September 14, 2009

Clerk of the Board
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Comments on Proposed Amendments to Passenger Motor Vehicle Greenhouse Gas Emission Standards for September 24, 2009 California Air Resources Board Hearing

To Whom It May Concern:

The Association of International Automobile Manufacturers, Inc. (AIAM)[1] respectfully submits our comments on the proposed amendments to the Passenger Motor Vehicle Greenhouse Gas Emission Standards to be considered at the September 24, 2009 California Air Resources Board (CARB) hearing. The regulatory amendments currently under consideration are aimed at fulfilling certain commitments CARB made last May in connection with an agreement among the federal government, California and the auto industry to establish a new national program for regulating greenhouse gas ("GHG") emissions from motor vehicles. As a strong advocate of a single, national fuel economy/GHG standard, AIAM fully embraces this initiative.

While AIAM supports the overall goals of CARB's proposed regulatory amendments, we offer these comments to address particular concerns we have regarding whether the accompanying Initial Statement of Reasons (ISOR) may be inconsistent with some aspects of the stakeholder commitment letters and where AIAM has questions about the language of the proposed regulatory amendments.

[1] The Association of International Automobile Manufacturers, Inc. (AIAM) is a trade association representing 13 international motor vehicle manufacturers who account for 43 percent of all passenger cars and light trucks sold annually in the United States. AIAM provides members with information, analysis and advocacy on a wide variety of legislative and regulatory issues impacting the auto sector. AIAM is dedicated to the promotion of free trade and to policies that enhance motor vehicle safety and the protection of the environment. For more information, visit our website at www.aiam.org.

We look forward to working with CARB in the future regarding these proposals and others as the auto industry, CARB and the Obama Administration work together to implement the regulatory changes needed to help reduce GHG emissions from motor vehicles.

Thank you for the opportunity to comment on this proposal. Please contact John Cabaniss, AIAM's Director of Environment & Energy, at (703) 247-2107, if you have any questions.

Sincerely,

Michael J. Stanton
President and CEO

Attachment

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COMMENTS OF

THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS ("AIAM")

PROPOSED AMENDMENTS TO PASSENGER MOTOR VEHICLE GREENHOUSE GAS EMISSION STANDARDS

FOR THE SEPTEMBER 24, 2009,
CALIFORNIA AIR RESOURCES BOARD ("CARB") HEARING

September 14, 2009

On May 19, 2009, the Obama Administration announced a new national program to regulate motor vehicle fuel economy and greenhouse gas ("GHG") emissions. This program is the result of an agreement between various stakeholders—including the State of California, the Administration and the automobile manufacturing industry—which is intended, in part, to resolve pending disputes concerning the authority of California and other states to enact their own motor vehicle GHG regulatory programs. As a strong advocate of a single, national fuel economy/GHG standard, the Association of International Automobile Manufacturers (AIAM) fully supports this initiative.

In order to effectuate this new national program, the various stakeholders executed commitment letters setting forth the agreed-upon framework for the national program and the steps necessary for its implementation. For its part, the State of California and the California Air Resources Board (CARB) agreed to:

(A) Amend the California motor vehicle GHG emissions regulations for the 2009 through 2011 model years (MYs), such that compliance with the standards can be demonstrated based on the GHG emissions from the combined fleet of vehicles sold in California and the states that adopt and enforce California's GHG emissions standards under section 177 of the Clean Air Act;

(B) Amend, as necessary, the GHG emissions regulations for MYs 2009 through 2011 such that manufacturers have the ability to demonstrate compliance using data generated by the Federal fuel economy standards ("CAFE") test procedures, vehicle selection, and other testing protocols, including substitution of CAFE test data for previously submitted test data; and

(C) Amend the GHG emissions regulations for MYs 2012 through 2016, such that compliance with the GHG emissions standards to be adopted by EPA shall be deemed compliance with the California GHG emissions standards.

See May 18, 2009 Letter from Mary Nichols to Lisa P. Jackson and Ray LaHood at 1-2; *see also* May 18, 2009 Letter from Edmund G. Brown to Lisa P. Jackson and Ray LaHood at 2; May 18, 2009 Letter from Arnold Schwarzenegger to Lisa P. Jackson and Ray LaHood at 1-2.

