



Airlines for America®
We Connect the World

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Submitted electronically at:

<https://ww2.arb.ca.gov/lispub/comm/bclist.php>

Clerks' Office
California Air Resources Board
1001 I Street
Sacramento, California 95814

Re: Airlines for America® Input on the 2024 Proposed Low Carbon Fuel Standard Amendments

Dear Chair Randolph:

I. Introduction

Airlines for America® (A4A), the principal trade and service organization of the U.S. airline industry,¹ appreciates the opportunity to provide comments to the California Air Resources Board (CARB) on the Proposed Low Carbon Fuel Standard (LCFS) Amendments.²

The U.S. airline industry is committed to reducing its climate impact and achieving net zero carbon emissions by 2050. Transitioning to Sustainable Aviation Fuels (SAF), also referred to as Alternative Jet Fuel (AJF) by CARB, is core to this commitment, and we have pledged to work with governments and other stakeholders to make three billion gallons of SAF available in the United States by 2030. Achieving these goals requires new and additional policy incentives, streamlined permitting processes, and close collaboration among airlines, the fuels industry, manufacturers, environmental organizations and governments, among others.

With respect to SAF, California has established itself as an early leader in attracting investment, production, and use of SAF through the existing Low Carbon Fuels Standard (LCFS) Program, which provides an opt-in credit for SAF that helps reduce the price difference between SAF and conventional jet fuel. We look forward to working with CARB on measures that will rapidly expand availability and deployment of SAF in California.

Aviation accounts for 2.6% of the U.S. greenhouse gas emissions but 5% of U.S. Gross Domestic Product (GDP) and 4.1% of California's GDP, thus having an outsized economic impact relative to its share of emissions. There are more than 380,000 employees of U.S.

¹ A4A's members are: Alaska Airlines, Inc.; American Airlines Group Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Federal Express Corporation; Hawaiian Airlines, Inc.; JetBlue Airways Corp.; Southwest Airlines Co.; United Airlines Holdings, Inc.; and United Parcel Service Co. Air Canada, Inc. is an associate member.

² These comments supplement and incorporate A4A's comments on the LCFS submitted on January 7, 2022, August 8, 2022, and March 15, 2023, as well as the comments previously submitted during the 2018 LCFS referenced in footnote 10 *infra*.

commercial aviation firms based in California, with an overall economic impact of \$194 billion³. Aviation is critical to driving California's economy and its rank as the fifth largest economy in the world, enabling \$114 billion in annual trade flows and underpinning many of the rest of California's biggest economic drivers such as agriculture, tourism, manufacturing, banking, technology and small business. Ensuring a healthy and vibrant aviation industry is essential to California's future, and leveraging CARB's early leadership on SAF can enable California leadership in the emerging SAF production industry, creating new jobs and economic development opportunities.

With this context, we express our serious concern with the proposal by CARB to regulate jet fuel used for flights within California as an obligated fuel under the LCFS Program. This proposal to obligate jet fuel would be unlikely to result in increased SAF production, availability, or use in California, but would lead to higher jet fuel prices and slow down rather than accelerate efforts to increase SAF production and use in California. The primary impediment to increased SAF production and availability in California and elsewhere remains the higher cost of SAF for producers and buyers relative to conventional jet fuel and renewable diesel. In addition, the long permitting processes for constructing SAF production facilities is a major impediment to growing overall production capacity in California, a necessary step to achieve California's goals. The CARB proposal would not address these fundamental challenges or otherwise meaningfully increase SAF supply or use. And because the proposal will not meaningfully increase SAF supply, the local air quality benefits attributed to increased SAF use as a result of eliminating the intrastate jet fuel exemption are overstated.

