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Ford Motor Company Comments on

Notice of Public Availability of Modified Text
2012 Amendments to the California
Zero Emission Vehicle Regulation
February 22, 2012

Ford Motor Company (Ford) welcomes the opportunity to comment on California's Notice of Public Availability of Modified Text for the 2012 Amendments to the California Zero Emission Vehicle (ZEV) Regulation, dated February 22, 2012 ("15-Day Notice"). Ford supports the Optional Section 177 State Compliance Path. Ford's comments concentrate on the changes reflected to incorporate this Optional Section 177 State Compliance Path based on our understanding of the discussions and agreements with the S177 states. This optional path requires the introduction of ZEV vehicles in the S177 states sooner than required by the base regulation. The obligations, reporting, and penalty provisions of this path should be, on the whole, comparable to those of the base path, so as not to create disincentives that would discourage manufacturers from choosing the Optional Path. Otherwise, manufacturers will not choose this option and the states will have no guarantee of early ZEV placements.

Summary

Ford recommends that the ARB make the following modifications to the proposed amendments:

- Allow ZEV credits to be traded and transferred consistent with the usage of ZEV credits of the base regulation, including carry-forward and carry-back of ZEV credits.

- Base any penalties for failure to meet the Optional Section 177 State Compliance Path for 2018 – 2021MY on the requirements of the Optional Path, rather than reverting to the base path. Furthermore, if a penalty is paid, the provisions of the Optional Path should continue for subsequent model years, considering the manufacturer has already met their obligation to deliver ZEVs to the S177 states early.
- Revise the Optional Section 177 State Compliance Path to only require state of vehicle placement and Vehicle Identification Number for vehicles that have a placed in service requirement in the base regulation.
- Defer proposed changes that have a negative impact on compliance until the 2014MY at the earliest.

Optional S177 Path – Trading and Transferring Credits

The Optional S177 Path allows for the ZEV regulations to be met based on regional "pools" (i.e. East, West, and California). Rather than have a "pooled" bank, the proposal requires manufacturers to continue to monitor and report by individual state. Although we would prefer a simpler "pooled" ZEV credit banking system, we understand the need to keep individual state banks. However, Ford does not agree with the provision that manufacturers may only trade and transfer credits *used to meet the same model year* requirements (*Emphasis added)*. This "same model year" provision places a much more stringent constraint on the Optional Path, compared to the base regulation. The ZEV regulation is very challenging, and the ability to meet specific quotas in a given model year can be affected by factors outside of a manufacturer's control. For the Optional Path as well as the base path, manufacturers need to have the flexibility to move credits across model years in order to have a reasonable prospect of compliance. The carry forward and carry back provisions are necessary to allow manufacturers to manage the program in light of many external factors that influence the introduction and market for these vehicles.

Furthermore, the 15-Day Notice description of the Optional Section 177 State Compliance Path clearly states, "Existing carry-forward and carry-back provisions will remain available to manufacturers." The regulatory language should be modified to be consistent with this description. Manufacturers should be encouraged to place vehicles in the S177 states early and carry the ZEV credits earned forward to meet later obligations. Manufacturers use these provisions to "keep ahead of the curve", especially considering the proposal to limit the use of carry-back credits to one year.

Recommendation: The proposal should be revised to allow ZEV credits to be traded and transferred consistent with the usage of ZEV credits of the base regulation, including carry-forward and carry-back of ZEV credits.

Failure to Meet Optional Section S177 State Compliance Path

The 15-Day Notice proposal totally unravels the Optional Section S177 State Compliance Path if a manufacturer fails to comply with the Optional Path. This may be appropriate in the 2015 – 2017MY, when manufacturers must meet an additional obligation. However, once the manufacturer has met the additional Optional Path obligation in 2016 and 2017MYs, penalty for a failure to comply for 2018 – 2021MY should be based on the Optional Path requirements. For example, a manufacturer making a good faith effort to meet the regulation may be one vehicle shy of meeting the 2020MY Optional Path in one state. The penalty calculation should be based on that one vehicle in that one state, and compliance should continue to be based on the Optional Path for subsequent model years. As proposed, this example would require the manufacturer to go all the way back to 2018MY, undo all trades and transfers and be penalized based on the base ZEV regulations, which the manufacturer was no longer trying to meet once it selected the Optional Path. This would likely put the manufacturer significantly out of compliance in all states, retroactively back to 2018MY, even though the manufacturer may already have demonstrated compliance for those model years.

