



June 4, 2018

Mary D. Nichols, Chair  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95814

David Lanier, Secretary  
Labor and Workforce Development Agency  
800 Capitol Mall  
Sacramento, CA 95814

**RE: Concept Paper for Clean Vehicle Rebate Project Potential Procedures for Certifying Manufacturers' Fair Treatment of Workers**

Dear Chair Nichols and Secretary Lanier:

Thank you for the opportunity to comment on the “Concept Paper for Public Comment: Potential Procedures for Certifying Manufacturers’ Fair Treatment of Workers for Clean Vehicle Rebate Project Eligibility” released by staff of the California Air Resources Board (CARB) and the Labor and Workforce Development Agency (LWDA) on May 23, 2018.

Tesla’s mission is to accelerate the world’s transition to sustainable energy. Since the company’s founding in 2003, our goal has been to accelerate the advent of sustainable transport by bringing compelling mass-market electric cars to market as soon as possible. Tesla shares the State of California’s air quality, clean transportation, and climate goals.

We appreciate the efforts of your respective agencies’ staff to “develop procedures for certifying manufacturers of vehicles included in the Clean Vehicle Rebate Project (CVRP) as being fair and responsible in the treatment of their workers,” pursuant to legislative direction. As discussed below, we have serious concerns with and objections to the draft certification procedures in the Concept Paper as inequitable and in violation of applicable legal standards.

The draft procedures would establish a certification process for manufacturers of CVRP-eligible vehicles that would apply to each manufacturing plant where CVRP-eligible vehicles are built. By focusing on locally applicable laws “concerning wages, workplace safety, rights to association and assembly, and nondiscrimination standards,” however, the draft procedures effectively penalize an automaker for locating manufacturing in California even though they are subject to the strongest labor standards.

At a minimum, any procedures must be applied consistently to all companies that manufacture CVRP-eligible vehicles, including those that have manufacturing facilities located outside of California in jurisdictions with lesser labor standards. We believe a workable self-certification framework can be developed that respects applicable legal requirements, and we reserve the right to submit further comments on this issue.

These comments on the draft certification procedures are submitted pursuant to the guidance in the Concept Paper.

**T E S L A**

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## Introduction

California's 2017 Climate Change Scoping Plan, which charts the path for meeting the state's greenhouse gas emissions and air quality goals, specifically calls for major increases in zero-emission vehicles (ZEVs). In January 2018, Governor Brown set a goal of at least 5 million ZEVs on California roads by 2030 and, as set forth in Executive Order B-48-18, ordered that "all State entities work with the private sector" to achieve this goal.

The Executive Order notes that "further boosting California's zero-emission vehicle market will strengthen the economy, [and] improve air quality and public health." It specifically finds that "California must continue to attract and encourage significant investments in zero-emission vehicles and infrastructure" from car manufacturers and other entities.

The Clean Vehicle Rebate Project plays an important role in promoting ZEV adoption by providing income-eligible California residents with rebates for the purchase or lease of new, eligible clean cars. The stated goal of the program is to "encourage and accelerate zero- and near-zero-emission, on-road light duty vehicle deployment and technology innovation." According to the Concept Paper, "CVRP rebates have been an important factor in driving ZEV market growth in California," and effective administration of the program will play a key role in achieving the State's goal of 5 million ZEVs on California roads by 2030.

Tesla shares the State of California's air quality, clean transportation, and climate goals, and is the only automaker fully aligned with those goals. This includes dramatically reducing carbon emissions and criteria pollutants from the transportation sector. We are working hard to help achieve the Administration's 5 million ZEVs goal, and we look forward to accelerating these tailpipe emission reductions through commercialization of our zero-emission heavy-duty Semi in 2019.

Tesla is the only automaker that is building electric cars at scale in California and, for that matter, the only automaker building any kind of passenger vehicle in the state. We are one of the largest manufacturing employers in California, with more than 20,000 workers in the state, and we directly invest billions of dollars into California's economy – more than \$4 billion in 2017 alone. We have done this while others look at locating auto manufacturing operations in California as a competitive disadvantage.

## Comment Period Is Unreasonably Short

Tesla appreciates the opportunity to comment on the draft certification procedures in the Concept Paper. However, requiring the submittal of comments by June 4, 2018 – only 7 business days – is greatly rushed and woefully inadequate to allow meaningful participation by all stakeholders, including manufacturers of CVRP-eligible vehicles.

This is especially problematic given that prior to the May 23<sup>rd</sup> release of the Concept Paper, the agencies had not previewed the approach taken in the draft certification procedures, which focus on locally applicable labor laws for each manufacturing facility where CVRP-eligible vehicles are made. This approach is fundamentally flawed because it exacerbates an unequal playing field were locally applicable labor laws generally are weaker outside of California. In short, it effectively penalizes the customers of companies that have chosen to

locate their manufacturing facilities in California even though those are the companies that are subject to the strictest labor laws.