In addition to not being an effective policy tool to increase SAF production, the CARB proposal to regulate jet fuel is pre-empted by federal law, a fact that CARB recognized when it exempted jet fuel from the LCFS in 2018.⁴ It is critically important that uniform federal rules apply to aviation and aviation fuels, under the Supremacy Clause of the U.S. Constitution. The CARB proposal seeks to regulate jet fuel and reduce emissions from aviation through such regulation, both of which are pre-empted under federal law, as described in further detail below. In light of the clear and broad federal authority for regulating jet fuel and aircraft engine emissions, California is pre-empted from regulating jet fuel under the LCFS.

We urge CARB to reconsider and withdraw the proposal to remove the exemption for jet fuel for intrastate flights and instead preserve the existing opt-in approach for SAF and partner with the aviation sector and stakeholders across the emerging SAF ecosystem on new policies and approaches to address the underlying challenges which could rapidly increase the availability and use of SAF in California. We encourage further dialog on this point to find a mutually acceptable path forward.

³ [The Economic Impact of Civil Aviation on the U.S. Economy, State Supplement, US Department of Transportation, November 2020](#)

⁴ CARB stated that "[s]ubjecting aircraft fuels to annual carbon intensity standards would raise federal preemption issues" available at https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2018/lcfs18/isor.pdf?_ga=2.259407882.1202437490.1641231788-253234234.1573227006

II. Discussion

1. The proposal to remove the exemption for conventional jet fuel is unlikely to lead to increased SAF production, availability, or use

The proposal to remove the exemption for conventional jet fuel for flights within California is unlikely to result in increased SAF production, availability, or use in California, but is likely lead to higher jet fuel prices. Given the higher cost of SAF compared to other regulated fuels, such as renewable diesel, producers and importers are most likely to buy credits generated from other fuels, rather than produce SAF to address the deficits generated by conventional fuels used on flights within California. Fuel producers will continue to prioritize renewable diesel production instead of SAF. As a result, the removal of the exemption for conventional jet fuel is unlikely to materially change the SAF production relative to the status quo. In fact, the deficits created by intrastate jet fuel likely will be retired primarily by renewable diesel and other road transport related credits. Obligating jet fuel will lead to the increased price of jet fuel, diverting resources that might have gone for SAF purchase and use towards renewable diesel production instead.

The relationship between deficit generation and credit generation is unchanged by the CARB proposal. Under the structure of the LCFS program, deficits are created for fuel producers from specific conventional fuels delivered into California as identified and defined by the program. These deficits form a common pool that can be retired with credits from any type of eligible fuel. But there is no requirement for a relationship between the type of fuel that created the deficit and the type of credit that retires that deficit. To illustrate this situation, one must only look at which fuels generate deficits in the current program, and which alternative fuels receive the credit benefits. In the current program, CARBOB (gasoline) generates 85% of the deficits, but gasoline alternatives (i.e. ethanol and EV related credits) receive only 40% of the credits. Diesel, on the other hand, generates only 14% of the deficits, but receives 44% of the credits.

Share of LCFS Program deficits and credits by fuel type for 2022 calendar year⁵

	CARBOB (Gasoline)	Diesel	Jet
Share of Total Deficits by Source	85%	14%	0%
Share of Credits by Fuel Alternative	40% (24% Electric, 16% ethanol)	44% (36% Renewable Diesel, 8% Biodiesel)	<1% (Alternative Jet Fuel)

Very few (<1%) AJF credits are generated because of the relatively higher cost of AJF compared to renewable diesel, not because of the absence of conventional jet fuel deficits. The relative cost of the fuels that can generate credits will be unchanged by the CARB proposal and therefore the relative supply and demand for renewable diesel and AJF credits is also unlikely to change. The LCFS proposal is likely to undermine the critical need to rapidly scale up

⁵ A4A analysis of LCFS Program Quarterly Data Spreadsheet, available at https://ww2.arb.ca.gov/sites/default/files/2023-10/quarterlysummary_Q22023.xlsx

production and use of SAF in order to meet ambitious government and aviation sector climate goals, including California's own ambitions for aviation within the state.