The regulatory amendments currently under consideration are aimed at fulfilling the first two of these commitments. AIAM appreciates the efforts by CARB in drafting this rulemaking and looks forward to working with CARB staff to fully implement the new national program as outlined in the commitment letters. While AIAM supports the overall goals of the proposed regulatory amendments, AIAM offers these comments to address particular concerns where the proposed amendments and the accompanying Initial Statement of Reasons (ISOR) may be inconsistent with the stakeholder commitment letters and where AIAM has questions about the language of the proposed regulatory amendments.

A. The Statement In the Initial Statement of Reasons Concerning The Industry's Commitment to Forego Future Lawsuits Is Inconsistent With The Commitment Letters

In describing the regulatory and legal background for these proposed amendments, the ISOR states that "[m]anufacturers agreed to ultimately drop current, ***and forego similar future legal challenges***, including challenging a waiver grant, which occurred June 30, 2009." *See* ISOR at 4 (emphasis added). Although it is not part of the actual regulatory amendments, AIAM feels that this statement is an inaccurate description of the commitments undertaken by the automobile industry and, thus, merits comment to avoid future confusion.

As discussed above, the current regulatory amendments are part of a broader compromise between the automobile industry and California concerning the state's authority to enact its own separate motor vehicle GHG emissions program. The automobile industry has argued in court challenges that California's GHG regulations are preempted under the Energy Policy and Conservation Act of 1975, *see* 49 U.S.C. § 32919(a), and also that these regulations are not entitled to a preemption waiver under Section 209(b) of the Clean Air Act, 42 U.S.C. § 7543(b). As part of the proposal for a new national program, the industry committed to staying this litigation while the program is promulgated, and then to dismissing the actions once all of the steps to implementation are complete. As CARB recognizes, this rulemaking is part of this "series of actions that would resolve these current and potential future disputes over the standards through model year 2016." *See* ISOR at 3.

The industry, however, never committed to forgoing all "similar future legal challenges." Rather, the industry only agreed "to dismiss all such litigation (and not to renew any such litigation ***with respect to MYs 2009-2016***)" if CARB and EPA fulfill the steps set forth in the commitment letters to implement the new national program. *See,* June 24, 2009 Letter from Michael J. Stanton to Lisa P. Jackson and Ray LaHood at 1 (emphasis added). Accordingly, although AIAM certainly hopes that no new litigation will be necessary in the future, should

subsequent events unfold such that the industry is deprived of the benefit of this new national program after the 2016 model year, nothing in the commitment letters would prevent the industry from instituting a legal challenge and pursuing all available legal arguments.

B. The Proposed Requirement For Reporting State-Specific Data For Each Section 177 State Is Inconsistent With The Goal Of Reducing Compliance Burdens Through Fleet Pooling

The proposed rulemaking correctly seeks to amend the CARB GHG regulations to allow manufacturers to demonstrate compliance with the fleet-average GHG emission standards by "pooling" California and Section 177 State vehicle sales into one combined fleet for compliance purposes. This amendment will protect manufacturers from the significant compliance burden that would have resulted if they were required to balance their fleets separately in each and every state that adopted the GHG emissions regulations. Under this amendment, if a manufacturer elects to comply with the CARB GHG regulations through such pooling, all that is necessary to assess compliance with the regulations are the sales and emissions data for the combined fleet of California plus the Section 177 States.

The proposed regulatory amendments, however, would require manufacturers to submit to CARB data for (a) the combined fleet of California and the Section 177 states; (b) the California-only fleet; and (c) each individual Section 177 state. Specifically, the proposed new subsection 1961.1(a)(1)(A)1.d. of Title 13 of the California Code of Regulations[2] states that "[a] manufacturer that selects compliance Option 2 [allowing for pooling] must provide to the Executive Officer production, delivery, and sales values ***separately for the District of Columbia and for each individual state within the average***" (emphasis added).

