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CARB Considers Amendments to Advanced Clean Cars II Rule Given Newly Proposed EPA Emissions Regulations

By Joel D. Eagle, Ashley C. Kirk and Kayla Juergens

Despite having only finalized its Advanced Clean Cars II standards rule (ACCII) in 2022, the California Air Resources Board (CARB) recently announced it is already considering a regulatory update. CARB's 2022 ACCII standards represent an ambitious suite of new motor vehicle emissions regulations. The standards were adopted pursuant to California's authority under Section 209 of the Clean Air Act, which enables California to enact its own motor vehicle emission standards. ACCII is aimed at achieving zero emissions in all new passenger cars, trucks and SUVs by 2035 by steadily mandating an increasing percentage of new zero emissions vehicle (ZEV) sales between the years of 2026-2035, with 100 percent new ZEV sales in 2035. ACCII is the most recent installment in CARB's motor vehicle emissions regulations and replaces its direct predecessor, the Advanced Clean Cars I regulations. CARB anticipates that ACCII will be instrumental in supporting California's larger goal of achieving net-zero emissions by 2045.

CARB's recent announcement of a potential ACCII update is in response to the United States EPA's own rule, proposed in May 2023 and currently in EPA's hands to finalize, "Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium Duty Vehicles." If adopted, the EPA rule, also known as the EPA Tier 4 program, would impose increasingly stringent greenhouse gas (GHG) and criteria air pollutant emissions standards on manufacturers of light- and medium-duty vehicles for 2027-2032 model years. While the EPA rule is not yet finalized, CARB indicated that it will evaluate the implications the proposed federal rule will have on California's separate but related emissions programs. As such, CARB is considering amendments to AACII to align it with the federal rule.

In connection with CARB's consideration of ACII amendments, CARB held a public workshop on November 15, 2023. CARB hosted the workshop to discuss CARB's potential updates to the ACCII regulations and to seek input from the public on topics including low-emission vehicle (LEV) GHG emission standards; coordination between the CARB and EPA rules for light- and medium-duty vehicle criteria air pollutants, as well as providing updates to CARB's ZEV program.

Following the CARB workshop, public comments will be accepted through January 15, 2024. CARB will consider all public comments as it continues to develop proposals for regulatory changes, which will be presented at future workshops and other public engagements. Public comments may be submitted to CARB here. Thompson Hine

will continue to monitor the CARB and EPA rulemaking developments and provide counseling to clients on the potential impacts of the rules on emissions certification and future compliance.

New EPA Rule Further Reduces the Use of HFCs in the Automotive Industry

By Joel D. Eagle and Aren K. Olson

In October 2023, the U.S. Environmental Protection Agency issued a final rule under the American Innovation and Manufacturing Act of 2020 (AIM Act), also called the "Technology Transitions" rule, which will impose significant restrictions on the use of hydrofluorocarbons (HFCs) in the automotive industry. This action represents the latest in a series of steps by EPA to phase down HFC use in the U.S. pursuant to the AIM Act.

Starting in 2025, the Technology Transitions rule will begin to impose significant limits on the manufacture and import of HFCs with a high global warming potential (GWP) in new refrigeration, air conditioning and heat pump (RACHP) products. The specific GWP limits applicable to RACHP products will vary by industry/sector, and so too will the compliance deadlines, which phase in between January 1, 2025, and January 1, 2028.

In addition to manufacture and import restrictions, the Technology Transitions rule establishes sale and export restrictions, which kick in three years after a product's manufacture or import restrictions take effect. The rule also includes labeling, recordkeeping and reporting requirements, which help ensure that all regulated products comply with the rules. For the avoidance of doubt, the Technology Transitions rule does not restrict the continued use of any existing RACHP products.

Of particular significance to the automotive industry, the Technology Transitions rule explicitly provides that motor vehicle air conditioners (MVACs) are the type of HFC products subject to the new limits and requirements. Accordingly, manufacturers of vehicles containing MVACs should understand the impact the Technology Transitions rule will have on vehicle manufacturing and EPA compliance and make plans to meet the rule's various requirements.

As shown below, light-duty passenger vehicles with MVACs manufactured or imported as early as Model Year 2025 will need to comply with a GWP limit of 150, and heavy-duty vans and trucks with MVACs will need to follow suit by Model Year 2028. Certain listed nonroad vehicles with MVACs (including agricultural tractors greater than 40 horsepower, self-propelled agricultural machinery, etc.) will need to comply with a GWP limit of 150 by January 1, 2028.