Also, regarding implementation, the proposal identifies producers as the First Fuel Reporting Entity for jet fuel but does not provide any information for how Reporting Entities would determine the volume of jet fuel used for flights within California. Data on jet fuel usage for flights within California is not currently collected or readily available and reporting entities would not be able to accurately measure and report on jet fuel used for intrastate flights across all types of operators – commercial, business, and general aviation. CARB's proposal is therefore completely unworkable and cannot be complied with in its current form.

2. The air quality benefits attributed to the intrastate jet fuel obligation are inaccurate and overstated.

A4A and its members concur with CARB's assessment that SAF has the potential to provide local air quality (LAQ) benefits (compared to conventional jet fuel) near airports. Significant academic and industry research has been conducted, including full scale static engine tests and flight tests have demonstrated lower Sulphur Oxides (SOx) and Particulate Matter (PM) emissions from SAF compared to conventional fossil jet fuel. However, we disagree with CARB's analysis and presentation of future LAQ levels that implies reductions in jet fuel related LAQ emissions resulting from the proposed intrastate jet fuel obligation. In addition, we recommend CARB review its model for jet fuel LAQ emissions as it does not appear to reflect the current scientific consensus. This analysis is so fundamental to CARB's proposal that it deserves an accurate and more robust study of the available facts.

As described in earlier sections of this document, the proposal to remove the jet fuel exemption is unlikely to stimulate additional SAF production, with producers most likely using credits generated by other fuels to satisfy the jet fuel obligation. Further, whatever increases in SAF production occur over the forecast time period will be the result of all economic levers: federal incentives⁶, LCFS incentives, LCFS deficit generation, and operator contributions. Attributing all SAF increase to only LCFS deficit generation is a misattribution of benefit of the proposed obligation. Therefore, claims of PM and NOx reduction from SAF use as a result of the intrastate jet fuel proposal are greatly overstated. LAQ emissions reduction will only occur when and where SAF is actually used in significant quantities.

In addition, we note that CARB's analysis of the benefits of LAQ emissions resulting from the use of SAF is based on a single series of tests conducted by NASA in 2009 and reported on in 2011⁷. CARB's interpretation of the results from this test identified that "Alternative jet fuel emits 87.4% the NOx and 55% the PM2.5 that fossil jet fuel emits." Additional research has been conducted since 2009 and the scientific consensus differs significantly from what CARB has modeled. The Airport Cooperative Research Program analyzed the body of research available in 2018 and concluded that SAF minimally reduces or has no effect on NOx. The body of research and summary analysis does verify that potential reductions in SOx and PM emissions are significant, similar to CARB's assumptions, and generally proportional to the SAF blend

⁶ See ISOR p. 55, IRA tax credits are included in baseline scenario

⁷ See ISOR Appendix C-1, Sec VI, p. B-6

percentage as combusted in the engine.⁸ We recommend CARB review its Methodology for Estimating Changes in Criteria Pollutant Emissions from Use of Alternative Jet Fuel for AJF emissions and update to current scientific consensus.

3. The proposal to remove the exemption for jet fuel used on flights within California is preempted by Federal Law.

CARB's Previous Recognition of Federal Preemption

Conventional Jet Fuel (CJF), which is defined in section 95481(a)(33) of the LCFS regulation, is currently exempt from the LCFS Program through section 95482(c)(2). When CARB proposed and then finalized this exemption as part of the 2018 LCFS rulemaking, CARB stated, correctly, that “[s]ubjecting aircraft fuels to annual carbon intensity standards would raise federal preemption issues.”⁹ CARB then pointed out that it “has the authority to amend the LCFS regulations to create incentives to promote the use of low carbon fuels in aircraft by allowing credit for such fuels. Importantly, by promoting the voluntary production and use of alternative jet fuel, CARB would not be regulating aircraft fuels, but rather would simply be creating opportunities for airlines to better support California’s GHG objectives.”¹⁰ A4A fully supported CARB’s continuation of the non-deficit generating status of CJF (which was originally set forth in section 95480.1(d)(1) of the LCFS regulation before being moved to section 95482(d)(4)) and its inclusion of AJF as a credit-generating fuel under the LCFS Program on a voluntary, opt-in basis.¹¹

