King & Spalding
Client Alert

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EPA and NHTSA Take Regulatory Action to Revoke California Authority to Regulate Greenhouse Gas Emissions

Action May Have Far-Reaching Impacts

Today, the Environmental Protection Agency ("EPA") and the National Highway Traffic Safety Administration ("NHTSA") announced a joint rule intended to substantially affect California's authority to regulate Greenhouse Gas ("GHG") emissions. This action is part of the Administration's proposal to set uniform fuel economy and GHG standards for cars and light-duty trucks, though the standards themselves have not yet been promulgated. Looming in the backdrop of this action is the potential impact to GHG credit markets, as certain companies have designed programs to produce Zero Emission Vehicles ("ZEVs") in order to generate credits that are sold to other manufacturers for compliance purposes.

In today's "One National Program Rule," NHTSA determines that under the Energy Policy and Conservation Act ("EPCA"), only the federal government may set fuel economy standards. The reach of this determination is intended to sweep in all state laws that substantially affect fuel economy standards, including tailpipe GHG emissions and ZEV mandates. This would affect light-duty vehicles, medium-duty, and heavy-duty vehicles as well. This means that state and local governments would be preempted from establishing their own separate fuel economy standards, including California and any states that have adopted California's standards (known as "Section 177 states") for vehicles that are subject to NHTSA's authority under EPCA.

However, EPCA does not preempt all potential state and local regulations related to GHGs, only those that substantially affect fuel economy standards. For instance, states may continue to regulate vehicular air conditioner refrigerant because that does not substantially affect fuel economy standards.

Relatedly, EPA is withdrawing the Clean Air Act preemption waiver it granted to California in January 2013 as it relates to California's GHG and ZEV programs. *See* notice. The revocation leaves in place California's programs to regulate tailpipe criteria emissions, such as Nitrogen Oxides ("NOx"). It also does not affect California's regulation of emissions from motorcycles, off-road recreational vehicles, off-road engines, or any other area that is not expressly addressed in the 2013 waiver.

In the rule, EPA concludes that California's waiver is not appropriate under Section 209(b) of the Clean Air Act, which allows EPA to grant a waiver for "compelling and extraordinary conditions." 42 U.S.C. 7543(b)(1)(B) ("No such waiver shall be granted if the Administrator finds that … such State does not need such State standards to meet compelling and extraordinary conditions."). In the One National Program Rule, EPA concludes, among other things, that California does not need its GHG and ZEV mandate standards because the standards address environmental problems that are not unique to California and will not provide a remedy that is unique to California.

The rule will become effective 60 days after publication in the Federal Register. The immediate compliance consequences to vehicle manufacturers are presently unclear. Undoubtedly, California, Section 177 states, and others will challenge both the legality of EPA's revocation of California's Section 209 waiver and NHTSA's determination of preemption. These plaintiffs will also seek an immediate stay of the effective date of the One National Program Rule. In reviewing stay requests, courts consider a four-pronged balancing test that evaluates, among other things, the plaintiff's likelihood of success on the merits, whether the plaintiffs will suffer an irreparable injury if a stay is not awarded, the possibility of harm to other parties if the relief sought is granted, and the public interest in the decision. In practical terms, given the nature of product planning in the automotive sector and the lack of revised fuel economy and GHG standards, most companies likely have solidified GHG and fuel economy compliance with the existing requirements at least through Model Year 2020.

In addition to the ensuing litigation, there is considerable uncertainty regarding the impact of the rule on GHG credits. Vehicle manufacturers can use both technology and credits to meet existing federal and state GHG standards. Certain companies have invested in zero emission products that generate credits that are then sold to vehicle manufacturers in order to meet federal and state fuel economy and GHG emissions requirements. The value of these credits is presently unclear as is the potential impact to these markets.

King & Spalding advises vehicle, engine, and equipment manufacturers on a variety of compliance issues related to fuel economy, GHGs, criteria pollutants, and certification requirements covering federal and state laws. As additional details of the rule are announced, a follow-up Client Alert will be issued.

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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.”

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