Products	**GWP Limit**	**Manufacture and Import Compliance Date***
Light-duty passenger vehicles	150	Model Year 2025, and no earlier than one year after publication in the *Federal Register*
Medium-duty passenger vehicles, heavy-duty pick-up trucks, complete heavy-duty vans	150	Model Year 2028
Listed nonroad vehicles (agricultural tractors greater than 40 horsepower; self-propelled agricultural machinery; compact equipment; construction, forestry, and mining equipment; and commercial utility vehicles)	150	January 1, 2028

**Sale, distribution, and export of these products is prohibited three years after the manufacture and import compliance date.*

The full text of EPA's Technology Transitions Rule is available here. Thompson Hine will continue to monitor the Technology Transitions rule and its impact on HFC regulation in the automotive industry.

NHTSA Proposes Rule to Require Passenger Cars and Trucks be Equipped with Rear Seatbelt Warning System

*By Will Godfrey**, Kerem Bilge and Richard M. Couch*

On September 7, 2023, the National Highway Traffic Safety Administration (NHTSA) issued a notice of proposed rulemaking to require a seatbelt warning system for the rear seats of passenger cars, trucks, most buses and multipurpose passenger vehicles that weigh less than 10,000 pounds (4,536 kilograms). The proposed rules enhance the existing requirements for front seat belt warnings and extend the duration of the warning. The comment period ended on November 6, 2023, and NHTSA has received more than 50 comments from different industry stakeholders.

NHTSA's stated safety need for this rule is the effectiveness of a seat belt in preventing injury and death in a crash. Although seat belt use is significantly higher now than it was a decade ago, NHTSA believes there is room for improvement. NHTSA points to the usage rates of a seat belt in rear seats versus seat belt usage in front seats. Usage rates of rear seat belts has been consistently below the usage rate of front seat belts. In 2021, front seat belt usage was around 90% and rear seat belt usage was around 78%. NHTSA estimates that the proposed requirements would prevent 300 non-fatal injuries and over 100 fatalities annually. Federal Motor Vehicle Safety Standard (FMVSS) 208 requires a short duration audio-visual seat belt warning for the driver's seat belt on passenger cars that weigh less than 10,000 pounds (4,536 kilograms). Many current model year vehicles go a step further by also having a seat belt warning for the front outboard passenger seat. However, only 47% of model year 2022 vehicles have a rear seat belt warning system. Given this information, and factoring in the anticipated fatal and non-fatal injury prevention and the historically low usage rates of rear seat belts compared to front seat belts, NHTSA is proposing vehicle manufacturers to install the following:

- For rear seats:
  - A visual warning on vehicle start that lasts 60 seconds to notify the driver of the status of the rear seat belts;
  - An audio-visual change of status warning lasting at least 30 seconds if a rear seat belt is unbuckled while the vehicle is in operation.
- For front seats:
  - An audio-visual seat belt use warning for the right front passenger's seat;
  - An audio-visual seat belt use warning for the driver and right front passenger seat that remains active until both the driver and right front passenger seat occupants are belted; and
  - An audio-visual change-of-status warning for both the driver and right front passenger seats that remains active until the unfastened seat belt is refastened.

According to NHTSA's research, an audio-visual seat belt warning system is effective in getting unbuckled occupants to fasten their seat belts. Requiring manufacturers to install an audio-visual seat belt warning system for rear passengers and enhancing the seat belt warning systems already required by FMVSS 208 will encourage higher seat belt use for passengers and lead to reduced fatal and non-fatal injuries in crashes.

Thompson Hine will monitor the progress of the proposed rule and provide future updates as the rule moves to promulgation.

U.S. Department of the Treasury and IRS Propose Guidance Regarding Entities Excluded from the Clean Vehicle Credits

By Francesca M.S. Guerrero, Pingshan Li and Kerem Bilge

On December 1, 2023, the U.S. Department of the Treasury (Treasury) and Internal Revenue Service (IRS) released proposed guidance regarding "excluded entities" – *i.e.*, "foreign entities of concern" under Section 30D of the Internal Revenue Code, the Clean Vehicle Tax Credit. The proposed guidance provides more clarity on the definition and scope of the term "foreign entity of concern" (FEOC), as used in the Inflation Reduction Act of 2022 (IRA). The due date to submit written comments and requests for a public hearing is January 18, 2024.

Section 30D of the Internal Revenue Code (the Code) provides a tax credit with respect to each new clean vehicle that a taxpayer purchases and places in service during the

respective taxable year. The IRA, enacted on August 16, 2022, significantly amended Section 30D of the Code. The amended Section 30D provides for a maximum credit of $7,500 per new clean vehicle, consisting of $3,750 if certain critical minerals requirements are met and $3,750 if certain battery components requirements are met. Under the amended Section 30D, however, the credit is not available for vehicles:

- Placed in service after December 31, 2024, with respect to which any of the applicable critical minerals contained in the battery of such vehicle were extracted, processed, or recycled by an FEOC; and
- Placed in service after December 31, 2023, with respect to which any of the components contained in the battery of such vehicle were manufactured or assembled by an FEOC.