If a manufacturer elects the Optional Path, any penalties for non-compliance should be based on the degree to which the manufacturer failed to meet the obligations of the Optional Path. It is unreasonable to base penalties on a regulatory scheme the manufacturer was not even trying to meet. Unless this is changed, the potential imposition of an extreme and illogical penalty is likely to discourage manufacturers from selecting the Optional Path, thereby denying the S177 states the guaranteed early placement that this Optional Path intended to deliver.

Recommendation: For 2018 – 2021MY, the penalty for failure to meet the Optional Section 177 State Compliance Path should be based on the requirements of the Optional Path. Furthermore, if a penalty is paid, the provisions of the Optional Path should continue for subsequent model years, considering the manufacturer has already met their obligation to deliver ZEVs to the S177 states early.

Optional S177 Path – Reporting Requirements

The 15-Day Notice requires the reporting of the Section 177 state where placement in service occurred for 2015 – 2017MY TZEVs, even though there is not a placement in service requirement for TZEVs. In addition, the 15-Day Notice requires reporting Vehicle Identification Number (VIN) for each TZEV and ZEV for 2015 – 2021MY. We believe that these requirements were proposed because the states want to understand the impact that "pooling" has in each of the regions. However, these proposed reporting requirements would not provide that data. The impact of "pooling" will be understood by the trading and transferring of credits, not by placement in service reporting requirements. At the end of a model year, manufacturers must submit ZEV reports to each of the states. Those reports will include ZEV credits that were traded and transferred from other states. This ZEV credit report will provide the data needed for the states to evaluate the impact of "pooling".

Manufacturers sell vehicles to dealerships, which are independent businesses. Manufacturers do not have control over what the dealer does with the vehicle after the vehicle is delivered. That is why the emissions regulations, generally, have been written as "produced and delivered for sale". The only exception is the ZEV regulations for 2009 – 2017MY for true-ZEVs (i.e. battery electric and fuel cell vehicles), for which there is a placement in service requirement. For this limited set of vehicles, the ZEV regulations require reporting of placement in service and VINs. The Optional Path should be consistent with this approach and not require reporting that is not needed to demonstrate compliance with the regulatory requirements.

Recommendation: The Optional Section 177 State Compliance Path should be revised to only require state of vehicle placement and VIN for vehicles that have a placed in service requirement.

Retroactive Changes with Negative Impact on Compliance

The proposal makes some changes for the 2012MY that have a negative impact on manufacturers; for example, the fleet average NMOG for heavy light duty trucks used to calculate ZEV credits. Ford continues to believe that it is appropriate to base the ZEV credit on the fleet average NMOG that is offset by these heavier light duty trucks. However, if a change is made to this calculation, it should allow lead time for the manufacturer to make adjustments to their ZEV plans. Manufacturers plan many years ahead to comply with regulations, especially technology forcing regulations, like the ZEV mandate.

Under California law, statutes and regulations can have an impermissible retroactive effect if they "operate[] retroactively to materially alter the legal significance of a prior event" in such a way as to "give[] a different and potentially unfair legal effect to actions taken in reliance on the preenactment law." *California Trout, Inc. v. State Water Resources Control Bd*. (1988), 207 Cal.App.3d 585, 609 (1989), citing Mahon v. Safeco Title Ins. Co. (1988) 199 Cal.App.3d 616, 620–623, 245 Cal.Rptr. 103.) Here, although Staff has characterized this is a minor change, it does alter actions that manufacturers have already taken in reliance on the previous regulatory provisions. The ARB is proposing this change for the 2012MY which is near the end of production; moreover, the 2013MY is well underway (having begun on January 2, 2012) and the rule has not been finalized yet. This proposal provides no lead time for a manufacturer to make adjustments to their product plans to make up the reduction in the ZEV credits resulting from the regulatory change. This could put a manufacturer out of compliance in 2012MY, with no realistic opportunity to recover. The ARB should refrain from enacting retroactive changes in the rules that adversely affect the ZEV credits associated with vehicles already produced and delivered for sale.

Recommendation: Proposed changes that have a negative impact on compliance should not be implemented until the 2014MY at the earliest.

Conclusion

Ford appreciates the opportunity to work with the ARB and Section 177 states in developing the Optional Section S177 State Compliance Path. However, the details of this Optional Path need to be better understood. As this Optional Path is incorporated into the regulations, care must be taken not to propose burdensome requirements (e.g., trading, transferring, reporting, penalty) that will not contribute to the goal of the program.