The exemption in section 95482(c)(2) is expansive and encompasses all CJF, whether used in intrastate flights or any other flights taking off from California airports. Nothing has changed since the 2018 LCFS rulemaking, meaning California, like every other state in the country, continues to be federally preempted from regulating jet fuel irrespective of a flight’s destination. Put another way, CARB remains subject to federal law that clearly preempts any authority other than the Federal Aviation Administration (FAA) from regulating aviation fuel, and CARB is compelled to maintain the scope of 95482(c)(2) to include CJF used for intrastate flights.

Preemption Under the Clean Air Act and the Federal Aviation Act

Federal law has for many decades made clear that the FAA has exclusive jurisdiction over jet fuel and that states are expressly preempted from adopting and enforcing fuel standards for aircraft:

⁸ See

<https://nap.nationalacademies.org/download/25095>

https://onlinepubs.trb.org/onlinepubs/acrp/acrp_wod_41Factsheet.pdf

⁹ See Staff Report on Public Hearing on Proposed Amendments to LCFS, CARB at III-30 (Mar. 6, 2018) https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2018/lcfs18/isor.pdf?_ga=2.259407882.120243749.0.1641231788-253234234.1573227006 at III-30.

¹⁰ *Id.*

¹¹ We incorporate by reference the comments we filed during the 2018 LCFS rulemaking, “Comments on the 2018 Amendments to the Low Carbon Fuel Standard” (April 23, 2018), and “Airlines for America’s Comments on Proposed Modifications to the Proposed Revisions to the Low Carbon Fuel Standard (LCFS) Regulation” (July 5, 2018).

The Administrator of the [FAA] shall prescribe-

(1) standards for the composition or chemical or physical properties of an aircraft fuel or fuel additive to control or eliminate aircraft emissions the Administrator of the Environmental Protection Agency decides under section 231 of the Clean Air Act (42 U.S.C. 7571) endanger the public health or welfare; and

(2) regulations providing for carrying out and enforcing those standards.¹²

Congress added this provision to the Federal Aviation Act of 1958 in conjunction with its adoption of Sections 231-234 of the Clean Air Amendments of 1970. Taken together, those complementary legislative enactments manifested an express Congressional intent that federal regulation alone was govern the regulation of aircraft emissions.¹³

That express intent with respect to the aircraft fuel and emissions must be read in the broader context of federal preemption of the field of aircraft regulation that has been legislated by Congress and embraced by the courts. As the Supreme Court has held, it is well-settled that the Federal Aviation Act of 1958 creates a “uniform and exclusive system of federal regulation” of aircraft that preempts state and local regulation.¹⁴ This recognizes the critical importance of ensuring aircraft operations are not subject to a patchwork of state and local laws. It also recognizes the critical importance that maintaining the integrity of aviation fuel has to maintaining the safety of aircraft operations. Quite simply, Congress recognized the need to ensure the FAA had sole and exclusive authority to regulate aviation fuels.

As a corollary of the federal government’s express and exclusive authority with respect to the regulation of aviation fuel, Section 233 of the Clean Air Act explicitly preempts states and their political subdivisions from “adopt[ing] or attempt[ing] to enforce any standard respecting emissions from any aircraft or engine thereof unless such standard is identical to a standard” established under section 231,¹⁵ which requires that the FAA be consulted on any aircraft engine emission standards proposed by the U.S. Environmental Protection Agency (EPA).¹⁶

¹² See 49 U.S.C. § 44714 (“Aviation fuel standards”).

¹³ See Conf. Rep. No. 1783, 91st Cong. 2nd Session (1970) (“The states were preempted from adopting or enforcing any emissions control standard with respect to aircraft or aircraft engines to which federal standards would apply”).