In addition to raising due process concerns because it is unreasonably short, the truncated comment period increases the likelihood that any changes later made to the CVRP to implement the certification procedures may have unintended consequences for ZEV manufacturing and deployment in California and for achieving the State's ZEV and climate goals.

The rushed comment period not only is inadequate, it is unnecessary. CARB typically provides at least a 30-day public comment period for matters that raise complex policy and legal issues. The truncated comment period hinders the ability of Tesla and other manufacturers that potentially would be subject to certification procedures, as well as other stakeholders, to fully review and meaningfully respond to all aspects of this proposal.

Therefore, Tesla respectfully requests that the comment period be extended to at least 14 business days, through June 13, 2018. In submitting these comments, Tesla specifically reserves its rights to (a) challenge the comment period as unreasonable and a violation of due process, and (b) submit additional comments on this version of the Concept Paper.

#### Legislation Requiring Development of Procedures for Certifying Manufacturers

As your agencies develop procedures for certifying manufacturers of vehicles included in the CVRP as being “fair and responsible in the treatment of their workers,” it is important to review why the certification procedures provision in AB 134 was included at the end of the 2017 legislative session. The relevant language, even though it lacked definitions of key terms such as “fair” and “responsible,” was amended into the bill on September 11, 2017, and the Legislature passed the amended bill on September 15, 2017, the same day it adjourned. Neither a labor certification concept for CVRP nor the language requiring development of certification procedures was considered by the Legislature, let alone analyzed or heard in any committee, prior to September 12, 2017.

The legislative history of AB 134 makes clear that the relevant provision specifically targeted Tesla, and other stakeholders have noted the legislative intent of the AB 134 language. For example, the Auto Alliance wrote in April 18, 2018 correspondence that “[a]s was widely reported in the press after AB 134 was passed, the ‘fair and responsible treatment’ provision discussed herein was included to address perceived labor practice concerns involving one automaker’s manufacturing plant in Fremont, California.” The Auto Alliance cited media reports that the certification procedures provision are a “direct shot at Tesla” and a “union-friendly provision” inserted to “inject the state into an increasingly acrimonious union organizing campaign at automaker Tesla’s Fremont plant.”

Given the legislative history of AB 134 strongly indicates that the relevant provision was included specifically to target Tesla because the company is the subject of an organizing campaign by the United Auto Workers, the legal standards discussed below must be respected in the development of the procedures. Specifically, the State cannot target a single manufacturer under the guise of creating a labor standard and its ability to regulate

labor issues related to the “fair and responsible” treatment of employees is circumscribed due to federal preemption.

As the only automaker of CVRP-eligible vehicles that has manufacturing operations in California, Tesla has been concerned that certification procedures will not be applied consistently to companies or facilities that manufacture CVRP-eligible vehicles in jurisdictions outside of California where existing labor standards are less robust than those in California. The draft certification procedures confirm those concerns.

### Tesla in California

Founded in 2003, Tesla is one of the largest manufacturing employers in California and the first successful American automotive startup in more than 50 years. Tesla has produced more than 300,000 cars at our Fremont factory, where all Tesla cars are assembled, and production of our zero-emission electric vehicles is set to increase dramatically in the years ahead. Tesla’s electric vehicles have prevented the release of 2.5 million tons of polluting greenhouse gas emissions. We could not do this without our dedicated and passionate employees.

In California, Tesla has more than 20,000 employees with major employment centers in Fremont, Hawthorne, Lathrop, and Palo Alto, and we are proud to employ many workers who previously were employed in Fremont by the former New United Motor Manufacturing, Inc. (NUMMI), which was operated by GM and Toyota before they shuttered the factory. We have a physical presence and jobs across California with more than 150 showrooms, service centers, warehouses, Superchargers, and other facilities.

In addition to its status as one of the largest manufacturing employer in the state with 20,000 employees, Tesla also supports an additional 31,000 jobs in the California. A recent report entitled “The Economic Contribution of Tesla in California” finds that Tesla’s economic impact in the state goes far beyond 51,000 jobs and includes billions of dollars of direct investment in the state economy annually – more than \$4 billion in 2017 alone. (See <https://ihsmarkit.com/research-analysis/the-economic-footprint-of-tesla-in-california.html>)

Tesla has tremendous pride in its workforce and provides market-competitive pay and benefits. The company cares deeply about doing the right thing and makes extraordinary efforts to ensure that its workers are treated not just fairly, but with their well-being in mind.

Unlike any other company in the automotive industry, every Tesla employee, including every manufacturing employee, is an owner of the company. This is an important and particularly rewarding part of every employee’s compensation package, as Tesla’s value has increased more than ten-fold in the last five years. Specifically, every employee is awarded Tesla shares upon hire, regardless of level, and employees have the opportunity to receive additional shares each year based on their performance. Employees are also eligible to buy additional stock at a discount through the Employee Stock Purchase Program. No other company that manufactures vehicles included in the CVRP provides these kinds of equity benefits. Even beyond equity, Tesla’s average starting hourly pay rate for manufacturing

employees is higher than the average starting hourly rate for employees at Ford, GM, and Fiat-Chrysler. We review pay rates every six months, and we adjust them periodically to ensure that we are competitive with the marketplace.

