer demand and may affect consumer behavior. Importantly, EPA is also seeking comments on the appropriate reference fleet. This list of topics potentially indicates a concern on the part of the Trump Administration about adopting emissions standards that would skew the market toward technologies that consumers may not favor.

Despite its willingness to re-open the Final Determination, EPA is limiting the scope of its review. The agency's August 21st announcement recognized that there is an existing body of EPA analyses and public comments already in the administrative record. Thus, EPA is not soliciting comments on the July 2016 Draft Technical Assessment Report ("TAR"). Instead, it is asking only for comments agreeing or disagreeing with the findings in the Obama Administration's Final Determination. In particular, EPA has expressed its willingness to consider studies that were not ready for submission during the previous comment periods. Comments should be accompanied by technical backup data and a clear description of any assumptions. Cost estimates must be accompanied by details sufficient to allow them to be reproduced.

Spotlight on MY 2021 Standards

Although the Midterm Evaluation relates to MY 2022-2025, EPA is also soliciting comments on the MY 2021 standards. EPA's stated reason is the need to harmonize the GHG and Corporate Average Fuel Economy ("CAFE") programs in light of NHTSA's recent announcement that it may re-evaluate the MY 2021 CAFE standards as part of its upcoming rulemaking for MY 2022-2025.^{xii}

Hot Topics and Key Questions

- **Electric Vehicles.** Commenters on the original Final Determination disagreed with the Obama EPA's conclusions in the TAR about the degree to which electrified vehicle technologies would be needed to comply with MY 2022-2025 standards. If EPA miscalculates, there is a risk that manufacturers will be forced to skew their fleets toward hybrid and plug-in models that consumers may not want (or may not be able to afford). The degree of risk is uncertain and has the potential to increase if gasoline prices fall or remain stable. Thus, although the Trump EPA is not reopening the TAR, its apparent interest in scrutinizing the reference fleet and analyzing consumer demand potentially suggests that it may be willing to adjust the compliance schedule if manufacturers can credibly establish that the current timeline results in an overly aggressive push toward electric vehicle technology. This issue may be of particular interest to manufacturers whose fleets remain more heavily focused on conventional gasoline vehicles.
- **California.** In March, the California Air Resources Board ("CARB") announced its decision retain the MY 2022-2025 standards as originally promulgated.^{xiii} Because of difficulties associated with building fleets to comply with two different sets of standards, this decision likely means that manufacturers will have to comply with the existing standards regardless of what the federal government does. Although EPA could turn the

tables by revoking California's waiver to implement its own GHG emissions program, that is a step that, so far, appears unlikely.^{xiv}

- **GHGs and Fuel Economy.** Fuel economy and GHG standards are linked: the less fuel burned, the lower the GHG emissions. Accordingly, certain industry representatives took issue with the Obama EPA's issuance of a Final Determination without NHTSA. Re-opening the Final Determination potentially gives EPA flexibility to revise existing GHG standards if NHTSA takes a less aggressive approach to fuel economy in its upcoming rulemaking. However, such a reversal may be difficult in light of CARB's position.

Summary

EPA's re-examination of the Midterm Evaluation of GHG emissions standards is a high-stakes rulemaking with significant cost implications for automobile manufacturers and the public. This rulemaking will have consequences beyond the automobile industry because it will also influence the overall domestic demand for oil and the pace at which alternative fuels are widely adopted for transportation use.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."

ⁱ 82 Fed. Reg. 39,551 (Aug. 21, 2017).

ⁱⁱ 82 Fed. Reg. 14,671 (Mar. 22, 2017).

ⁱⁱⁱ 82 Fed. Reg. 39,976 (Aug. 23, 2017).

^{iv} 74 Fed. Reg. 66,497 (Dec. 15, 2009).

^v 549 U.S. 497 (2007).

^{vi} 75 Fed. Reg. 25,324 (May 7, 2010).

^{vii} 77 Fed. Reg. 62,624 (Oct. 15, 2012).

^{viii} *Id.* at 62,784.

^{ix} 81 Fed. Reg. 87,927 (Dec. 6, 2016).

^x EPA, *Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation*, EPA-420-R-17-001 (2017), available at <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100QQ91.pdf>.

^{xi} See EPA, *Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation: Response to Comments 7*, EPA -420-R-17-002 (2017), available at <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100QQ9Y.pdf>.

^{xii} 82 Fed. Reg. 34,740, 34,742 (July 26, 2017).

^{xiii} Press Release, *CARB Finds Vehicle Standards Are Achievable and Cost-Effective* (Mar. 24, 2017), available at <https://www.arb.ca.gov/newsrel/newsrelease.php?id=908>.

^{xiv} In May, Administrator Pruitt asked California Governor Jerry Brown to participate in the re-opened Midterm Review. See Letter from E. Scott Pruitt, Administrator, U.S. Environmental Protection Agency, to the Hon. Edmund G. Brown, Jr., Governor of California (May 2, 2017). Administrator Pruitt has also stated publicly that EPA is not reviewing California's waiver. See Dino Grandoni, *The Energy 202: California Scores Its First Big Environmental Victory of the Trump Era*, WashingtonPost.com (June 19, 2017), https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2017/06/19/the-energy-202-california-scores-its-first-big-environmental-victory-of-the-trump-era/5946ffb2e9b69b2fb981dd77/?utm_term=.0183ed4f7017.