¹⁴ See *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973); see also *American Airlines v. Department of Transp.*, 202 F.3d 788, 801 (5th Cir. 2000) (aviation regulation is an area where “[f]ederal control is intensive and exclusive”) (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944)).

¹⁵ See 42 U.S.C. § 7573; 40 C.F.R. § 87.3(d).

¹⁶ 40 C.F.R. § 87.3(a) (EPA emission standards “apply to engines on all aircraft that are required to be certificated by FAA”). Aircraft and engine certification is the exclusive domain of the FAA. Thus, any state

EPA, for its part, has openly acknowledged that FAA has exclusive authority over aviation fuel. In a 2012 response to a rulemaking petition requesting that EPA address the lead content of fuel used in piston-engine general aviation aircraft, EPA explained as follows:

EPA has no direct authority on setting . . . aviation fuel specifications by regulation. Rather, FAA has authority to prescribe standards for the composition or chemical or physical properties of aircraft fuels to control or eliminate aircraft emissions. 49 U.S.C. § 44714. However, under current practice, these specifications are not set directly by government regulation. Rather, FAA indirectly regulates aircraft fuel by specifying that fuel meeting specifications identified by the aircraft engine manufacturer as part [of] the engine type certificate . . . must be used by the operator as a condition of operating the aircraft under its type certificate. Thus, while EPA has an interest in environmentally compatible fuels, our direct role here is limited to setting an engine emission standard under [Clean Air Act] section 231 that can be met, within appropriate leadtime, with the development and application of requisite technology, giving appropriate consideration to the cost of compliance and to safety and noise factors.¹⁷

In accordance with the legislative directives of CAA Section 231 (requiring the EPA Administrator to issue regulations for aircraft engine emissions) and Section 232(a) (granting

regulation that interferes with EPA's emissions standards for aircraft engines also interferes with FAA's authority.

¹⁷ See EPA, *Memorandum in Response to Petition Regarding Lead Emissions from General Aviation Aircraft Piston-Engines*, at 16 (July 18, 2012) (footnote omitted) (emphasis added), available at <https://www.epa.gov/sites/default/files/2016-09/documents/ltr-response-av-ld-petition.pdf>; see also 75 Fed. Reg. 22440, 22441 (Apr. 28, 2010) ("Under the [Clean Air Act], if, in the Administrator's judgment, lead emissions from the use of leaded avgas cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, then EPA would be required under our statutory authority to prescribe standards to control the emissions of lead from piston-engine aircraft. In promulgating such standards, the EPA would be required to consult with the [FAA], and could not change standards if doing so would significantly increase noise and adversely affect safety. FAA would then be required, after consultation with EPA, to prescribe regulations to [e]nsure compliance with any standards to control the emissions of lead from piston-engine aircraft. **Under 49 U.S.C. 44714, FAA would also be required to prescribe standards for the composition or chemical or physical properties of piston-engine fuel or fuel additives to control or eliminate aircraft lead emissions.**) (emphasis added); *id.* at 22445-46 ("**fuels used exclusively in aircraft engines are to be regulated by the FAA**") (emphasis added); National Academies of Sciences, Engineering, and Medicine, *State and Federal Regulations That May Affect Initiatives to Reduce Airports' GHG Emissions*, at 15 (2012) (footnote omitted) ("EPA's authority to establish [aircraft emission standards] under the [Clean Air Act] does not extend to the regulation of jet fuel. Rather, FAA has exclusive authority to prescribe 'standards for the composition or chemical or physical properties of an aircraft fuel or fuel additive to control or eliminate aircraft emissions' for pollutants EPA has found endanger the public health and welfare"), available at https://www.nap.edu/cart/download.cgi?record_id=22671.

the Secretary of Transportation authority to enforce standards issued under Section 7571) both EPA and FAA have issued regulations exercising their exclusive authorities in this space.¹⁸ There is no language in those regulations suggesting an exemption that would allow California or any other state to regulate fuel content, nor has any court decision recognized the same.