The term FEOC, as defined in section 40207(a)(5) of the Infrastructure Investment and Jobs Act (IIJA), includes, *inter alia*, foreign entities "owned by, controlled by, or subject to the jurisdiction or direction of a government" of a covered nation – *i.e.*, People's Republic of China, the Russian Federation, the Democratic People's Republic of Korea, and the Islamic Republic of Iran.

For the interpretation of the term FEOC, the Treasury and IRS's proposed guidance refers to the proposed interpretive rule released by the Department of Energy (DOE) on the same day as the proposed guidance. First, the DOE's proposed interpretation defines the term "foreign entity" to include companies organized under the laws of or having its principal place of business in a foreign country, as well as "an entity organized under the laws of the United States that is owned by, controlled by, or subject to the direction … of" a foreign entity. Second, according to the proposed interpretation, an entity would be "owned by, controlled by, or subject to the direction of" another entity if 25 percent or more of the entity's board seats, voting rights, or equity interest are cumulatively held by such other entity. Further, the DOE guidance states that certain licensing agreements or other contractual agreements may create effective control. Finally, the proposed interpretation of the term FEOC is intended to encompass companies owned/controlled by the national or subnational governments, agencies or instrumentalities of the national/subnational governments, dominant political parties, or current or former senior foreign political figures of a covered nation. In short, according to DOE's proposed interpretation, some of the scenarios that can result in a determination that an entity is an FEOC include:

- An entity is incorporated or domiciled in, or has its principal place of business in, a covered nation;
- An entity engages in the extraction, processing, or recycling of critical minerals, the manufacturing or assembly of battery components, or the processing of battery materials in a covered nation;
- 25% or more of the entity's board seats, voting rights, or equity interest are cumulatively held, directly or indirectly, by the foreign government of a covered nation. The DOE guidance provides for the following examples of control:
    - If Entity A, the government of a covered nation, holds 25% of Entity B's board seats, voting rights or equity interests; and if Entity B cumulatively holds 50% of Entity C's board seats, voting rights, or equity interests, then Entities B and C are both FEOCs.
    - If Entity A, the government of a covered nation, holds 50% of Entity B's board seats, voting rights, or equity interest; and if Entity B holds 25% of Entity C's board seats, voting rights, or equity interest, then Entities B and C are both FEOCs.
    - If Entity A, the government of a covered nation, holds 25% of Entity B's board seats, voting rights, or equity interest; and if Entity B cumulatively holds 40% of Entity C's board seats, voting rights, or equity interest, Entity B is an FEOC. But Entity A holds only a 10% interest in Entity C, which is less than the 25% threshold requirement to deem Entity C controlled by Entity A. Therefore, Entity C is not an FEOC via the indirect control of Entity A.
- An entity that has entered into a licensing arrangement or other contract with another entity (a contractor) that provides effective control to the other entity over the extraction, processing, recycling, manufacturing, or assembly of the critical minerals, battery components, or battery materials that would be attributed to the entity. DOE also proposed that a non-FEOC entity that can demonstrate that it has

reserved certain rights to itself or another non-FEOC entity through contract would not be deemed an FEOC solely based on the contractual relationship. The rights identified by the DOE in the proposed guidance to demonstrate that the FEOC does not have effective control over the non-FEOC entity include:

- To determine the quantity of critical mineral, component, or material produced (subject to any overall maximum or minimum quantities agreed to by the parties prior to execution of the contract);
- To determine, within the overall contract term, the timing of production, including when and whether to cease production;
- To use the critical mineral, component, or material for its own purposes or, if the agreement contemplates sales, to sell the critical mineral, component, or material to entities of its choosing;
- To access all areas of the production site continuously and observe all stages of the production process; and
- At its election, to independently operate, maintain, and repair all equipment critical to production and to access and use any intellectual property, information, and data critical to production, notwithstanding any export control or other limit on the use of intellectual property imposed by a covered nation subsequent to execution.

In short, the proposed guidance reflects an expansive view of the term FEOC, potentially eliminating the eligibility of various electric vehicles with batteries that contain critical minerals that were extracted, processed, or recycled by an FEOC or that contain components manufactured or assembled by an FEOC. For assistance with comments regarding the proposed guidance, please contact the authors of this article.

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