Tesla's benefit plans benchmark to the highly competitive Silicon Valley, and Tesla offers a variety of comprehensive medical plans, including four free health care plans at no cost to the employee. Manufacturing employees have opportunities to quickly advance based on their performance, and significant numbers of employees are promoted each year.

Tesla's California workforce is diverse—more than 50 percent of our California employees identify themselves as non-white. In addition, we have sponsored Employee Resource Groups for underrepresented employees that act as a resource to leadership regarding employee issues, ideas, and policies and promote a company culture of inclusion, respect, and support for everyone. Tesla also is a top employer of military veterans in the state, with active programs hiring from each branch of the armed services, such as the California National Guard's Work for Warriors. With over 700 veteran employees in California, we are proud to be one of the largest veteran employers in the state.

We strive to be a safe, fair, and just company as outlined in Tesla's Code of Business Conduct and Ethics. Employees can talk directly with their manager about a violation of this code or submit workplace concerns anonymously through our toll free 24-7 Integrity Hotline.

Safety is a core value at Tesla and part of how we do business. As a value driven company, our goal is to have the safest factories and workplaces in the auto industry. We work to create a culture of safety by building a foundation with engaged workers, rules, training, standards, and accountability. Each department has a Safety Team that meets monthly to increase safety awareness, engage our teams, and recommend improvements.

As we have increased production at our Fremont factory, our safety incident rates continue to trend down. By the traditional workplace safety metric of Total Recordable Incident Rate (TRIR), our 2017 rate at the Fremont factory improved significantly from 2016 and is approximately at industry average, even though Tesla started building its own cars in volume just over 5 years ago. That's not good enough for Tesla, though, and we're on a short path toward safety that is far better than industry average. Moreover, our company is achieving a safer work culture by incorporating and focusing more on progressive safety measures such as leading indicators and not solely focusing on lagging indicators such as TRIR. As we continue to improve, it is worth noting that safety at the Fremont factory is already significantly better than when it was operated as NUMMI before shutting down in 2010, as measured by TRIR. Indeed, Tesla's 2017 incident rate is half what it was during the final years of NUMMI. In the 2000s, NUMMI's incident rate was worse than industry average in every single year, and on average in those years, it was 33% worse.

To be sure, Tesla is not perfect – no company is. But any objective analysis of our workplace, as opposed to the selective use of unrepresentative anecdotes in a company of almost 40,000 employees globally, demonstrates we are a leader in the workplace. There should be

absolutely no question that we care deeply about the well-being of our employees and that we try our hardest to do the right thing.

#### Development of Certification Procedures

The AB 134 provision directs CARB to work with LWDA to “develop procedures for certifying manufacturers of vehicles.” While AB 134 also states that it is the intention of the Legislature to use these procedures to have the Labor Secretary “certify” manufacturers “as fair and responsible in the treatment of their workers before their vehicles are included in any rebate program funded with state funds” starting with fiscal year 2018-19, it does not authorize the agencies to impose a manufacturer certification requirement in the CVRP, nor does it authorize the implementation of any certification procedures.

The Concept Paper correctly acknowledges that “the potential procedures could inform further legislative direction and authority,” and that “these conceptual procedures could inform further legislative direction and authority needed to move ahead with the development of the two-phase process.” In short, certification procedures cannot be implemented without further action by the Legislature.

We also note that the Legislature required development of “procedures” for certifying manufacturers; it did not require development of any “standard” governing what constitutes “fair and responsible” treatment of workers. Under well-established rules of statutory construction, to determine legislative intent courts “look first to the words of the statute, giving the language its usual, ordinary meaning.” (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000.) If the language is not ambiguous, courts “presume the Legislature meant what it said, and the plain meaning of the statute governs.” (*Id.* [internal citations omitted].) Here, “procedures” means a series of steps followed in a regular definite order and is distinct from creating a new standard by which to assess a manufacturer’s treatment of its workers.

#### Procedures Based on Locally Applicable Labor Requirements Are Fundamentally Flawed

The draft procedures would establish a two-phase certification process for manufacturers of CVRP-eligible vehicles that would apply to each manufacturing plant where CVRP-eligible vehicles are built. The relevant language in AB 134 plainly applies to all vehicle manufacturers whose customers benefit from CVRP rebates, regardless of where the vehicles are manufactured. Therefore, it is appropriate that certification procedures apply to all manufacturing plants where CVRP-eligible vehicles are built, regardless of geographic location.

The draft procedures for both phases include an attestation by the manufacturer, submission of specified documentation about labor-related practices, and agreement to fully cooperate in an agency investigation related to the manufacturer’s application that could include access to records, employees, and the facility premises.

