

Auto Cos. Must Prep For State AG Action On Fuel Efficiency

By **James Koukios and Nathan Reilly** (November 19, 2021, 2:54 PM EST)

From global summits and multilateral treaties to citizen activists and local ordinances, few issues draw as much scrutiny in the overlapping arenas of politics, policy and public discourse as climate change. While discussion on the impact of industrial activities and appropriate remedial action spans across sectors, the automotive industry remains at the center of the debate.

In particular, vehicle fuel efficiency standards and the regulation of greenhouse gases remain areas that are subject to continued scrutiny from federal regulators — as well as intense focus by individual state regulators.

Recent actions by state attorneys general make plain that state governments, in concert with their federal counterpart, are maintaining an active interest in regulating and enforcing fuel efficiency standards. Companies in the automotive industry can position themselves to quickly address state regulators' concerns by taking some simple, yet effective, steps.

First, companies should closely monitor pronouncements from regulators, whether formal public comments to proposed regulations, as discussed below, or press releases on relevant issues. These kind of statements are frequently precursors to coming enforcement actions.

By identifying the issues and areas of concern for regulators, automotive manufacturers can begin an internal effort to strengthen compliance or identify vulnerabilities before a regulatory action commences.

Second, automotive companies should watch national trends to understand where regulators have begun enforcement actions against potential competitors or similarly situated entities. Regulators have well learned the maxim that imitation is the sincerest form of flattery, and an enforcement action by one state's attorney general often foreshadows similar actions by other state regulators.

Third, automotive companies should understand the extremely broad scope of state attorneys general — particularly in the fuel efficiency and emissions context. Not only do state regulators have criminal and civil remedies at their disposal, but their enforcement actions can range from consumer protection and civil rights and environmental justice laws to health and safety and securities regulation laws — and often involve prelitigation civil subpoena power.



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This being the case, when confronted with an inquiry from a state attorney general, companies must work with counsel to understand, define and, where possible, narrow the scope of the conduct being scrutinized.

The EPA Proposal

On Aug. 5, the U.S. Environmental Protection Agency proposed new GHG emission standards relating to passenger cars and light trucks for model years 2023 through 2026.[1] In the proposal, the EPA outlined standards designed to set aside less stringent GHG emission standards that had been proposed in March 2020 by the previous administration.

The EPA proposal identified three potential courses of conduct: a preferred alternative, a less stringent alternate standard and a more stringent alternate standard. The preferred alternative calls for a 10% fuel efficiency increase in model year 2023 car and light truck models, and 5% efficiency increases for each of the following three model years.

The proposal's preferred alternative also sought to establish a target average mile per gallon for the passenger car and light truck fleet of 52 mpg by 2026. In contrast, the standard proposed by the prior administration in March 2020 sought annual fuel efficiency increases of 1.5%, and a model year 2026 target fleet average of 43.4 mpg.

The Sept. 27 Letter

On Sept. 27, 21 state attorneys general; the attorney general for the District of Columbia; the cities of Denver, Los Angeles, New York, San Francisco, and Oakland and San Jose, California; and the counties of Denver and San Francisco sent a letter to the EPA, broadly supporting the EPA's plan to strengthen the fuel efficiency regulations as outlined in the agency's August proposal.[2]

Nonetheless, in the letter, the states and localities urged the EPA to go further, requesting that it adopt the more stringent standards set forth in its second alternative.

While indicating their belief that the proposal comported with existing law — which they argued was not true of the prior administration's March 2020 proposal — the signatories argued that the EPA should adopt the more stringent alternative, given that car and light trucks constitute a substantial portion of the transportation sector's GHG emissions, and that those emissions are, in turn, a meaningful percentage of overall industrial emissions.

The letter contended that there was sufficient lead time for the automotive industry to adapt existing technologies to meet the more stringent alternative's standards for model years 2023 through 2026, or to meet the standard set by the EPA's preferred alternative for 2023, and the more stringent standards in model years 2024 through 2026. The letter further argued that the more stringent alternative's requirements comported with the cost-benefit analysis that the EPA was required to conduct as part of the rulemaking process.

In addition to advocating for more stringent regulations, the Sept. 27 letter outlined the history of harmonizing state and federal GHG regulations. While individual states are currently, and have previously been, preempted by federal law from independently imposing emissions standards, California has historically received waivers from the EPA that have permitted the state to impose regulations on

GHG emissions — regulations that have frequently been adopted by other states, and adopted by automakers, given the size of the California market.

