

MJB&A Summary ■ May 3, 2021

## NHTSA's CAFE Preemption Proposed Rule

On April 22, 2021, the National Highway Traffic Safety Administration (NHTSA or the Agency) released the *CAFE Preemption Proposed Rule* (Proposed Rule),<sup>1</sup> which would repeal the Trump Administration's Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One (SAFE I). In this portion of the SAFE Vehicles Rule, NHTSA and the Environmental Protection Agency (EPA) argued that the Energy Policy and Conservation Act (EPCA) preempted state authority to establish tailpipe greenhouse gas (GHG) standards. In that rule, EPA also revoked a waiver that EPA had previously extended to California, under Section 209 of the Clean Air Act, to regulate motor vehicle emissions through GHG emission standards and a zero emission vehicle (ZEV) mandate.

In the Proposed Rule, NHTSA states that it has significant concerns that the regulations finalized in SAFE I likely exceeded the Agency's rulemaking authority. The Agency believes that withdrawing and repealing these regulations and statements is appropriate to reaffirm the proper scope of NHTSA's preemption authority and to remove the uncertainty created by SAFE I. If finalized, the Agency believes that this proposal would restore a "clean slate" for the Agency's position on EPCA preemption. The Proposed Rule does not directly state that California has explicit authority to set GHG motor vehicle standards, nor does it reissue the waiver necessary under the Clean Air Act for the state to enforce those standards.

---

## Background

*Relevant Statutory Authority: Energy Policy and Conservation Act and the Clean Air Act*

### EPCA

In 1975, Congress enacted the Energy Policy and Conservation Act (EPCA), which among other goals, sought to "conserve energy supplies through energy conservation programs, and where necessary, the regulation of certain energy uses." Congress included the "improved energy efficiency of motor vehicles" among the energy conservation and independence objectives specifically enumerated in the Act. To facilitate the enhanced energy efficiency of motor vehicles, EPCA charged the DOT to "prescribe, by rule, average fuel economy standards" for various classifications of motor vehicles.<sup>2</sup> This is the foundation for NHTSA's corporate average fuel economy (CAFE) standards.

Congress incorporated a provision into EPCA that expressly described the federal preemptive effect of resulting fuel economy standards and requirements, which states that "a State or a political subdivision of a State may not

---

<sup>1</sup> National Highway Traffic Safety Administration, *CAFE Preemption Proposed Rule* (April 22, 2021). Available at [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/cale\\_preemption\\_nprm\\_04222021\\_1.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/cale_preemption_nprm_04222021_1.pdf)

<sup>2</sup> Energy Policy and Conservation Act of 1975, Pub. L. 94-163, 89 Stat. 871

adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.”

### Clean Air Act

Section 209 of the Clean Air Act (CAA) prohibits any “state or any political division thereof” from implementing emission standards for new vehicles. However, it requires EPA to waive this restriction for “any state which has adopted standards...prior to March 30, 1966”—i.e., California. Section 209(b) explains that EPA “shall” waive this restriction if California determines that its standards will be, in aggregate, at least as protective of public health and welfare as the federal standards.<sup>3</sup> EPA must grant the waiver unless it establishes that any of three specific conditions are met.<sup>4</sup>

In July 2009, EPA granted a waiver of Clean Air Act preemption for California’s Advanced Clean Cars program, which included GHG emissions standards for motor vehicles beginning with the 2009 model year as well as a zero emissions vehicle (ZEV) mandate.<sup>5</sup> As of the publication of the Proposed Rule, fourteen additional states and the District of Columbia have adopted California’s more stringent standards.<sup>6</sup>

### *SAFE Rule, Part I*

On September 19, 2019, EPA and NHTSA jointly issued the final SAFE Vehicle Rule Part One: One National Program (SAFE I).<sup>7</sup> SAFE I included two actions: 1) finalization of new regulatory text under EPCA that states any regulation by a state or local government that regulates tailpipe carbon dioxide emissions from automobiles or automobile fuel economy is expressly and impliedly preempted, and 2) withdrawal of the waiver for California’s Advanced Clean Cars program. SAFE I included new regulatory language pursuant to EPCA that: (i) “a law or regulation of a State or political subdivision of a State having the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobile or automobile fuel economy is a law or regulation related to fuel economy standards and expressly preempted”; and (ii) any such law or regulation is “impliedly preempted.” NHTSA argues that under EPCA, only NHTSA can regulate fuel economy standards and there are no circumstances under which states can adopt or enforce “identical or equivalent” standards.

