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On the Road to New Fuel Efficiency Standards

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On December 19, 2007, the traffic on the regulatory highway of greenhouse gas emissions for new vehicles was congested on the state, federal, and international level. Stephen Johnson, the U.S. EPA Administrator, announced his agency would not grant a waiver to California's regulation to limit the amount of greenhouse gas emissions from new automobiles. At the same time, President Bush signed a new energy bill, the Energy Independence and Security Act of 2007, that requires a fleet average of thirty-five miles per gallon by 2020 and an annual production of thirty-six billion gallons of renewable fuels by 2022. And the European Commission adopted a proposal for legislation to dramatically reduce the average carbon dioxide ("CO₂") emissions of new passenger cars by 2012.

President Bush's and the U.S. EPA's actions over the last seven months reflected a preference for a national instead of a state-by-state approach to regulating greenhouse gas emissions from vehicles. In May, President Bush required federal agencies to consider regulations to control such emissions from motor vehicles. Over the summer, the U.S. EPA held hearings on California's petition for a waiver that the state originally requested in 2005. Even with most comments supporting the grant of a waiver, the U.S. EPA seemed reluctant to do so. Instead, the U.S. EPA announced this fall that it would begin a "Rulemaking To Address Greenhouse Gas Emissions From Motor Vehicles." According to the U.S. EPA, a notice of proposed rulemaking would be published by the end of 2007 and the agency would announce its final action in October 2008. Then, on December 19, 2007, hours after President Bush signed the energy bill, Johnson held a press conference to announce the U.S. EPA would not grant California a waiver. In making the announcement, Johnson specifically cited Bush's recent signing of the bill and said, "The Bush administration is moving forward with a clear national solution, not a confusing patchwork of state rules. I believe this is a better approach than if individual states were to act alone." The denial affects not only California, but over a dozen other states that had either adopted similar legislation or whose governors had indicated they would soon do the same.

The denial of the waiver arguably moots litigation in three jurisdictions. Federal district courts in Vermont and the Eastern District of California had both held that so long as the U.S. EPA granted a waiver, federal law did not preempt California's ability to affect fuel economy through the regulation of greenhouse gas emissions from automobiles. With the waiver denied, there is no issue for the respective appellate courts to now decide. Moreover, California had petitioned the D.C. Circuit to force the U.S. EPA to either grant or deny its waiver. The U.S. EPA has now done so. However, the battle over the waiver will return to the D.C. Circuit as both Governor Arnold Schwarzenegger and his Attorney General have stated they will challenge the U.S. EPA's decision in court. The state will likely file suit as soon as the denial is published in the Federal Register in the next few weeks. California will need to demonstrate why its regulation was necessary to "meet compelling and extraordinary conditions," even though, as the U.S. EPA asserted, climate change due to greenhouse gases is global in nature. The state may argue, as it did before the U.S. EPA, that warmer temperatures have the effect of increasing local smog and ozone, which in turn demonstrate a local ambient air quality problem under the Clean Air Act. Regardless of the outcome, California's regulation will not be able to apply to 2009 model cars as the state had required.

While the issue of the waiver makes its way through the courts, the U.S. EPA's rulemaking will go forward. To meet its goal of final action by October 2008, the U.S. EPA will have to move forward

quickly, with the public comment period coming by summer 2008 at the latest. The regulations may require more than thirty-five miles per gallon by 2020, but it is unlikely they will be as stringent as those proposed by the European Commission on December 19, 2007. If adopted by the European Parliament, the regulations would require, by 2012, a fleet average of 130 grams of CO₂ emissions per kilometer, with another 10 grams per kilometer reduction from alternative sources such as biofuels and more efficient air-conditioning. Considering Europe's cars currently emit on average 160 grams of CO₂ per kilometer, this represents an almost twenty percent reduction of CO₂ emissions. For the auto industry this could mean grossly different standards in what has long been a global market.

Developments in the government regulation of greenhouse gas emissions will continue to come faster than Henry Ford put Model T's on the road. Morrison & Foerster is committed to staying aware of these and other developments in the area of climate change. Please contact the firm for the latest news on the U.S. EPA's regulations and all related matters.