This requirement of providing data for each individual state is, at a minimum, inconsistent with the spirit of the commitment letters, which was to reduce the added compliance burden on manufacturers caused by the balkanization of the motor vehicle market into multiple compliance regimes. For any manufacturer that chooses the pooling option, there would be no regulatory purpose in requiring a manufacturer to provide CARB with data concerning sales in each and every Section 177 State. The only data needed by CARB to fully implement its program are: (1) the pooled sales data and (2) California-only data so that CARB can track progress in meeting the targeted GHG emission reductions called for in AB 32, *see* ISOR at 5, and to assess any penalties that may be due to California for failure to zero out debits.[3]

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[2] All Section references in these comments will be to Title 13 of the California Code of Regulations.

[3] Indeed, one Section 177 State, Pennsylvania, does not even require separate reporting of sales in that state, relying instead on California sales to determine compliance with that state's regulations. See Pennsylvania Bulletin, December 9, 2006.

Moreover, the text of the proposed amendments does not limit this new requirement of multi-state reporting to just the 2009 through 2011 model years, but rather would extend it through the period of time when the national program takes effect. In other words, even if a manufacturer were to transition to the federal program in lieu of the California program in the 2012 model year, it would still be obligated to submit to CARB sales data for each individual Section 177 State. AIAM can conceive of no legitimate regulatory purpose for such a reporting requirement. Once the national program goes into effect and a manufacturer elects to participate in the national program, state-by-state compliance should no longer be required for either the substantive standards or administrative requirements. AIAM views this requirement as inconsistent with CARB's commitment to "[a]mend the GHG emissions regulations for MYs 2012 through 2016, such that compliance with the GHG emissions standards adopted by EPA shall be deemed compliance with the California GHG emissions standards." Data for assessing GHG emissions from vehicles in individual states for use in determining compliance with state overall GHG emission reduction targets can be obtained through other, more accurate methods, such as by tracking fuel sales. Accordingly, AIAM believes that the proposed regulatory amendments should be changed to remove the requirement that manufacturers report sales data for each and every Section 177 State.[4]

C. Sales in Pennsylvania Should Not Be Included In The Pooling Because That State Does Not Have Its Own Fleet-Average GHG Emissions Requirements

The Section 177 States that are included in the "pooling" under "Option 2" should only be those states that have adopted their own fleet-average GHG emissions requirements. We note, however, that the hearing notice at page 3 states that Pennsylvania is one of the "pool" states. It is our understanding that Pennsylvania did not adopt the California GHG standards in such a way that would require manufacturers to meet fleet-average GHG emissions limits in that state; rather Pennsylvania simply relies on its requirement that only California-certified vehicles be sold in the state in order to obtain GHG benefits. Specifically, while the Pennsylvania Administrative Code adopts and incorporates by reference the California LEV program, it does so *verbatim*. Thus, Pennsylvania has also incorporated the language from Section 1961.1(a)(1)(A) providing that "[t]he fleet average greenhouse gas exhaust mass emission values from passenger cars, light-

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[4] Additionally, the new subsection 1961.1(a)(1)(A)1.d. requires that manufacturers provide to CARB "production, delivery, and sales values" separately for all of the pooled states. AIAM does not understand this language. Vehicles are not generally "produced" for individual states, so there is no "production" value specific to California or any other state. Similarly, once vehicles are delivered for sale in a state, manufacturers do not track the location of actual sales, which could occur in other states due to dealer transfers. Moreover, the ISOR at page 5 states that manufacturers will be required to submit state-specific test data to CARB. Vehicles are not tested separately for individual states. AIAM recommends that this subsection be revised to track the language of the rest of the regulation, which refers to "***vehicles that are produced and delivered for sale*** in California." *See* Cal. Code Regs. tit. 13 § 1961.1(a)(1).

duty trucks, and medium-duty passenger vehicles ***that are produced and delivered for sale in California*** each model year by a large volume manufacturer shall not exceed . . . " Cal. Code Regs. tit. 13 § 1961.1(a)(1)(A). This suggests that there are no separate fleet-average GHG requirements in Pennsylvania. This understanding of the Pennsylvania regulations is supported by statements made by the state agency in response to comments in connection with Pennsylvania's adoption of LEV II:

> This final-form rulemaking does not include a Pennsylvania GHG fleet average requirement. A vehicle offered for sale in this Commonwealth must simply be CARB-certified. For a vehicle to be CARB-certified, the vehicle manufacturer must meet California's GHG fleet average requirements based on sales of vehicles in California. The Department does not believe that it needs to establish a GHG fleet average for vehicles offered for sale in this Commonwealth to realize the GHG emission reductions in this Commonwealth anticipated under the California LEV II program. Overall, the vehicle fleet mix in this Commonwealth is similar to California's, and the Commonwealth anticipates it will realize similar GHG emissions reductions in this Commonwealth because the fleet vehicle mix in this Commonwealth is similar to California's.

See 36 Pa. Bull. 7424, 7432 (Dec. 9, 2006). Accordingly, we recommend that CARB not include Pennsylvania vehicles in the compliance "pool," unless a manufacturer elects to include vehicles delivered for sale in that state.

D. The Proposed Provisions Concerning The Inclusion Of Late Adopting States Create Regulatory Inconsistencies

For the purpose of pooling sales, the proposed amendments do not include Section 177 States for a given model year unless those states adopted the California GHG emissions regulations at least two years before the start of that model year, consistent with Section 177 of the Clean Air Act. *See* 42 U.S.C. § 7507(2) (providing that a state may adopt California motor vehicle emissions standards if "California and such State adopt such standards at least two years before commencement of such model year.") Thus, "[d]ue to the timing of their respective state's adoption, Maryland and New Mexico sales would not be part of this multi-state compliance averaging option until the 2011 model year. Arizona sales would also be part of the average beginning in the 2012 model year …" ISOR at 3. The regulatory text effectuates this intent by providing that for "Option 2," the fleet consists of vehicles sold in California, the District of Columbia, and "and all states that have adopted California's greenhouse gas emission standards ***for that model year pursuant to Section 177*** of the federal Clean Air Act (42 U.S.C. § 7507)." Cal. Code Regs. tit. 13 § 1961.1(a)(1)(A)1.

AIAM recognizes that the fact that some Section 177 States adopted their regulations later than other states and outside of the two-year window for inclusion in the earlier model years presents difficulty in crafting the pooling provisions. However, adding the late-enacting states in model years after the inception of the program may lead to complications in implementing the regulations and place unintended and undue burdens on manufacturers.

For example, increasing the pool of vehicles subject to the regulations in the 2011 and 2012 model years will skew the stringency of the regulations. The regulations for later model years are more stringent and thus more difficult to comply with. Because credits and debits are determined in part by reference to the number of vehicles in a given year's fleet, compliance is made even more difficult if a manufacturer is not able to accrue credits in these late-enacting states for the earlier model years. AIAM believes that allowing manufacturers to accrue credits (to the extent they are available) in the 2009 through the 2012 model years for sales in these late-enacting states would ease this compliance burden and would be consistent with the provisions of Section 177.

Additionally, adding states to the program in successive model years would complicate the calculation and assessment of penalties on account of the five-year averaging provisions for zeroing out debits. Under the five-year averaging provisions, penalties could not be assessed in Maryland or New Mexico until the 2016 model year, since 2011 will be the first model year for which those state regulations are in place.[5] For Arizona, penalties could not be assessed until the 2017 model year, five years after the inception of its program in the 2012 model year. In contrast, penalties may arguably be assessed in California and the other Section 177 States as early as the 2014 model year. The proposed amendments do not address how, for example, vehicle sales in model years 2013 and 2014 in these late-adopting states would be used to assess whether a manufacturer has net debits thus requiring the payment of penalties.[6] Arguably they

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[5] In the 2012 model year and thereafter, manufacturers will have three compliance options: (a) opting into the federal program; (b) remaining in the California program and choosing the state-by-state compliance option; and (c) remaining in the California program and choosing the "pooling" compliance option. This discussion assumes that a manufacturer opts to remain in the California program and chooses the pooling compliance option.