The manufacturer must attest that for each plant where it builds CVRP-eligible vehicles, the manufacturer “complies with all applicable local, state, and national laws and treaties concerning wages, workplace safety, rights to association and assembly, and

nondiscrimination standards.” Certifying manufacturers based on attestation of compliance with locally applicable laws and treaties is fundamentally flawed and would lead to absurd results that effectively treat the customers of companies who choose to operate in California the worst even though they are the companies who are subject to the strongest labor standards. This approach also will disincentivize any manufacturer making CVRP-eligible vehicles from establishing manufacturing operations for those vehicles in California.

It is paramount that certification procedures constitute a fair and level playing field for in-state, out-of-state, and out-of-country manufacturing operations. In other words, the same procedures and the same effective standard for certifying manufacturers must consistently apply industry-wide to all companies with vehicles included in the CVRP regardless of where their manufacturing operations are located.

This “apples-to-apples” approach is required by basic notions of fairness, and it is particularly critical because working conditions in the auto industry in California are far better than they are outside of the state because of California’s much more stringent labor standards concerning wages, workplace safety, and nondiscrimination. Companies with manufacturing operations in California already are subject to the strongest laws to ensure their employees in California are treated fairly.

In contrast to the proposed CVRP certification procedures, California’s tailpipe emission standards embody this “apples to apples” approach. The state has not created one set of tailpipe emission rules that apply to California vehicle manufacturers and a separate set of rules that apply to non-California vehicle manufacturers; rather, the state insists that all vehicle manufacturers meet the same tailpipe emission requirements. Similarly, any CVRP certification procedures must be applied consistently and equally regardless of where a vehicle is manufactured, in a way that does not incentivize locating manufacturing plants outside of California and does not produce results that will confuse and frustrate California consumers who are eligible for CVRP.

It would be wrong to effectively penalize the customers of one automaker whose manufacturing employees benefit from California’s rigorous labor standards and fail to address different working conditions at manufacturing plants in other jurisdictions with lesser labor standards. Other than Tesla vehicles, all of which are built in California, all of the other 40+ CVRP-eligible vehicles are built in other states, such as Michigan and Tennessee, or other countries, such as Japan, Germany, and Mexico. As other automakers bring more ZEV vehicles to market, it is only a matter of time before CVRP-eligible vehicles are built in additional countries with significantly lesser labor standards, like China and India. Yet, no manufacturer besides Tesla currently plans to build clean cars at scale in California.

Under the draft certification procedures, on one hand the customers of a California manufacturer could be penalized because that manufacturer inadvertently made a non-substantive mistake on its paystubs. On the other hand, an out-of-country or out-of-state manufacturer could obtain CVRP certification by complying with far less rigorous workplace safety requirements, lesser wage requirements, or locally applicable laws that, by California’s standards, would allow sub-standard conditions or that would permit discriminatory conduct.

This flaw in focusing on locally applicable requirements is highlighted by the State of California’s prohibition on requiring its employees to engage in state-funded or state-sponsored travel to certain states with laws that California perceives to support or finance “discrimination against lesbian, gay, bisexual, and transgender people.” (Govt. Code, § 11139.8, subd. (a)(5).) The list of states that currently are subject to the travel ban includes Tennessee, where a CVRP-eligible vehicle is made.

For certification procedures to be equitable and meaningful, it is critical that the procedures establish a fair and level playing field for in-state, out-of-state, and out-of-country manufacturing operations. This cannot be accomplished by focusing on locally applicable labor laws.

#### Procedures Must Satisfy Applicable Legal Standards

For the reasons discussed above, the procedures must respect applicable legal standards. First, Tesla believes that the state’s ability to regulate labor issues related to the “fair and responsible” treatment of employees is circumscribed due to federal preemption. The inclusion of locally applicable laws concerning “rights to association and assembly” in the attestation crosses into NLRA jurisdiction that is preempted. This is because procedures for certifying manufacturers created by the state may not consider allegations of unfair labor practices or matters that could arguably constitute unfair labor practices under the National Labor Relations Act (NLRA). All such matters are within the exclusive jurisdiction of the National Labor Relations Board (NLRB). (*San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236, 245; *Wisconsin Dept. of Industry v. Gould Inc.* (1986) 475 U.S. 282, 286.)

Federal preemption applies not only when the state expressly acts as a regulator, but when the state is offering funds – as it is here, in the form of rebates provided directly to consumers. As the Concept Paper notes, “CVRP is a voluntary incentive program, both for automobile manufacturers and consumers.” Creating procedures that intrude into areas of federal preemption not only would be impermissible, it would constitute a federal civil rights violation. (*Golden State Transit Corp. v. Los Angeles* (1989) 493 U.S. 103, 110.)

