

Comments of the Association of Global Automakers Concerning CARB's Request for Input on California's "Deemed to Comply" Provision

May 31, 2018

The Association of Global Automakers (Global Automakers)¹ appreciates the opportunity to comment on the California Air Resources Board's (CARB) May 7, 2018 Request for Public Input on Potential Alternatives to a Potential Clarification of the "Deemed to Comply" Provision for the LEV III Greenhouse Gas Emission Regulations for Model Years Affected by Pending Federal Rulemakings (the Request for Input). Specifically, the Request for Input states that CARB is considering

whether to proceed with amendments to California's light-duty GHG regulations to clarify that the "deemed to comply" option is available only for the currently adopted federal GHG regulations (as of the date of this notice) for the model years affected by the pending federal rulemaking if those rules are weakened.²

CARB's anticipated action would not change any of the regulatory requirements in the State's GHG regulations, but would take whatever regulatory action is needed to "clarify" that "compliance with any weakened federal standards will not be deemed compliance with CARB standards for the model years affected."³

For the reasons explained below, Global Automakers opposes CARB's purported "clarification" or any other move that would effectively revoke its "deemed to comply" provision for any model year through 2025. Doing so would violate the State's earlier commitments to support the "One National Program" for motor vehicle fuel economy and greenhouse gas (GHG) regulations. Moreover, the proposed "clarification" is contradicted by the language in California's regulations, which does not limit the "deemed to comply" provision to the U.S. Environmental Protection Agency (EPA) regulations promulgated in 2012, but rather includes **any** amended EPA regulations that are published in the Code of Federal Regulations. Instead of taking the anticipated action, Global Automakers encourages CARB to work with the EPA and National Highway Traffic Safety Administration (NHTSA) on revised Corporate Average Fuel Economy (CAFE) and GHG standards for model years (MY) 2022 - 2025 that are strong and achievable,

¹ The Association of Global Automakers represents the U.S. operations of international motor vehicle manufacturers, original equipment suppliers, and other automotive-related trade associations. We work with industry leaders, legislators, regulators, and other stakeholders in the United States to create public policy that improves motor vehicle safety, encourages technological innovation and addresses environmental needs. Our goal is to foster an open and competitive automotive marketplace that encourages investment, job growth, and development of vehicles that can enhance Americans' quality of life. **Our members account for 56 percent of new vehicle sales and 56 percent of green vehicle sales in California.** For more information, visit www.globalautomakers.org.

² See Request at 2.

³ *Id.* at 3.

that provide for meaningful year-over-year improvements to fuel economy and GHG emissions, and that encourage investment in the next-generation of fuel-saving technologies.

Global Automakers Supports One National Program

In 2009, the automobile industry and regulators from CARB, EPA, and NHTSA reached a historic agreement for “One National Program” to address motor vehicle fuel economy and GHG emissions in a coordinated and harmonized fashion. This commitment resulted in joint fuel economy and GHG emission standards promulgated by NHTSA and EPA in 2010 covering MY2012 through 2016 (commonly referred to as “ONP1”).⁴ For its part, CARB amended its GHG emissions regulations for those model years to include a “deemed-to-comply” provision whereby automakers could show compliance with its state GHG emission standards by complying with EPA’s MY2012-2016 GHG regulations.⁵

As EPA and NHTSA explained in their final rule for ONP1, their joint rule would “allow automakers to meet both the NHTSA and EPA requirements with a single national fleet, greatly simplifying the industry’s technology, investment and compliance strategies.”⁶ And, California’s action to adopt the “deemed to comply” provision in ONP1 would “allow the single national fleet used by automakers to meet the two federal requirements and to meet California requirements as well.”⁷ Without ONP1, the U.S. market would have been split in two; states representing 40% of the market would have one set of standards, and the other 60% of the market would have another. The One National Program is therefore important to the industry’s competitiveness, because it ensures that automakers’ compliance costs are not needlessly and wastefully increased, and enables manufactures to devote their resources to developing fuel-saving and other vehicle technologies that benefit the customer.

In 2011 the Auto Industry and the Federal and State Agencies Agreed to Extend the One National Program through MY2025 While Providing for a Midterm Evaluation

After ONP1 was finalized, the EPA, NHTSA, CARB and the auto industry started working on a framework for the second phase of the One National Program (“ONP2”), which would cover MY2017 through 2025. The process for ONP2 started with EPA’s and NHTSA’s October 2010 Notice of Intent for 2017 and Later Model Year Light Duty Vehicle GHG Emissions and CAFE Standards (the NOI).⁸ This NOI expressed the agencies’ intent to promulgate standards for MY2017-2025 and provided a range of scenarios for improving fuel economy and GHG

⁴ Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010).

