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No Fast Start Predicted For Tougher Fuel Economy Proposal

By **Linda Chiem**

Law360 (August 2, 2023, 8:20 PM EDT) -- A proposed U.S. Department of Transportation mandate for higher fuel efficiency in cars and trucks marks the Biden administration's latest effort to accelerate an electric-vehicle revolution, but experts say legal opposition, competing environmental regulations and carmaker compliance are among the speed bumps that lie ahead.

On July 28, the DOT's National Highway Traffic Safety Administration proposed new fuel economy standards for passenger cars and light trucks that envision boosting average efficiency to 58 miles per gallon by 2032. NHTSA's latest so-called corporate average fuel economy, or CAFE, standards come after the U.S. Environmental Protection Agency in April floated stricter rules curbing tailpipe emissions from cars and trucks.

The fuel economy proposal will kick off a monthslong public comment frenzy that will draw attention to the stringency of the NHTSA's standards, to what extent they align with the EPA's separate regulations and how the automotive industry will realistically comply with the standards when they're finalized, experts say.

At the same time, a spate of pending legal challenges to other emissions-curbing rules covering the transportation sector from federal and California regulators all but assures there's a legal challenge waiting in the wings for what the NHTSA ultimately finalizes as its fuel economy standards for vehicles in model years 2027 to 2032, experts say.

Neither the NHTSA nor the EPA proposal outright commands automakers to build or sell a certain type of car, but the Biden administration has mined its statutory and regulatory resources to phase out fossil fuel-dependent vehicles and accelerate the adoption of low- or zero-emission vehicles.

The groundwork was laid with billions in funding for electric-vehicle charging infrastructure and battery manufacturing in 2021's Infrastructure Investment and Jobs Act, better known as the Bipartisan Infrastructure Law, and the enhanced tax incentives in 2022's Inflation Reduction Act. Both laws seek to ensure a homegrown EV industry backed by U.S. jobs and manufacturing.

But it remains to be seen how the U.S. auto safety regulator will win favor with carmakers whose compliance with the proposed fuel economy standards remains a wild card, given the multipronged regulatory offensive directed at the industry.

"There's nothing surprising or earth-shattering here … given the current situation and the Biden

administration trying to use its authority to move the transportation sector along to meet its climate goals," Kevin B. Jones, director of Vermont Law School's Institute for Energy and the Environment, told Law360. "None of these standards have really been about making the internal combustion engine more efficient. There's been trillions of dollars invested in a technology [the combustion engine] that's just incredibly inefficient and has physical limits to it."

The industry historically has met higher fuel efficiency standards by introducing smaller cars to account for vehicle weight, and then pivoting to introducing hybrid or battery electric technology, according to Jones.

"The fact that there are people saying this is de facto requiring the transition to electric vehicles, well, what does the industry really expect, because we're not going to change the physics around the internal combustion engine and make gas cars somehow magically significantly more efficient," Jones said. "What is really the option when we're talking about both cleaning up tailpipe emissions and making the transportation sector more efficient? It has to be a rapid transition away from the internal combustion engine."

The NHTSA says its CAFE standards would "work in harmony" with the EPA's air pollution regulations. The EPA in April unveiled two new vehicle emissions standards: one covering passenger cars and light-duty trucks, and the other covering medium- and heavy-duty vehicles such as delivery, garbage or public utility trucks and transit, shuttle or school buses.

They would require manufacturers to slash the total amount of greenhouse gas emissions from all new vehicles rolling off the assembly line and sold in the U.S. starting with the 2027 model year for cars and the 2028 model year for heavy-duty trucks.

By propelling makers of cars and trucks to overhaul their inventory to include more fully electric- or hydrogen fuel-cell powered vehicles that produce no tailpipe emissions, the EPA anticipates that electric vehicles could account for 67% of new light-duty vehicle sales and 46% of new medium-duty vehicle sales in 2032.

"We've got two statutory ships sailing in the same direction," Crowell & Moring LLP partner Bob Meyers, a former principal deputy assistant administrator with the EPA's Office of Air and Radiation, told Law360.

But automakers will likely flag concerns about parallel penalty systems for getting their fleets in compliance because the "whole panoply of the EPA's enforcement is broad and aggressive, and then on the NHTSA side, the penalties were increased," according to Meyers.