Second, in developing procedures for certifying manufacturers, the State may not put “their thumb on the scale” with respect to labor matters that the Congress “intended to remain unregulated and left to be controlled by the free play of economic forces.” (*Machinists v. Wisconsin Employment Relations Commission* (1976) 427 U.S. 132, 140.) The fact that the CVRP is an incentive program, rather than outright regulation, does not render this principle inapplicable. (*Chamber of Commerce of U.S. v. Brown* (2008) 554 U.S. 60, 70-71; *Michigan Bldg. & Const. Trades Council v. Snyder* (6th Cir. 2013) 729 F.3d 572, 577-78; *Associated Builders & Contractors Inc. New Jersey Chapter v. City of Jersey City, New Jersey* (3d Cir. 2016) 836 F.3d 412, 818.)

While the state may regulate whether employers observe generally applicable labor standards, it may not adopt laws or policies designed to favor or harm a particular employer or union engaged in a labor dispute. These generally applicable labor standards are uniformly applied industry-wide, affect union and nonunion employees equally, neither encourage nor discourage collective bargaining, and do not technically interfere with labor-

management relations. (*American Hotel and Lodging Association v. City of Los Angeles* (2016) 834 F.3d 958, 963.)

These principles apply equally to both in-state and out-of-state employers. Requiring out-of-state manufacturers wishing to participate in the CVRP to satisfy California's labor standards is permissible so long as the certification procedures do not impose a heavier regulatory burden on out-of-state manufacturers compared to in-state manufacturers. (*S.D. Myers, Inc. v. City and County of San Francisco* (9th Cir. 2001) 253 F.3d 461, 467 [upholding San Francisco's equal rights ordinance requiring that out-of-state City contractors provide certain benefits because the ordinance did not directly regulate interstate commerce, it applied to all contractors with the City equally, and it contained no language explicitly or implicitly targeting out-of-state entities, entities engaged in interstate commerce, or contractors based on the nature or extent of their commercial operations].)

Third, the failure to develop draft certification procedures that apply equally to in-state and out-of-state manufacturing facilities amplifies concerns that inclusion of the relevant provision in AB 134 is being used as a tool to influence the UAW's organizing effort at Tesla's Fremont factory. This is not just an equitable problem, it is a legal one. While a state can legally require that manufacturers meet generally applicable labor standards, it cannot target a single manufacturer under the guise of creating such a labor standard. In *520 S. Michigan Ave. Assocs., Ltd. v. Shannon* (7th Cir. 2008) 549 F.3d 1119, the court considered a *Machinists* preemption challenge to an Illinois statute that mandated rest breaks for certain hotel workers based upon NLRA preemption. The court in *Shannon* held that although the NLRA did not preempt generally applicable labor standards imposed under state law, the Illinois statute was not such a standard because it was not a law of general applicability. One of the key aspects of the law that led that court to reach this conclusion was that it was based on the location of the regulated company:

Unlike these cases, though, the Attendant Amendment is not just limited by trade—it is also limited by location; the Attendant Amendment is a state statute that applies only in one county in Illinois—Cook county. That fact distinguishes this case from the series of cases cited by Appellees, including Nunn; the Attendant Amendment is not just limited to a particular trade, profession, or job classification; it is also a state statute limited to only one of Illinois' 102 counties.

(*520 S. Michigan Ave. Assocs., Ltd. v. Shannon* (7th Cir. 2008) 549 F.3d 1119, 1130-31.)

The same is true here: California's rigorous labor standards currently apply to a single manufacturer of vehicles in the CVRP – Tesla. Development of inappropriate procedures for certifying manufacturers does far more than raise "legitimate concerns" that the state is targeting Tesla in such a way that "could potentially frustrate the purpose of the NLRA, by substituting the "free-play of political forces for the free-play of economic forces.'" (*Fortuna Enterprises, L.P. v. City of Los Angeles* (C.D. Cal. 2008) 673 F. Supp. 2d 1000, 1011.) Indeed, the legislative history of AB 134 leaves no doubt that the purpose of the certification procedures provision is to uniquely harm Tesla, which has been conceded by parties who have an interest in this issue. Therefore, at a minimum, any procedures must effectively

apply the same generally applicable labor standards to all manufacturing facilities, regardless of geographic location.

Another aspect of *Shannon* is also present here. The *Shannon* court was troubled that the challenged law appeared to focus on a particular employer that was involved in a labor dispute. Not only is that the case here, the legislative history of AB 134 strongly indicates that the relevant provision specifically targeted Tesla because the company is the subject of an organizing campaign by the UAW.

#### Provisional Certification Procedures: Attestation

Besides the focus on locally applicable laws, there are significant problems with various aspects of the proposed Phase 1 “provisional certification” attestation procedures whereby a manufacturer would be provisionally certified for an initial period of two fiscal years. The attestation checklist in Phase 1 requires attestation of compliance with “all applicable local, state, and national laws and treaties concerning wages, workplace safety, rights to association and assembly, and nondiscrimination standards,” and all the manufacturer’s “existing agreements and commitments . . . with local, state, federal, or international agencies or other parties, that concern wages, workplace safety, rights to association and assembly, and nondiscrimination standards.” While this seems like a self-certification approach, there are several legal and practical difficulties.