⁵ 13 C.C.R. § 1961.3(c).

⁶ Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324, 25,329 (May 7, 2010).

⁷ *Id.*

⁸ 75 Fed. Reg. 62,739 (Oct. 13, 2010).

emissions performance over those years—*i.e.*, ramp rates of 3%, 4%, 5% and 6%.⁹ The NOI also considered the idea of a “Mid-term Standards Review” of the latter year standards and requested comment on the form such a review should take.¹⁰

After the publication of the NOI, the industry, CARB and the federal agencies continued to discuss what the contours of ONP2 would look like. These discussions culminated in “Commitment Letters” signed by the various industry participants and CARB in July 2011. The Commitment Letters anticipated final MY2017-2025 GHG and fuel economy regulations consistent with the scenarios outlined in the NOI, and also a robust “Midterm Evaluation” of the latter-year standards.

The Midterm Evaluation was necessary because NHTSA is statutorily prevented from promulgating fuel economy standards more than five years at a time,¹¹ and because the GHG standards were being set more than ten years into the future. It was therefore important for the agencies to reevaluate the many assumptions underlying the rule that may not hold true in the long term—assumptions on matters such as the effectiveness and costs of fuel-saving technologies, the price of gasoline, and consumer demand for vehicles with higher fuel economy.

All parties to the Commitment Letters recognized that the Midterm Evaluation could result in the standards being increased, decreased, or kept the same after they were finalized (which was anticipated to be in 2012). As EPA subsequently explained in the NPRM for ONP2: “Where EPA decides that the standards are not appropriate, EPA will initiate a rulemaking to adopt standards that are appropriate under section 202(a), which could result in standards that are either less or more stringent.”¹²

Against this backdrop, CARB made several pledges in its July 2011 Commitment Letter. One was to “fully participate in the mid-term evaluation.” Another was to revise its state GHG emission standards to provide a “deemed to comply” provision with respect to the EPA GHG standards. Importantly, the “deemed to comply” provision would be part of California’s regulations even if the EPA standards were to be amended after 2012 as part of the Midterm Evaluation. Specifically, CARB’s Commitment Letter states:

California commits to propose to revise its standards on GHG emissions from new motor vehicles for model-years (MYs) 2017 through 2025, such that compliance with the GHG emissions standards adopted by EPA for those model years that are substantially as described in the July 2011 Notice of Intent, *even if amended after 2012*, shall be deemed compliance with the California GHG

⁹ 75 Fed. Reg. at 62,745.

¹⁰ *Id.* at 62,749.

¹¹ See 49 U.S.C. § 32902(b)(3)(B) (providing that NHTSA may promulgate regulations prescribing “average fuel economy standards for at least 1, but not more than 5, model years” at a time).

¹² See 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards (Proposed Rule), 76 Fed. Reg. 74,854, 74,986 (Dec. 1, 2011).

emissions standards, in a manner that is applicable to states that adopt and enforce California's GHG standards under Clean Air Act (CAA) Section 177.¹³

In 2012, the EPA and NHTSA finalized their rulemaking for ONP2, which was "a continuation of a harmonized and consistent National Program" for fuel economy and GHG emissions.¹⁴ In the preamble, the agencies once again highlighted the fact that:

Continuing the National Program in coordination with California will help to ensure that all manufacturers can build a single fleet of vehicles that satisfy all requirements under both federal programs as well as under California's program, which will in turn help to reduce costs and regulatory complexity while providing significant energy security, consumer savings, and environmental benefits.¹⁵

Per its commitment, CARB finalized rulemakings in 2012 to: (a) promulgate California's GHG emission standards for MY2017 through 2025, and (b) provide a "deemed to comply" provision.¹⁶ CARB then sought and obtained a waiver from EPA for these regulatory amendments, which the industry did not contest.¹⁷

The EPA Has Completed its Midterm Evaluation of the MY2022-2025 Standards and Found that Adjustments Should be Made

As anticipated in the Commitment Letters, ONP2 provided for a Midterm Evaluation of the MY2022-2025 standards. This evaluation was to be: (a) based on the most up-to-date data concerning the state of the auto industry, (b) completed by April 2018, and (c) coordinated with rulemaking by NHTSA, which was required to promulgate *de novo* standards for those model years. The preamble to the 2012 Final Rule stated that "[i]n order to align the agencies' proceedings for MYs 2022–2025 and to maintain a joint national program, if the EPA determination is that its standards will not change, NHTSA will issue its final rule concurrently with the EPA determination."¹⁸ However, after the 2016 election, the prior administration rushed through a Final Determination, in contravention of its anticipated April 2018 timeline, and without coordinating with NHTSA, which hadn't even published a proposed rule for MY2022-2025, let alone issue a final rule.