Following the promulgation of the SAFE I Rule, the actions of both NHTSA and EPA were challenged by a number of petitioners in both the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) and the United States District Court for the District of Columbia.

On his first day in office, President Biden signed Executive Order 13990, “Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis,” which, among other actions, directed DOT and NHTSA to immediately review and consider suspending, revising, or rescinding the SAFE I Rule by April 2021.

---

<sup>3</sup> Clean Air Act of 1967, Pub. L. 90–148, 81 Stat. 501

<sup>4</sup> For additional information, see MJB&A’s Issue Brief, “California’s Light-Duty Vehicle Emissions Standards: The Clean Air Act Waiver, Standards History, and Current Status” (April 2017), at [https://mjbradley.com/sites/default/files/MJB%26A\\_IssueBrief\\_CA%20Vehicle%20Emissions%20Waiver\\_2017-04-25.pdf](https://mjbradley.com/sites/default/files/MJB%26A_IssueBrief_CA%20Vehicle%20Emissions%20Waiver_2017-04-25.pdf)

<sup>5</sup> 74 Fed. Reg. 32761 (July 8, 2009) <https://www.gpo.gov/fdsys/pkg/FR-2009-07-08/pdf/E9-15943.pdf>

<sup>6</sup> These include Colorado, Connecticut, Delaware, Maine, Massachusetts, New Jersey, New York, Maryland, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.

<sup>7</sup> For additional information, see MJB&A’s “EPA and NHTSA Withdrawal of California Advanced Clean Cars Program Waiver Under Clean Air Act” summary at [https://www.mjbradley.com/sites/default/files/MJBA-Summary\\_Final-SAFE-Rule-Part-One\\_2019-09-22.pdf](https://www.mjbradley.com/sites/default/files/MJBA-Summary_Final-SAFE-Rule-Part-One_2019-09-22.pdf).

## Summary of the CAFE Preemption Proposed Rule

In the Proposed Rule, NHTSA proposes to take two primary actions: repealing the regulations in the SAFE I Rule and repealing the preemption interpretations contained in the preamble and other text of the SAFE I Rule. NHTSA does not take action directly regarding California’s Advanced Clean Cars program.

### *Proposed Repeal of Regulations*

After a comprehensive reconsideration of the SAFE I Rule, NHTSA now has “substantial doubts” about whether Congress provided the Agency with the authority necessary to engage in legislative rulemaking to define the scope of preemption under EPCA. NHTSA “tentatively believes” that the SAFE I Rule, which codified additional binding standards for express EPCA preemption, “represented an additional act of express preemption beyond the self-contained language of [EPCA].” NHTSA’s tentative conclusion is that “Congress does not appear to have granted NHTSA such authority, and that in light of this doubt, the Agency should not have issued such regulations in the first instance.” If Congress had intended to give NHTSA such direct regulatory authority over EPCA preemption, NHTSA states, “it would have done so explicitly.” Instead, EPCA does not appear to expressly provide the authority to DOT or NHTSA to promulgate legislative rules implementing or defining the scope of the statute’s preemption.

Consequently, NHTSA proposes to conclude that it “likely overstepped its authority in issuing binding legislative rules on preemption.” NHTSA is now of the view that the SAFE I Rule “rests upon an infirm foundation” and should be repealed. Therefore, NHTSA proposes to repeal each of these provisions in full.<sup>8</sup> This is to “ensure that its actions are unquestionably within the legally permissible boundaries of the Agency’s authority.” NHTSA also notes that repealing these rules would “restore the Agency’s previous practice, in which NHTSA did not codify interpretations of EPCA preemption in regulations.” NHTSA seeks comment on this tentative determination.

### *Proposed Repeal of Interpretative Text*

In addition to the proposed repeals of the codified provisions promulgated in the SAFE I Rule, NHTSA also proposes to rescind the accompanying substantive analysis in the Preambles of the Proposed and Final SAFE I Rules—including positions on California’s GHG and ZEV programs under the Advanced Clean Cars program. “To be abundantly clear,” NHTSA proposes to explicitly repeal any interpretative positions regarding EPCA preemption that may be contained within the Preambles of the SAFE I notice of proposed rulemaking and final rule regardless of whether they are linked to the codified text. This includes any views on whether particular state motor vehicle GHG emissions programs or ZEV mandates conflict with or “relate to” CAFE standards or are otherwise preempted by EPCA.