First, inclusion of laws concerning rights to association and assembly in the scope of the attestation appears to cover matters that could constitute unfair labor practices under the NLRA, which are within the exclusive jurisdiction of the NLRB. (*San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236, 245; *Wisconsin Dept. of Industry v. Gould Inc.* (1986) 475 U.S. 282, 286.) The proposed procedures do not expressly exclude matters regulated by the NLRA, and certifying compliance with the NLRA, or NLRB regulations, orders, decisions, or settlements is prohibited under federal preemption. (*Golden State Transit Corp. v. Los Angeles* (1989) 493 U.S. 103, 110.) The attestation must be limited to certification regarding generally applicable labor standards (i.e., conduct outside of the exclusive jurisdiction of the NLRB). (See *Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1, 21-22.)

Second, while Tesla is fully committed to complying with all applicable laws, inevitably any large employer in California with manufacturing operations will be subject to allegations concerning wage and hour issues, Cal/OSHA requirements, and discrimination claims. Like any employer, Tesla employs people in both line and supervisory ranks. Occasionally, human beings make poor judgments. Hence, total compliance with all laws regulating workplace conduct is a worthy but practically impossible goal for any large company in California. To the extent that isolated violations do occur, companies should be judged by their policies and training, not on whether there are isolated violations. For that reason, we believe a more appropriate assessment is whether the manufacturer has policies, procedures and resources in place at each manufacturing facility concerning wages, workplace safety, rights to association and assembly, and nondiscrimination standards to ensure employees are treated fairly.

Third, “existing agreements and commitments . . . with . . . other parties” appears to include confidential settlement agreements. Disclosing the nature of or certifying compliance with such confidential settlement agreements would violate the rights of the parties subject to those agreements.

#### Provisional Certification Procedures: Documentation

As part of their applications for provisional certification, manufacturers would be required to submit 6 categories of information and documentation to the Labor Secretary for each manufacturing facility where CVRP-eligible vehicles are built. While some categories are limited to a manufacturer’s policy and procedures, several other supporting documentation requirements are unworkable and legally questionable.

As a general matter, the scope of any information and documents to be provided must be limited to the relevant time period for the certification. The draft procedures either do not specify the time period for which records must be provided or they provide for a 5-year disclosure time period. This is an inappropriate and unreasonably long time frame for which to assess whether a manufacturer’s employees currently are being treated “fairly and responsibly,” and it will be unduly burdensome for manufacturers to compile records going back 5 years. The time period in the proposed procedures is particularly troubling because the period for which information is sought predates the development of certification procedures as well as the passage of AB 134. The procedures and any requirements therein should be applied prospectively, regardless of what final procedures are established, so that manufacturers are put on notice of what is being considered. Any documents to be provided should be limited to the time period up to one year prior to the date a manufacturer’s CVRP certification application is submitted. Clearly, what matters for employees is how the workplace is now, not how it was five years ago.

The draft procedures require submission of the “manufacturer’s illness and injury prevention program or its equivalent, if any.” The procedures should clarify that a manufacturer is to submit the current version of their program, and that any confidential aspects may be appropriately designated. In jurisdictions outside of California, a manufacturer may not be required to prepare any equivalent of an illness and injury prevention program, in which case they may submit nothing as the category is currently designed. If this category is included, meaningful information must be provided by each manufacturer even if they do not have an equivalent program, to avoid an inequitable application.

The draft procedures require submission of the manufacturer’s recordable worker injury rates, or their equivalent, during the prior 5 years. They should be revised to require submission of this data for the previous year only, since that data is most relevant and appropriate to help assess current workplace safety conditions. At the same time, we note that recordable worker injury rates are not globally defined and thus manufacturing facilities outside the United States may not record or maintain the same data. Moreover, recordable injury rates are lagging indicators and do not necessarily indicate current safety conditions. Again, what matters for employees is how safe the workplace is now, not how safe it was five years ago.

The draft procedures require submission of the manufacturer's policy and procedures for reporting, investigation, and resolution of worker complaints about violation of standards related to wages, workplace safety, rights to association and assembly, and nondiscrimination. The procedures should clarify that a manufacturer is to submit the current version of their policy and procedures for reporting, investigation, and resolution of employee complaints about these issues. The plain text of AB 134 shows that the certification procedures should address the treatment of workers employed by the clean car manufacturer seeking certification: "develop procedures for certifying manufacturers of vehicles . . . as being fair and responsible in the treatment of their workers." (emphasis added). In other words, the certification procedures concern employees of a manufacturer and do not extend to workers in the supply chain.