Global Automakers and other stakeholders asked the new EPA Administrator to reconsider this finding, which he correctly did. On April 2, 2018, the EPA issued a new Determination finding

¹³ July 28, 2011 Commitment Letter from Mary Nichols (CARM Commitment Letter) at 2 (emphasis added).

¹⁴ See 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012).

¹⁵ *Id.* at 62,630.

¹⁶ 13 C.C.R. § 1961.3.

¹⁷ See 78 Fed. Reg. 2112 (Jan. 9, 2013).

¹⁸ 77 Fed. Reg. at 62,633.

that, based on the most up-to-date data, the current standards need to be adjusted.¹⁹ Importantly, the 2018 Determination is just an initial step in a detailed rulemaking process. The EPA and NHTSA are expected to issue a joint notice of proposed rulemaking whereby NHTSA would propose new fuel economy standards for MY2022-2025 and EPA would propose amendments to its currently-existing GHG standards. After an appropriate period for public comment, the agencies will issue a joint final rule. Global Automakers has expressed its hope that California will be an important part of that rulemaking process, and that the result will be standards that maintain One National Program and that build on the industry's success on continuing to improve fuel economy and reduce GHG emissions.

CARB's Proposed "Clarification" Would Effectively Revoke the State's Commitment to the One National Program

The CARB Request for Input states that the Board is considering its "clarification" on the "deemed to comply" provision because of EPA's recent Determination that the federal GHG standards "may be too stringent" and should be changed. As an initial matter, Global Automakers notes that CARB's anticipated action is contrary to the spirit of ONP2, as expressed in the parties' Commitment Letters. In its letter, California committed to: (a) a Midterm Evaluation of the MY2022-2025 standards that may result in changes to the federal regulations, and (b) accepting compliance with EPA's MY2017- 2025 GHG standards "even if amended after 2012" as part of the Midterm Evaluation. Notably, CARB's Commitment Letter says nothing about revoking the "deemed to comply" provision should the EPA standards change; indeed, it says just the opposite.²⁰

The auto industry relied on CARB's commitment, and made several of its own. For instance, the industry committed to not challenging the final EPA/NHTSA rules established in 2012, and to not contest CARB's request for a waiver for its MY2017-2025 GHG standards. Indeed, in Global Automakers' Commitment Letter, we expressed our understanding that CARB had committed not to remove the national compliance option irrespective of what the outcome of the Midterm Evaluation may be.²¹

EPA shared this understanding of CARB's commitment to maintain the "deemed to comply" provision after the Midterm Evaluation. This is reflected in CARB's September 14, 2012 Initial Statement of Reasons for the rulemaking to adopt the "deemed to comply" provision. Describing the interplay between the Midterm Evaluation and California's adoption of the "deemed to comply" provision, CARB states:

US EPA and the U.S. Department of Transportation also committed to re-evaluate the state of vehicle technology no later than April 1, 2018, to determine whether

¹⁹ 83 Fed. Reg. 16,077.

²⁰ CARB, however, did retain "all rights to contest final actions taken or not taken by EPA or NHTSA as part of or in response to the mid-term evaluation." CARB Commitment Letter at 3.

²¹ See July 21, 2011 Letter from Michael J. Stanton to Ray LaHood and Lisa Jackson.

any adjustments to the stringency of the 2022 through 2025 model year national greenhouse gas standards, adopted as a result of these commitments, are appropriate. This re-evaluation of vehicle technology is referred to federally as a ‘Mid-term Evaluation’ and in prior Board documents as the ‘Mid-term Review.’ ... In addition to California’s Commitments [to participate in the federal Midterm Evaluation], ***EPA has stated its understanding that*** “The rules submitted to EPA for a waiver under the CAA will include such a mid-term evaluation” and “***that California’s 2017–2025 standards to be submitted to EPA for a waiver under the Clean Air Act will deem compliance with EPA greenhouse gas emission standards, even if amended after 2012, as compliant with California’s.***” (76 Fed. Reg. at 74987).²²

This history makes it clear that all stakeholders involved in crafting ONP2 anticipated that California would adopt a “deemed to comply” provision for the MY2017 through 2025 standards, and to maintain that provision even if the EPA standards were to be amended in response to the Midterm Evaluation. While it is true that the political dynamics have shifted considerably since the development of ONP2, Global Automakers hopes that all the relevant parties will uphold their commitments to One National Program and to the important policy goals the Program was designed to achieve.