For aviation fuel, 14 CFR § 34.3 sets forth the uniform “General Requirements” for that fuel. As explained above, that regulation contemplates FAA setting standards in consultation with EPA as the federal agency with expertise in this area. States, however, are not involved, reflecting the legislative intent for uniform federal regulation. Further, the LCFS is not identical to any fuel standard that has been adopted by EPA and FAA under the auspices of Sections 231 and 233 of the CAA and the Federal Aviation Act. Extending its reach to aviation fuel is therefore not excused from preemption.

The Federal Aviation Act Preempts State Regulation of Aircraft Operations

Extending the reach of the LCFS to jet fuel would impose a regulatory mandate of aircraft operations. California is both expressly precluded from regulating aircraft fuels, and the Federal Aviation Act more broadly preempts the field of aviation regulation so as to preclude applying the LCFS to aircraft operations. See *City of Burbank*, 411 U.S. at 634 (explaining that the *pervasive* nature of federal regulation evidences Congress’ preemptive intent). Congress recognized that the airline industry is a uniquely complex, interconnected system in which even the slightest disruption can have ripple effects that disrupt the functioning of the National Airspace System and interstate commerce.

Indeed, with respect to operational mandates there is no “minor” encroachment in the aviation industry—any state interference with airlines’ operations has the potential to cause chaos at a national or international level. *Northwest Airlines v. State of Minnesota*, 322 U.S. 292, 303 (1944) (“Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government”).

This concern prompted Congress to vest FAA with sole, exclusive authority to regulate airline operations. As the court explained in *Arapahoe County Public Airport Authority v. Federal Aviation Administration*, 242 F.3d 1213, 1221 (10th Cir. 2001), it is “difficult to visualize a more comprehensive scheme of combined regulation, subsidization, and operational participation than that which Congress has provided in the field of aviation” (citations omitted). (“Congress’ clear intent to occupy the field with respect to the airline industry “tilts the balance toward the application of supremacy principles to protect against state courts trumping the federal interests and concerns”) *Id.*; see also *English v. General Electric Co.*, 496 U.S. 72, 79 (1990) (“in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively”).

¹⁸ See notes 14 and 15, *supra*. FAA has issued regulations under 49 U.S.C. § 44714, set forth at 14 CFR Part 34.

Extending the LCFS to Aviation Fuels Would be Preempted by the Airline Deregulation Act

California's proposal would interfere with airlines' prices, routes, and services, and is therefore preempted under the Airline Deregulation Act (ADA). Under the ADA, states are expressly forbidden from interfering with airlines' prices, routes, and services. The ADA provides that "[a] State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b).

This is an expansive prohibition and federal courts have consistently struck down laws that even minimally encroach on the aviation industry. *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364 (2008). Congress' goal in passing the ADA was to avoid inefficient regulation of the airline industry and to allow market demands to drive airlines' competitive decisions. *Federal Express Corp. v. California Public Utilities Commission*, 936 F.2d 1075, 1075, 1079 (9th Cir. 1991) (explaining that Congress preempted state regulation of the airline industry to create a "sound regulatory environment" and to "facilitate adaptation of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States). By including these specific statutory preemption provisions, Congress sought to ensure the ADA purposes and avoid the effect of a balkanized system of local laws and a patchwork of regulatory regimes at odds with a national objective of deregulating air commerce. *Ventress v. Japan Airlines*, 747 F.3d 716 (9th Cir. 2014).

California's proposed LCFS expansion would cause disruptions that would impermissibly interfere with airlines' operations, including but not limited to:

- Forcing airlines to alter their methods of tracking fuel supply sources and uses.
- Forcing airlines to potentially alter the amount of fuel carried by planes involved in intrastate trips.
- Forcing airlines to restructure their supply chain based on California's regulatory CI metric, rather than based on the demands of the marketplace.