The draft procedures require submission of the manufacturer's agreements with local, state, federal, or international agencies or other parties, that concern wages, workplace safety, rights to association and assembly, and nondiscrimination standards. As discussed above, this appears to include confidential settlement agreements, including on garden variety wage and hour issues. Disclosing the nature of or certifying compliance with such confidential settlement agreements would violate the rights of the parties subject to those agreements, including the manufacturer. The procedures should clarify that this category concerns current agreements with government entities and that confidential information will be protected from disclosure.

The draft procedures require submission of the manufacturer's policies in addition to any such agreements, with respect to its direct suppliers' compliance with all applicable local, state and national laws and treaties concerning wages, workplace safety, rights to association and assembly, and nondiscrimination standards. The procedures should clarify that this category concerns the manufacturer's current policy or policies.

Finally, the draft procedures require a list of any (a) formal citation or charges by a government agency, (b) final orders, decisions, or awards of back pay, or their equivalent, and (c) prosecutor-filed criminal charges, within the past 5 years, related to a violation of laws related to wages, workplace safety, rights to association and assembly, and nondiscrimination standards. There are multiple objectionable aspects to this sixth category.

The sixth category is so broad that it includes citations, charges, final orders, decisions, or awards issued by the NLRB, and therefore infringes on the federally preempted jurisdiction of the NLRB. If the state were to use this information to determine if a manufacturer treats its workers fairly and responsibly for purposes of CVRP certification, it would be unlawfully imposing an additional sanction on manufacturers that have allegedly violated the NLRA. (*See Wisconsin Dept. of Industry, Labor and Human Relations v. Gould Inc.* (1986) 475 U.S. 282, 287.) The U.S. Supreme Court has made it clear that states are prohibited from imposing supplemental remedies or sanctions on federal labor law violators, or on conduct expressly or arguably prohibited by the NLRA, because such state statutes or programs "incrementally diminish[] the [National Labor Relations] Board's control over enforcement of the NLRA and thus further detracts from the "integrated scheme of regulation" created by Congress. (*Id.* at 288-89.)

The sixth category must exclude citations, charges, and allegations and include only final decisions by adjudicatory bodies or courts of law. Basing CVRP certification decisions on mere allegations, citations, or charges that are not final adjudications would infringe upon the manufacturer's most fundamental due process rights. (*Coffin v. U.S.* (1895) 156 U.S. 432, 452 ["The law presumes that persons charged with crime are innocent until they are proven, by competent evidence, to be guilty"].) Consideration of allegations, citations, or charges also will incentivize their filing in the context of an organizing campaign.

This category exacerbates the greatly tilted playing field for in-state, out-of-state, and out-of-country manufacturing operations. Not only do jurisdictions outside of California not have the same locally applicable requirements, they do not have the same levels of enforcement of those requirements. Consideration of the information reflected in the sixth category is likely to penalize the customers of companies that locate their manufacturing facilities in California. Finally, any assessment of the information in this category should be limited to the most recent year.

#### Provisional Certification Procedures: Access and Public Posting

The draft procedures for provisional certification require that the manufacturer "agree to cooperate fully in providing reasonable access to the manufacturer's records, documents, agents or employees, or premises if reasonably required by the Secretary of Labor to determine the manufacturer's compliance with these requirements." This requirement raises serious legal and practical issues.

First, a core issue is the conditions under which the Secretary of Labor would have a legitimate reason to determine compliance after an attestation under penalty of perjury was received. The other requirements for provisional certification require the manufacturer to provide various types of information and documents. Either that information will be provided and the application is complete, in which case provisional certification should occur, additional information may be requested, or the information will not be provided and the application is incomplete. It is unclear why a manufacturer should be required to provide further access to records, documents, agents or employees, or premises under these circumstances.

Second, allowing the Labor Secretary to intervene in employer-employee relations runs the risk of illegally influencing labor matters that Congress "intended to remain unregulated and left to be controlled by the free play of economic forces." (*Machinists v. Wisconsin Employment Relations Commission* (1976) 427 U.S. 132, 140.) While the state may regulate whether employers observe generally applicable labor standards, it may not adopt laws or policies designed to favor or harm a particular employer or union engaged in a labor dispute. (*American Hotel and Lodging Association v. City of Los Angeles* (2016) 834 F.3d 958, 963.)

Third, the proposed procedures do not define which parties may be given "reasonable access" to the manufacturer's records, employees, and premises, nor do the procedures limit such access to the Labor Secretary. To avoid infringing on privacy rights and unlawfully influencing the labor relations of a manufacturer, the proposed procedures must define and

restrict “reasonable access” to the Labor Secretary and his staff, access procedures, and a right to appeal access orders issued by the Labor Secretary, if any such access is included in final procedures.

Fourth, as a practical matter the Labor Secretary is unlikely to expend state resources to utilize this access provision to meet with employees of or visit the premises of manufacturing facilities that are outside California, let alone ones that may be located outside of the country. Manufacturing facilities in California are most likely to be the subject of this requirement, which again would effectively penalize the customers of Tesla because Tesla located its factory in California.