Any Action to Revoke the “Deemed to Comply” Provision Would Require Regulatory Changes to the California Standards

In its May 7, 2018 Request for Input, CARB states that it intends to “clarify” that “compliance [by automobile manufacturers] with any weakened federal standards will not be deemed compliance with CARB standards” for the applicable 2022-2025 model years. Such a “clarification” would be entirely improper, because it is contradicted by the plain language of the regulations promulgated by CARB in 2012. CARB’s 2012 rulemaking to adopt the “deemed to comply” provision was consistent with the commitment the State made in 2011 to accept compliance with the EPA GHG standards, even if those standards were to be amended as part of the Midterm Evaluation.

The “deemed to comply” provision in the California regulations provide as follows:

For the 2017 through 2025 model years, a manufacturer may elect to demonstrate compliance with this section 1961.3 by demonstrating compliance with the 2017 through 2025 MY National greenhouse gas program, [provided certain procedural prerequisites are met].²³

²² Staff Report, Initial Statement of Reasons for Rulemaking; Proposed Amendments to New Passenger Motor Vehicle Greenhouse Gas Emission Standards for Model Years 2017-2025 to Permit Compliance Based on Federal Greenhouse Gas Emission Standards and Additional Minor Revisions to the LEV III and ZEV Regulations (Sept. 14, 2012) at 3.

²³ 13 C.C.R. § 1961.3(c).

The term “2017 through 2025 MY National greenhouse gas program” is defined in the regulations. It means:

the national program that applies to new 2017 through 2025 model year passenger cars, light-duty-trucks, and medium-duty passenger vehicles as adopted by the U.S. Environmental Protection Agency *as codified in 40 CFR Part 86, Subpart S.*²⁴

The language CARB chose for this definition is critical, because it reflects CARB’s deliberate intent to tie the “deemed to comply” provision to the EPA GHG regulations that are found in 40 CFR Part 86, Subpart S—whatever those standards may be (*i.e.*, those that were promulgated in 2012 or as amended by EPA after 2012).

CARB’s intent in this regard is made clear when one contrasts the “deemed to comply” provision in ONP2 with a similar “deemed to comply” provision in ONP1 for MY2009-2016. CARB’s GHG regulations for ONP1 also had a “deemed to comply” provision: “For the 2012 through 2016 model years, a manufacturer may elect to demonstrate compliance with this section 1961.1 by demonstrating compliance with the 2012 through 2016 MY National greenhouse gas program”²⁵ There, however, the regulations define the “2012 through 2016 MY National greenhouse gas program” as:

the national program that applies to new 2012 through 2016 model year passenger cars, light-duty trucks, and medium-duty passenger vehicles *as adopted by the U.S. Environmental Protection Agency at 75 Fed. Reg. 25324 (May 7, 2010)*, as incorporated in and amended by the ‘California 2001 through 2014 Model Criteria Pollutant Exhaust Emission Standards and Test Procedures and 2009 through 2016 Model Greenhouse Gas Exhaust Emission Standards and Test Procedures for Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles.’²⁶

The “deemed to comply” provision in ONP1 was tied specifically to the EPA regulations promulgated in the 2010 final rule. If CARB had intended for the “deemed to comply” provision in ONP2 to apply only to the EPA standards promulgated by EPA in 2012 and not to any amended standards—as the supposed “clarification” would find—then it would have used the same language as it did in ONP1. CARB’s decision not to do so was to account for the fact that the EPA standards may change as a result of the Midterm Evaluation and to comport with its Commitment Letter. The plain language of 13 C.C.R. § 1961.3(c) thus provides that if EPA amends the GHG emission standards set forth in 40 CFR Part 86, Subpart S, manufacturers may still rely on those federal standards for the “deemed to comply” provision.

²⁴ 13 C.C.R. § 1961.3(f)(25) (emphasis added).

²⁵ 13 C.C.R. § 1961.1(d)(A)(ii).

²⁶ 13 C.C.R. § 1961.1(e)(7) (emphasis added).