All of these effects will have impacts on airlines' prices, routes, and services. They are all far more disruptive to airlines' methods of service than other state regulations that have been struck down, such as the signature requirement for packages at issue in *Rowe*. 552 U.S. 364. They will also affect airlines' prices because disruptions to the supply chain and the larger market will raise costs for airlines, and those costs will inevitably be passed on to consumers.¹⁹

Any argument that the economic impact from the rule will be felt by fuel producers, not airlines themselves, is also misplaced. Higher costs for fuel producers will be passed on to the airlines and it is beyond dispute that higher costs translate into higher prices. "It is freshman-year economics that higher prices mean lower demand, and that consumers are sensitive to the full price that they must pay, not just the portion of the price that will stay in the seller's coffers."

¹⁹ While the ADA does not prevent a state that owns or operates an airport from carrying out its proprietary powers and rights (49 U.S.C. § 41713(b)(3)), the regulation of jet fuel does not fall within said powers, and 49 U.S.C. § 44714 recognizes no exception to its express preemptive language. *see also Arapahoe County*, 242 F.3d at 1221-22 (explaining the interactions of FAA's preemptive authority and the "proprietary powers" exception).

Sanchez, 590 F.3d 1027 at 1030 (citing *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 36 (1st Cir. 2007)).

CARB's Program in its Current Form Would Violate the Commerce Clause

CARB's Program also is not in conformity with the Dormant Commerce Clause. Courts have refused to enforce state regulations with the type of burdens that are proposed here on instrumentalities of interstate transportation—trucks, trains, and the like. *See, e.g., Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520, 523–530 (1959) (concerning a state law specifying certain mud flaps for trucks and trailers); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 763–782 (1945) (addressing a state law regarding the length of trains).²⁰

These cases support a prohibition on state regulations that impose improper or discriminatory extraterritorial burden, and apply a balancing of legitimate interests which has not been undertaken here. At a minimum, these cases condemning state laws that “although neutral on their face . . . were enacted at the instance of, and primarily benefit,” in-state interests. *Raymond Motor Transp., Inc. v. Rice*, 434 U. S. 429, 447 (1978). These concerns predominate where preemption also applies state regulation of the entire field of aviation operations and fuels, and where a lack of national uniformity would impede the flow of interstate goods.

4. Concerns about the proposed guardrails on crop and forestry-based fuels through supply chain traceability and certification

During CARB's workshops held in 2022 and 2023 and the CARB Board Meeting held on September 28, 2023, CARB Staff and Board members expressed desire to establish “guardrails” for crop-based feedstocks. A4A and its members concur with CARB that “biofuel production must not come at the expense of deforestation or food production” and towards that end urge CARB to continue relying on its robust carbon intensity methodology for assessing land use change,²¹ including a quantification of the indirect effects associated with crop-based biofuels. The analytical, science-based methodologies used by CARB provide the necessary controls on feedstocks and fuels to ensure environmental integrity. As the available science continues to evolve, these models can be and are updated.

The proposal to establish supply chain traceability requiring certification through third party Sustainability Certification Systems (SCS) raises several concerns. First, this concept was not shared during workshops and thus does not have the benefit of stakeholder consideration and feedback. Stakeholder consultation would be needed to discover additional detail process requirements and definition necessary for implementation. As a result, the SCS certification program, as envisioned by CARB, may take longer to develop and implement than has been allocated by CARB.

²⁰ See generally *National Pork Producers Council et al. v. Ross*, 598 U.S. 356, 373 (May 11, 2023); see also *id.* at, 389 n.4 (dormant Commerce Clause protects the instrumentalities of transportation from state regulation).

²¹ See 17 CCR § 95488.3.

Second, there are only two established third-party SCSs generally relevant to biofuels and both have been developed through Europe-based organizations. Both SCSs have requirements that have limited experience in being applied to U.S. agricultural feedstocks and supply chains. The proposal should instead rely on an existing U.S. government standard, such as controls incorporated into the EPA Renewable Fuel Standard.