The draft procedures also provide that manufacturer applications, including supporting documentation, will be made publicly available and posted on the LWDA website. This underscores the significant privacy concerns for manufacturers and employees. For example, documentation may include confidential business information and in California EEOC and DFEH complaint files are not open to the public while charges are pending. Employees also have significant privacy rights in workers’ compensation and other proceedings. While it may not be the intent of this approach, requiring public disclosure of such matters not only violates a slew of federal and state regulations, but, paradoxically, would deter many employee complaints.

#### Provisional Certification Procedures: Due Process

Without subjecting the draft certification procedures to the requirements of the California Administrative Procedure Act, the proposal for provisional certification procedures lacks transparency and due process safeguards. Unlike the proposal for full certification procedures, it does not even “establish a formal process, including regulations and guideline changes as necessary, for manufacturers to apply.” Moreover, the certification procedures do not include a process by which necessary changes to any regulations and guidelines may be made based on feedback from stakeholders and the participating manufacturers.

Due process is essential to the integrity of any decertification procedures. At a minimum, any consideration of denying a manufacturer’s application for provisional certification should be subject to a duly noticed formal hearing before an administrative body, a formal administrative appeal, and judicial review. The manufacturer must have a rebuttal opportunity to challenge the grounds for proposed denial of certification by presenting evidence and testimony before a fair and impartial quasi-judicial body, in addition to those rights guaranteed by California’s Administrative Adjudication Bill of Rights. (See Gov. Code, § 11425.10.) A proposed denial of certification should not take effect until after the appeal process is completed.

The opportunities for manufacturers in the CVRP to participate in the certification development process have been limited, which enhances the likelihood that the proposed procedures will be judicially invalidated on due process or federal preemption grounds or result in other unintended consequences for ZEV deployment in California.

### Full Certification Procedures

The Phase 2 “full certification” draft procedures are significantly less developed than the Phase 1 “provisional certification” draft procedures, but they are just as flawed because “the process for evaluating the annual recertification submittal would be similar where appropriate to the process described for provisional certification” and the criteria “would likely include a requirement that the manufacturer complies” with all locally applicable labor laws as described in the “provisional certification” draft procedures. Tesla incorporates by reference all of the comments above that concern the draft procedures for provisional certification, including those regarding due process.

As an initial matter, it is unclear why different “full certification” procedures are necessary. In addition to the flawed focus on locally applicable laws, establishing an annual recertification process starting with fiscal year 2020-21 will be unduly burdensome to participating manufacturers and divert limited state resources from other matters. At most, a recertification process should be conducted every two years, similar to the time period for a provisional certification.

The full certification draft procedures state that “LWDA would establish a formal process to receive and investigate complaints from the public relating to the full certification of a manufacturer.” Subjecting participating manufacturers to investigations of “complaints from the public” appears to allow unlimited scrutiny of manufacturers by people who have no direct connection to the manufacturer or its facilities where CVRP-eligible vehicles are made, and an invitation for third parties to generate allegations in order to drive investigations of a particular manufacturer. This is inappropriate, lacks due process safeguards, and goes well beyond the scope of anything contemplated by a plain reading of AB 134, which is focused on whether workers are treated fairly and responsibly.

### Conclusion

For all these reasons, Tesla objects to the draft certification procedures in the Concept Paper as inequitable, fundamentally flawed, and in violation of numerous legal standards. At a minimum, any procedures must be applied consistently to all companies that manufacture CVRP-eligible vehicles, including those that have manufacturing facilities located outside of California in jurisdictions with lesser labor standards. We believe a workable self-certification framework can be developed that respects applicable legal requirements if the comments discussed above are fully addressed, and we reserve the right to submit further comments on this issue.

Unlike its competitors, Tesla has chosen to locate in California and, in doing so, to be subject to and comply with the most stringent labor standards in the country. We are proud to be a California company with all that it entails. The existing state laws, as well as federal laws, already require fair and responsible treatment of employees; they need no supplement. What these draft procedures fail to do is ensure that procedures are consistently applied, so that all companies whose customers are eligible for CVRP incentives – including those with manufacturing facilities located outside California – are worthy of participating in a program funded by California taxpayers’ dollars.

The CVRP is a consumer rebate program, and consumers will expect that any certification procedures are applied consistently and equitably. Implementation of these draft procedures, if the Legislature provides authority necessary to do so, would compromise the continued effective administration of the CVRP, confuse consumers who are interested in driving a CVRP-eligible clean car, and impede progress toward achieving the goal of 5 million ZEVs by 2030.

We understand from the Concept Paper that CARB and LWDA staff will consider the public comments on this draft and provide a revised Concept Paper for further consideration. We urge staff to address the issues raised in these comments, and to provide a meaningful and adequate opportunity for public comment on the revised Concept Paper when it is released.

Respectfully,



Sanjay Ranchod  
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Business Development and Policy