[6] Assume, for example, that when considering the pooled states except the late-enacting states, a manufacturer incurred debits in the 2010 model year, but zeroed them out by the 2015 model year with credits accrued in those pooled states, and therefore would not be subject to penalties. Assume further that the manufacturer had net debits in Maryland and New Mexico in the 2015 model year such that when added to the pooled states this takes the manufacturer from zero debits to a net debit situation. It would be improper for the manufacturer to be subject to penalties in all of the pooled states since the manufacturer could not be subject to penalties if Maryland and New Mexico were to be considered by themselves.

should not be included, since the manufacturer would not be subject to penalties if the late-adopting state were viewed in isolation.[7]

To address this problem, AIAM recommends that the regulatory amendments specifically provide that vehicle sales in a Section 177 state shall not be included in the calculation of debits that are subject to penalties unless such state has had its program in place for at least five model years. Thus, for example, vehicle sales in Maryland or New Mexico will not be used in calculating any penalties under the regulations until the 2016 model year, and vehicle sales in Arizona will not be used in calculating any penalties under the regulations until the 2017 model year.

E. The Discussion In The Initial Statement of Reasons Concerning The Transition To Federal GHG Program Is Inconsistent With The Commitment Letters

Although the regulatory amendments under current consideration pertain to just the first two of CARB's commitments—allowing for pooling and permitting the use of CAFE data to show compliance—the ISOR discusses how CARB is considering its implementation of the other regulatory change required in the commitment letters—allowing for compliance with the federal program to be deemed compliance with the California program. The ISOR states that in the "unlikely" event a manufacturer has accrued net debits at the end of the 2011 model year and then transitions to the federal program for the 2012 model year and beyond, "California will likely require that manufacturers opting into the federal program will offset any debits incurred in California by earning a commensurate number of credits in the federal program and retiring those credits rather than using them to meet their federal obligations.…" ISOR at 4.

AIAM appreciates CARB's concern about the possibility that a manufacturer may transition to the federal program in the 2012 model year with net debits in California. This potentiality arises from the flexibility of the debit and credit provisions in the GHG emissions regulations and from the five-year averaging, a flexibility that AIAM members appreciate. However, AIAM has concerns with the approach suggested by CARB in the ISOR. Most significantly, California has no direct regulatory authority over the Federal program, and AIAM therefore does not believe that CARB has the power to require a forfeiture of Federal credits. Moreover, as discussed above, in the 2012 model year and thereafter, a manufacturer will have the option of continuing to comply separately with the California program or transitioning fully to the federal program, in which case compliance with the federal program will be "deemed" to

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[7] Conversely, however, the manufacturer should be allowed to rely on credits from sales in the late enacting states to offset debits in the pooled states because the five-year averaging is tied to when debits are accrued and not credits. In other words, while the regulations prevent a manufacturer from being penalized for debits until after the passage of the five-year averaging period, credits can be used immediately to offset existing debits.

be compliance with the California program. Should a manufacturer transition to the federal program, the intent of the commitment letters is that it will no longer have any compliance obligations with regard to California after that date.

This raises the question of what to do with any net debits a manufacturer may have in California as of the 2012 model year. AIAM recognizes the potential problem that this could cause CARB in terms of implementing and enforcing its program for the 2009 through 2011 model years. However, AIAM believes that this issue should be addressed in connection with EPA's GHG rulemaking in consultation with CARB and the industry. The most equitable solution would be to allow for both credits and debits accrued in the California program to be carried over into the EPA program. The regulatory mechanism for achieving this result, however, should be a matter for the federal program and related rulemaking and not the CARB rulemaking. AIAM looks forward to working with CARB and EPA to craft a solution to this issue.

F. Suggestions Concerning Drafting Language

In addition to the substantive comments discussed above, AIAM also offers the following two comments on the drafting language in the proposed regulatory amendments, which, in AIAM's view, could be clearer and more accurately reflect regulatory intent.