Third, the existing SCSs are struggling with capacity constraints in providing certifications under already established voluntary certification programs, EU RED, and ICAO CORSIA. Burdening the existing SCSs with an additional requirement for the CARB LCFS program could create an administrative bottleneck on qualifying feedstocks and supply chains for the LCFS program that would otherwise be qualified. This would have the adverse impact of slowing down supply growth, which for the still emerging SAF market is a constraint that must be avoided.

We urge CARB to reconsider the necessity of and timeline for this proposed requirement at this time. CARB should consider other options which may accomplish the same intent of providing reasonable assurance that biofuel production credited under the LCFS program does not come at the expense of deforestation or food production without creating undue administrative impediments to the availability of SAF supply that would otherwise meet sustainability requirements.

5. Concerns about SAF producer's ability to source low-carbon intensity electricity and hydrogen produced from low-carbon intensity electricity through indirect accounting

Under the existing LCFS Regulation, indirect accounting (aka book-and-claim accounting) is authorized for low-CI electricity supplied as a transportation fuel or to produce hydrogen through electrolysis if that hydrogen is used either as a transportation fuel or in the production of another transportation fuel (e.g., SAF). Through these provisions, SAF production facilities are explicitly authorized to source low-CI electricity from the grid to produce hydrogen that is used in the production of transportation fuels. Under the existing LCFS provisions, low-CI electricity can be sourced flexibly through the use of Renewable Energy Certificates (RECs) or via a qualifying Green Tariff program.

The proposed LCFS program revisions would dramatically narrow the power-sourcing landscape for SAF producers and limit the use of "Indirect Accounting" for "low-CI Electricity" to produce "Hydrogen as a transportation fuel." The proposed amendments would revoke the current authorization to source low-CI electricity for electrolysis through the REC mechanism when used for SAF production.

CARB's proposal will particularly and severely inhibit the growth of Power to Liquid (PtL) SAF production, availability and use in California. PtL is a promising fuels pathway that has the potential to provide very low CI SAF. Other jurisdictions (e.g. European Union and United Kingdom) have policies in place to attract PtL SAF, and CARB's proposal will encourage PtL SAF producers that utilize indirect accounting for the sourcing of low-CI electricity in their production to sell their fuels into those jurisdictions. Other types of biomass based SAF utilizing indirect accounting for use of low-CI electricity in their SAF production will have their CI scores lowered accordingly, which may make markets in other jurisdictions more attractive.

We recommend CARB preserve its existing policy allowing use of indirect accounting mechanisms for low-CI electricity that is used for hydrogen production in the production of a

transportation fuel. We also recommend that CARB expand the use of its existing indirect accounting mechanisms to extend the use of book-and-claim RECs to facilities sourcing power to produce SAF, PtL and other alternative fuels.

CONCLUSION

A4A supports the existing opt-in crediting model under the LCFS, combined with U.S. federal incentives, as an effective approach for increasing SAF production, use and availability in California. With further collaboration and partnership, we see the potential to dramatically increase the production and use of SAF in California and other jurisdictions and are interested in identifying new opportunities to work together. A4A offers its technical and operational expertise to work together with CARB and other stakeholders in better understanding the challenges and opportunities for promoting the availability of SAF to achieve CARB's objectives of a sustainable and workable reduction of carbon emissions in the transportation sector. The proposal to remove the exemption for jet fuel used on flights within California, however, will not be an effective tool for stimulating SAF production, and instead would divert resources and attention away from SAF objectives shared by California and the aviation industry. In addition, CARB is federally pre-empted from removing the exemption for jet fuel and obligating conventional jet fuel as a deficit-generating fuel. We urge CARB to reconsider and withdraw the proposal to eliminate the exemption for jet fuel used on flights within California.

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Thank you for your consideration of our comments. Please do not hesitate to contact us if you have any questions.

Sincerely,



Kevin Welsh
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