NHTSA states that the SAFE I Rule included a “lack of clarity” and “often blurred the line between when the Agency was attempting to merely articulate views on preemption under [EPCA], which were merely advisory, and when NHTSA sought to categorically forbid state action through federal preemption.” Furthermore, NHTSA writes in the Proposed Rule that it is concerned that the “categorical preemption views announced in the SAFE I Rule were insufficiently tailored to account for...federalism interests because they label an entire segment of state

---

<sup>8</sup> NHSTA also writes, however, that repealing the regulations and positions announced in the SAFE I Rule remains appropriate even if NHTSA possessed the authority for the rulemaking. It writes that, upon reconsideration, even if it could do so lawfully, NHTSA no longer deems it necessary to speak with the force and effect of law on matters of EPCA preemption.

and local regulation as preempted, irrespective of the precise contours of any particular programs, regulations, or technological developments that may arise.”

Repealing all aspects of the SAFE I Rule “will restore the Agency to a clean slate to appropriately exercise its interpretative discretion on matters of EPCA preemption.” NHTSA believes that a clean slate would more appropriately enable a particularized consideration of how the specifics of state programs may “relate to” fuel economy standards under EPCA. It also believes this will encourage “states and political subdivisions to more freely devise programs that can potentially coexist with [EPCA].”

#### *Treatment of California’s Advanced Clean Cars Program*

NHTSA notes that when an agency determines that its past action transcends the legally permissible scope, the agency is “obliged to realign its regulatory activities to its properly authorized scope posthaste.” In this case, a repeal is the fastest way to do so. Reassessing the scope of preemption under EPCA and announcing new interpretative views entails a more substantive inquiry that would necessitate “additional consideration and deliberation.” While NHTSA may decide to undertake such a deliberation in the future, the Agency’s “imminent concern is realigning its regulatory statements to their legally proper scope and removing the uncertainty caused by the SAFE I rule.” Accordingly, at this time, the Agency is not proposing to replace any such interpretations with further views on the relationship between state motor vehicle GHG emissions programs or ZEV mandates and EPCA preemption.

Additionally, this proposed rule is being issued only by NHTSA. As such, to the extent EPA subsequently undertakes an action to reconsider the revocation of California’s Section 209 waiver, such action would occur through a separate, independent proceeding.

#### **Next Steps**

Comments on the Proposed Rule will be due 30 days after it is published in the Federal Register.

NHTSA clarified that the Proposed Rule is being issued by the agency independently and any action EPA subsequently undertakes to reconsider the revocation of California’s Section 209 waiver would occur through a separate, independent proceeding. Additionally, NHTSA may “reassess[] the scope of preemption under EPCA and announc[e] new interpretative views” in the future.

## Contacts

For more information on this topic, please contact:

Paul Allen  
Senior Vice President  
[pallen@mjbradley.com](mailto:pallen@mjbradley.com)  
410-802-7777

Grace Van Horn  
Consultant  
[gvanhorn@mjbradley.com](mailto:gvanhorn@mjbradley.com)  
612-270-9276

Alissa Huntington  
Policy Analyst  
[ahuntington@mjbradley.com](mailto:ahuntington@mjbradley.com)  
415-254-1319

## About Us

MJB&A provides strategic consulting services to address energy and environmental issues for the private, public, and non-profit sectors. MJB&A creates value and addresses risks with a comprehensive approach to strategy and implementation, ensuring clients have timely access to information and the tools to use it to their advantage. Our approach fuses private sector strategy with public policy in air quality, energy, climate change, environmental markets, energy efficiency, renewable energy, transportation, and advanced technologies. Our international client base includes electric and natural gas utilities, major transportation fleet operators, investors, clean technology firms, environmental groups and government agencies. Our seasoned team brings a multi-sector perspective, informed expertise, and creative solutions to each client, capitalizing on extensive experience in energy markets, environmental policy, law, engineering, economics and business. For more information we encourage you to visit our website, [www.mjbradley.com](http://www.mjbradley.com).