This preemption waiver has periodically been the subject of litigation, most recently following the EPA's 2019 issuance of the One National Program rule, which argued that the preemption waiver that permitted California to regulate GHG was inconsistent with federal law. While the Biden administration has taken steps to reinstate California's GHG waiver, the issue remains contentious.

In July, a coalition of 15 state attorneys general urged the EPA to adhere to the One National Program rule set forth by the Trump administration, and not to reinstate California's exemption.[3]

Predictions for the Future

At first glance, the Sept. 27 letter is perhaps unsurprising. That a collection of attorneys general from the same political party as the president would support his EPA's regulatory initiative — and, in fact, urge even bolder action on emissions — is, in many ways, predictable.

Indeed, given the public's heightened awareness of the increasingly serious risks associated with climate change, many automakers have embraced stricter emissions standards not only as good policy, but also as good business.

Nonetheless, the active engagement of the attorneys general and localities on the issue of emissions signals that they will be at the forefront of ensuring compliance with environmental regulations, and emissions standards in particular. This enforcement activity has taken and will continue to take many forms. For example:

- In April 2018, the National Highway Traffic Safety Administration issued notice of proposed rulemaking to reduce penalties on automakers who were not complying with certain fuel economy standards. Numerous state attorneys general opposed the proposed rule, and brought a successful suit to bar implementation of the final rule, obtaining an order from the U.S. Court of Appeals for the Second Circuit in August 2020 vacating NHTSA's rule.[4]
- Throughout the past five years, various state attorneys general have been active participants in investigations, resulting lawsuits and ultimate settlements relating to the Volkswagen emissions scandal — an inquiry which resulted in substantial monetary fines. While many of these lawsuits have been resolved, state attorneys general remain active. As recently as June, the Ohio attorney general won a decision in the Ohio Supreme Court in *State ex rel. Yost v. Volkswagen Aktiengesellschaft*, allowing its suit against Volkswagen to proceed.
- Activity in this area has not been confined to issues relating to Volkswagen. For instance, in January 2019, in *People of the State of New York and the New York State Department of Environmental Conservation v. FCA US LLC, Fiat Chrysler Automobiles NV, VM Motori SPA and VM North America Inc.*, a coalition of state attorneys general obtained a consent judgment in New York Supreme Court for more than \$70 million from a major auto manufacturer based on alleged violations of consumer protection laws and emission standards.

More generally, the broad jurisdictional reach of state attorneys general offers them a number of enforcement mechanisms if, and when, they choose to be active in this area. From consumer protection statutes and expansive civil fraud investigatory authority to environmental justice initiatives, the state

attorneys general have considerable resources and jurisdictional reach to either supplement federal enforcement activity, or to proceed of their own accord.

Given the increased sense of urgency in the public sphere about the need to take aggressive steps to combat climate change, it seems all but inevitable that automakers and the automotive industry more broadly will draw increasing levels of regulatory scrutiny, especially from state attorneys general and localities.

Conclusion

The Sept. 27 letter makes plain that state attorneys general continue to keep a close eye on federal regulators, and will use their own considerable authority and investigative powers to ensure regulatory compliance, and punish those who they believe are failing to comply.

As noted above, public comments by attorneys general are often the canary in the coal mine for coming regulatory actions. Automotive manufacturers should continue to monitor public-facing statements and actions by state attorneys general in the realm of fuel efficiency and emissions standards, to identify potential area of concerns in their own operations that will, in turn, allow them to address problems in advance of regulatory outreach.

Finally, automotive companies that become the subject of regulatory scrutiny or a potential enforcement action should work with counsel to define the scope of the inquiry and attempt to limit it. This will enable such companies and their counsel to be effective in both educating regulators and, where appropriate, implementing targeted remedial actions.

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[1] See <https://www.epa.gov/newsreleases/epa-overhaul-pollution-standards-passenger-vehicles-and-heavy-duty-trucks-paving-way>.

[2] See <https://oag.ca.gov/system/files/attachments/press-docs/EPA%20Comments%20for%20Multi-State-City%20Coalition.pdf>.

[3] See <https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/EPA-Comment-Letter-States.aspx>.

[4] See https://legacy-assets.eenews.net/open_files/assets/2020/08/31/document_gw_15.pdf.