

## 4 Things To Watch As New Truck Emissions Regs Get In Gear

By **Juan Carlos Rodriguez**

*Law360, New York (August 17, 2016, 8:32 PM ET)* -- The Obama administration's newly finalized regulations aiming to curb greenhouse gas emissions from the nation's trucking fleet will push owners, operators and manufacturers toward new efficiency goals through a mix of heightened standards and incentive provisions.

The U.S. Environmental Protection Agency and National Highway Traffic Safety Administration said once the second phase of the greenhouse gas regulations for medium- and heavy-duty vehicles are fully implemented in 2027, the program will achieve up to 25 percent lower carbon dioxide emissions and fuel consumption compared to the phase 1 standards.

Andrew Linhardt, a transportation expert at the Sierra Club, said the truck GHG rules are necessary to help mitigate the effects of climate change.

"While trucks are a small percentage of the fleet, they make up a disproportionate amount of the carbon pollution. In order for us to try and get ahead of the climate change issues and extreme weather that we're seeing more and more of, we have to tackle these things now," Linhardt said.

Here are four things to watch as the latest truck GHG rule is rolled out.

### Legal Questions

Megan Berge, a partner at Baker Botts LLP, said the EPA has interpreted the Clean Air Act more broadly than in the past in order to achieve deeper reductions in greenhouse gas emissions.

She said greenhouse gases are fundamentally different from traditional "criteria" pollutants that are regulated under the act, which has spurred the EPA to look beyond what people usually think of as traditional emissions sources, whether that's been in the power plant, oil and gas, or aircraft sectors.

In the truck GHG rule, for instance, she noted that the EPA will regulate trailers as well as the tractors that pull them.

"Any time EPA takes that kind of broad view of what their authority encompasses, they open themselves up to greater challenges," Berge said.

Shannon Broome, a partner at Hunton & Williams LLP, pointed out that another potential vulnerability

in the rule is that the EPA will start regulating “glider kits,” which are trucks that are delivered without an engine, which is then installed.

“They say glider vehicles aren’t really a new class or category of vehicle, but just a method of manufacturing, and so they didn’t need to go through all the findings that one would have to undergo if EPA were to regulate a new class or category of vehicle,” Broome said. “That’s a threshold issue that needs to be thought about if there is any challenge to this rule.”

And Bob Meyers, senior counsel at Crowell & Moring LLP, said NHTSA’s authority to regulate under the rule could be challenged.

He said while the EPA has regulated trucks for a long time, NHTSA’s authority comes more recently and from a different statute. NHTSA got that authority in the Energy Independence and Security Act of 2007, and the agency applied that authority in phase 1.

“Some comments have been filed that Congress only really intended NHTSA do one rulemaking, and that would have been the phase 1 rulemaking; or that other aspects of the way that statute was written really deprive NHTSA of the ability to go forward in this rulemaking,” Meyers said.

### **All Eyes on California**

NHTSA, the EPA and the trucking industry will be watching closely to see how California decides to handle the new rule, Berge said. She said because California has special permission to create different standards for vehicles than the federal ones — it’s the only state with the power to do so — a lot depends on whether the state’s powerful Air Resources Board is satisfied with the EPA and NHTSA rule.

“EPA took pretty much every step they could take to try to bring CARB in and ensure that they’re appealing to CARB. Because one of the biggest risks to the manufacturers is potentially having two different regimes to comply with, which would result in not being able to manufacture a single vehicle for the entire country,” Berge said.

She said if the two standards aren’t harmonized, it would mean a drastic increase in costs across the board for fleet owners, suppliers and manufacturers.

### **Incentives and Flexibility**

One way to entice California’s buy-in is to offer compliance incentives to industry players, Meyers said. He said the EPA and NHTSA incorporated a system of credits into the rule. In one program, if a company can’t build a compliant vehicle in one year, it can use a credit earned from an overperforming vehicle in another year to comply for that year.

“It provides flexibility in not making each vehicle in every year comply with the ... standard,” he said.

The trading system also exists in the EPA’s rule for light-duty vehicles, but in this case, because there’s a broader range of medium- to heavy-duty vehicles, credit trading is limited to within classes, so a tractor-trailer can’t trade with a smaller truck.

A separate credit will be awarded for the use of advanced technology, and won’t be earned through compliance. Meyers said the agencies considered eliminating this credit because it wasn’t that

successful in phase 1, but decided to stick with it.

“Now they have credits for plug-in hybrid, electric and fuel-cell vehicles that will give you from 3.5 credits to 5.5 credits per vehicle. And that is far beyond what is offered in other programs. Usually you get 1.5 or 2 credits,” he said.

Broome said that idea in particular will appeal to CARB.

“These were the same values that were recommended by CARB in a supplemental filing that they did,” she said.

## **Modeling**

Another important aspect is how implementation of the new rule relies on the use of the Greenhouse Emissions Model, how different technology inputs were created and how they affect the marketplace, Meyers said.

He said the model existed in the first phase, but only factored in aerodynamic coefficients, types of tires and a couple of accessories.

“In phase 2, they’ve built out this model and they went into different components of the vehicle outside of aerodynamics and tires. They went into transmissions and axles and got more into trying to model when you build a truck, what is the next impact on greenhouse gas emissions, CO2 emissions?” he said. “The model is much more complicated and goes into major vehicle components that EPA and NHTSA believe have an impact on the overall fuel efficiency of the vehicle.”

Meyers said that’s important because how a component is rated in the model determines how easily a vehicle does or doesn’t comply with the standards, but it also affects the marketplace because people who make different types of components will be looking to see how they are rated in the model versus other types of components.

Berge said there’s another open question about the modeling.

“The modeling that EPA has used is optimistic, and the jury’s out on whether they can achieve the types of reductions that they think they can through fuel efficiencies,” she said.

--Editing by Mark Lebetkin and Philip Shea.