There is also California, which has the unique authority to set stricter greenhouse gas emissions standards and run its own zero-emission vehicles program under a Clean Air Act waiver. That waiver was revoked by the Trump administration in 2019 and reinstated by the Biden administration in March 2022, freeing the Golden State to forge ahead with its transportation electrification initiatives.

The California Air Resources Board, or CARB, has its Advanced Clean Trucks regulation, a first-of-its-kind sales mandate for makers of medium- and heavy-duty trucks such as semi-trailers, big rigs, cement mixers, garbage trucks, delivery vans and airport shuttles — alongside a recently approved Advanced Clean Fleets regulation requiring owners and operators of large commercial truck and bus fleets to start transitioning to electric next year and be completely zero-emission by 2036.

There is also CARB's so-called heavy-duty engine and vehicle omnibus regulation that lays out tougher emissions-testing standards to drastically cut smog-forming nitrogen oxide, NOx, from conventional heavy-duty engines starting with the 2024 model year. And in August 2022, CARB approved its Advanced Clean Cars II program, which calls for all new passenger cars, trucks and SUVs sold in the Golden State to be zero-emission by 2035.

It's safe to say, automakers are navigating a complex regulatory landscape.

"The [NHTSA] proposal should be seen adjunct to the EPA actions and the California actions as one bundle because they're regulating the same products, the same industry and raising the same general strong push to be consistent," Arnold & Porter partner Jonathan S. Martel told Law360. "All of those issues should be considered with a broader lens regarding how they impact the industry and advance the regulatory objectives."

Martel said that industry stakeholders will be focused on the stringency of the NHTSA's proposed standards and how they align with the EPA's proposed standards, as well as whether the NHTSA's eventual final rule will address the transfer of credits between categories of cars and trucks.

The NHTSA allows companies to earn credits when they "over comply" or achieve higher fuel efficiency levels for their vehicles in a model year. They can use those credits to offset the amount by which a different fleet falls short of its requirement for that model year.

With certain limitations, the credits can be transferred between a company's passenger car and light truck fleets, or traded to other manufacturers. But it's unclear whether NHTSA will tweak various factors that go into calculating how those credits can be transferred.

"It appears that the proposal creates flexibility with options to maintain alignment [with EPA], but NHTSA's decisions on stringency are significant because of the impacts to manufacturers and potential size of the regulatory fines if the standards are not achieved," Martel said.

Looming large are a trio of closely watched D.C. Circuit legal battles. The NHTSA in late March 2022 finalized the fuel economy standards for model year 2024, 2025 and 2026 passenger cars and light trucks, swiftly prompting challenges by groups and states alleging they either go too far or not far enough.

"[NHTSA officials] sort of take some pains [to say], 'We're not basing this rule on EV penetration. We can't do that statutorily,'" Meyers said of the proposed 2027-2032 CAFE standards. "But then you look at this and wonder if this is a fallback rule in case litigation goes south in the D.C. Circuit."

In another case, Texas and a group of other Republican-leaning states and several industry organizations led by the Competitive Enterprise Institute accused the EPA of overstepping its authority by strengthening the greenhouse gas emissions standards for 2023 light-duty vehicles and later model years. In the other case, various states and industry groups are challenging the EPA's 2022 decision to restore California's Clean Air Act waiver authority.

Against that backdrop, the NHTSA should expect an avalanche of feedback from interested stakeholders on the business side as well as from environmental groups.

"This proposal comes at a critical time for the auto industry and the climate — a moment when the U.S. can take big strides toward the clean, efficient transportation of the future," Dave Cooke, senior vehicles analyst for the Clean Transportation Program for the Union of Concerned Scientists, said in a statement. "Given the pace of technological change and urgent need to conserve energy, it's clear that these standards could be even more ambitious than NHTSA's proposal."

"Taken together, the EPA's emissions standards and NHTSA's fuel economy standards are the most effective policy in force to cut oil use and reduce global warming pollution," Cooke said. "The EPA's new proposed emissions rules would be the strongest such standards to date. NHTSA must meet the moment with final rules that deliver the most efficient vehicles possible to the market."

--Additional reporting by Keith Goldberg and Juan Carlos Rodriguez. Editing by Jill Coffey and Philip Shea.