Therefore, if CARB intends to reverse course and prevent automakers from relying on the EPA GHG standards for MY2022-2025 if they are adjusted to be less stringent as a result of the Midterm Evaluation (and as discussed above CARB should not), then the Board must amend the text of its regulations to do so.²⁷ This is not a matter that would be subject to a “clarification.”

CARB Should Consider Alternatives to its Contemplated Action

The May 7, 2018 Request for Input asked for alternatives to CARB’s anticipated action on the “deemed to comply” provision. As discussed above, it would not be appropriate for CARB to take the action laid out in the notice—*i.e.* provide a “clarification” that the “deemed to comply” provision in the current regulations does not apply to amended EPA standards—because it is flatly contradicted by the actual text of the regulations and therefore would require a regulatory amendment. Rather, to the extent that California seeks to withdraw from ONP2 on account of the outcome of EPA’s and NHTSA’s rulemaking, it must do so by going through formal rulemaking to amend the “deemed to comply” provision in 13 C.C.R. § 1961.3(c), and seek a waiver from EPA.²⁸

Global Automakers, however, does not support this alternative. There are other actions that the State can take instead to advance California’s clean air goals. First, we urge California to remain engaged with the federal regulators on MY2022-2025 standards that are strong and achievable and that account for current market realities. GHG emission standards that are applicable in all 50 states provide greater overall benefits than standards applicable to only a portion of the market. Moreover, striking the appropriate regulatory balance will maximize automaker investment in fuel savings technologies and maintain the competitiveness of the U.S. auto industry in this space—especially if the regulations recognize how increased harmonization and programmatic flexibilities can ease compliance burdens while maintaining the goals of the One

²⁷ Global Automakers notes that if CARB were to amend 13 C.C.R. § 1961.3(d) so as to revoke, or simply “clarify,” the “deemed to comply” provision, a Clean Air Act Section 209(b) waiver from EPA would be needed because the result would be a much more stringent California program. Where a CARB regulatory amendment is “geared toward increasing the underlying stringency of the program,” or “add[s] a new pollutant or other emission standard,” then that “would require full waiver consideration” under the standard set forth in Section 209(b). *See In the Matter of California State Motor Vehicle Pollution Control Standards; Amendments to California Zero Emission Vehicle (ZEV) Regulation; 2003-2008 Model Years Within the Scope Request; 2007 and Subsequent Model Years Waiver Request*, Decision Document, at 20 (December 21, 2006). Removing or altering the “deemed to comply” provision is “geared toward increasing the underlying stringency of the program” because: (a) having to comply with a California-specific GHG program is more stringent—and would require greater fleet-wide GHG reductions in California—than the California regulation with the “deemed to comply” provision, and (b) California’s GHG emissions regulations do not include some of the programmatic elements that the federal program has to give manufacturers alternate compliance pathways, thus easing the regulatory burden.

²⁸ It is important to note that if California were to remove or “clarify” its “deemed to comply” to require manufacturers to following the California regulations, such action would be problematic. California’s own regulations lack many of the necessary credit and compliance mechanisms needed to support feasibility and a cost-effective approach to future GHG reductions, which are also an important part of the discussion regarding any changes to the federal regulations. Thus, if “deemed to comply” were to change in some form, California would need to provide additional programmatic amendments to, at a minimum, provide necessary flexibility, promote innovation, and encourage advanced technologies throughout the light-duty fleet.

National Program. We understand that CARB and the federal agencies are in the process of consultations concerning the EPA/NHTSA rulemaking, and we hope that that process will yield a result that achieves the policy objectives of both the federal and state agencies.

Second, CARB should focus its efforts on building the market for electric-drive vehicles, which will play an important role in reducing emissions from the light duty sector well into the future. As we explained in our March 17, 2017 comments on California's Advanced Clean Cars Midterm Review, the best way to do this is not to focus on arbitrary numeric mandates, but rather to enact policies and incentives that will actually spur the market for these vehicles. California has already taken a significant step in this regard with Governor Brown's Executive Order B-48-18, which increases funding for California's Clean Vehicle Rebate Project and for building out the infrastructure for electric charging and hydrogen refueling stations. California should work with the Section 177 States to ensure that they are making a commensurate investment in the electric-drive vehicle market.

* * *

Thank you for your consideration of these comments. If you have any questions, please feel free to contact Julia Rege (jrege@globalautomakers.org) or Charlie Haake (chaake@globalautomakers.org) at (202) 650-5555.