1. The expanded definition of "California" to include the Section 177 States does not extend to all of the provisions to which it should apply

The proposed new subsection 1961.1(a)(1)(A)1.c. states that if a manufacturer elects the pooling compliance option, then "the term 'in California' as used in subsections 1961.1(a)(1)(B)3. and 1961.1(b) means California, the District of Columbia, and all states that have adopted California's GHG emission standards for that model year pursuant to Section 177 of the federal Clean Air Act (42 U.S.C. § 7507)." However, the subsection that actually sets forth the regulatory standards is in a different subsection than those listed—subsection 1961.1(a)(1)(A)1., which provides that "[t]he fleet average greenhouse gas exhaust mass emission values from passenger cars, light-duty trucks, and medium-duty passenger vehicles that are produced and delivered for sale ***in California*** each model year by a large volume manufacturer shall not exceed …" *See* Cal. Code Regs. tit. 13 § 1961.1(a)(1)(A). The expanded definition of "California" should therefore also apply to this subsection 1961.1(a)(1)(A). Consequently, AIAM recommends that subsection 1961.1(a)(1)(A)1.c. be amended to read: "The term 'in California' as used in subsections 1961.1(a)(1)(A), 1961.1(a)(1)(B)3. and 1961.1(b) means California, the District of Columbia, and all states that have adopted California's greenhouse gas emission standards for that model year pursuant to Section 177 of the federal Clean Air Act (42 U.S.C. § 7507)."

2. The procedure for calculating penalties is vague

The ISOR states that "[u]nder the proposed pooling option, debits that are not equalized in the time specified must be apportioned between California and the Section 177 states according to their new vehicle sales in the model year the debits are first accrued." ISOR at 4. As AIAM understands it, this would mean that if a manufacturer has accrued [X] amount of debits for which a penalty must be paid, and if in the first year that these debits accrued 20% of the vehicles in the "pooled" fleet were sold in California, then 20% of the total debits would be allocated to California for the assessment of penalties. AIAM supports this approach but the language used in the proposed regulatory amendments is made unclear by the reference to other states. The proposed language states:

> For a manufacturer demonstrating compliance under Option 2 in subsection 1961.1(a)(1)(A)1., the emission debits that are subject to a civil penalty under Health and Safety Code section 43211 shall be calculated separately for California, the District of Columbia, and each individual state that is included in the fleet average greenhouse gas requirements in subsection 1961.1(a)(1)(A)1. These emission debits shall be calculated for each individual state using the formula in subsections 1961.1(b)(1)(B) and 1961.1(b)(2), except that the "Total No. of Vehicles Produced and Delivered for Sale in California, including ZEVs and HEVs" shall be calculated separately for the District of Columbia and each individual state.

See Proposed Amendment to Section 1961.1(b)(3)(A).

It is unclear from this language how CARB intends to address the question of the enforcement of the GHG emissions regulations and the collection of statutory penalties under the California Health and Safety Code for those manufacturers that choose the pooling option. AIAM believes that CARB should consult further with the Section 177 States and the industry to develop an approach that is legally defensible and workable.

G. CARB Should Seek A Within The Scope Determination For These Amendments

Although not specifically addressed in the proposed regulatory amendments or in the ISOR, AIAM would like to take this opportunity to point out that once these amendments are finalized, CARB should submit them to EPA for a "within the scope" determination. EPA has set forth the circumstances in which a California emissions standard may fall within the scope of an existing waiver as follows:

> If California acts to change a previously waived standard or accompanying enforcement procedure, the change may be included within the scope of

> the previous waiver if it does not cause California's standards, in the aggregate, to be less protective of public health and welfare than applicable Federal standards, does not cause California's requirements to be inconsistent with Section 202(a) of the Act, and raises no new issues affecting the Administrator's previous waiver determinations.

California State Motor Vehicle Pollution Control Standards; Amendments Within the Scope of Previous Waiver of Federal Preemption, 46 Fed. Reg. 36742 (July 15, 1981). "However, California's regulations must independently meet the waiver criteria of section 209(b) if they constitute new or different standards or accompanying enforcement procedures, or if they change the basis for statutory determination in previous waiver decisions." California Motor Vehicle Pollution Control; Emission Control System Warranty Regulations; Waiver of Federal Preemption, 44 Fed Reg. 61096 (Oct. 23, 1979).

AIAM urges CARB to timely seek a "within the scope" determination so that the amendments may be implemented without delay.