



## Department of Transportation and Environmental Protection Agency release proposals to reconsider and potentially repeal Trump SAFE Rule Part One

28 April 2021

In two recent agency actions, the Biden administration has taken steps to initiate reconsideration of the former administration's greenhouse gas and fuel economy rules for light duty vehicles that could facilitate enforcement of more stringent, separate requirements in the state of California and other states that chose to adopt California's standards.

On 22 April 2021, the U.S. Department of Transportation (DOT) National Highway Traffic Safety Administration (NHTSA) released a [notice of proposed rule-making](#) that would repeal regulatory changes and related interpretive statements promulgated as part of the Trump administration's September 2019 Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One (SAFE 1 Rule). Specifically, the proposed rule would repeal the sections of 49 Code of Federal Regulations Parts 531 and 533 put in place under SAFE 1 Rule that sought to codify in DOT regulations the preemption provisions laid out in the Energy Policy and Conservation Act (EPCA). This latest agency action may pave the way for California and other states to reinstate their own greenhouse gas (GHG) emissions limits and zero emission vehicle (ZEV) programs.

In a 20 January 2021 [executive order](#), President Biden directed the relevant agencies, including DOT and NHTSA, to review and assess the SAFE 1 Rule and publish any proposed reconsiderations by April 2021. According to NHTSA's proposed rule, its review led to "substantial doubts about whether the SAFE 1 Rule was a proper exercise of the Agency's statutory authority with respect to [corporate average fuel economy (CAFE)] preemption, particularly as to whether NHTSA had authority to define the scope of EPCA preemption through legislative rules, carrying the force and effect of law." In fact, NHTSA notes in the proposed rule that, even if it could definitively speak on matters of EPCA preemption, the agency would nonetheless find it unnecessary and unwise to do so, preferring a more case-by-case approach. In addition, NHTSA's review raised agency concerns that the SAFE 1 Rule did not exhibit proper respect for federalism by preempting an entire category of state and local rules without regard to the specifics of each program. Finally, NHTSA stated that its review raised doubts regarding the legal analysis and substantive conclusions reached in the SAFE 1 Rule pertaining to EPCA's preemption provisions.

NHTSA's proposed rule would repeal the changes to the regulatory text enacted as part of the SAFE 1 Rule, and would further repeal all interpretive statements from the SAFE 1 proposed and final rules as well, seeking to take a "clean slate" approach to exercising interpretive discretion on EPCA preemption. Notably, NHTSA's proposed rule does not go so far as to announce the agency's view that state GHG limits and ZEV mandates are specifically *not* preempted by EPCA; rather, the agency notes that it may undertake such a deliberation in the future after a separate analysis.

Public comments must be submitted on NHTSA's proposed rule within 30 days after the rule's publication in the federal register.

Separately, on 26 April 2021, EPA released a [notice of opportunity for public hearing and public comment](#) on its decision to reconsider the SAFE 1 Rule's withdrawal of a Clean Air Act preemption waiver issued to California in 2013. The waiver at issue allowed California to enforce its own GHG emissions limits and ZEV mandate through model year 2025, which in turn allowed other states to adopt California's GHG and ZEV rules pursuant to Section 177 of the Clean Air Act (i.e., Section 177 States). EPA's notice grants three separate requests for reconsideration of the SAFE 1 Rule filed by California, several cities and states, and a number of NGOs. In its notice, EPA stated that the agency "believes that there are significant issues regarding whether SAFE 1 was a valid and appropriate exercise of agency authority," including with regard to the amount of time that had passed following the 2013 waiver grant, the legal interpretations supporting the SAFE 1 Rule, and whether EPA had properly considered the environmental consequences of the withdrawal. Moreover, EPA noted that the petitions for reconsideration raised important questions regarding whether the withdrawal was a valid agency action and whether the agency had properly interpreted and applied the Clean Air Act's preemption provision. Specifically, EPA's notice requests public comment on a variety of questions related to its decision to reconsider the SAFE 1 Rule, including whether the SAFE 1 Rule was a valid and appropriate exercise of EPA's authority and whether the rule's interpretation limiting the authority of Section 177 States to follow California's GHG and ZEV rules was proper.

Importantly, EPA's notice does not officially restore California's 2013 waiver. The waiver will become effective again following EPA's reconsideration, if and when EPA ultimately determines that the SAFE 1 Rule waiver revocation should be rescinded. If the revocation is rescinded and the waiver is reinstated, California, as well as the Section 177 States, could enforce California's existing GHG requirements, which are based on Obama-level standards (requiring roughly 5% year over year increasing stringency) and significantly exceed federal standards implemented by the Trump administration (under SAFE Rule Part Two) for model years 2021-2026 (requiring roughly 1.5% year over year increasing stringency). As a result, automotive manufacturers could face increased compliance pressure in California and the 13 states plus Washington, D.C. that have adopted California's GHG requirements once the waiver decisions are finalized.

EPA will hold a virtual [public hearing](#) on its notice on 2 June 2021 and requests written comments by 6 July 2021.

The Biden administration is expected to propose additional rule-making to potentially reconsider and/or replace the Trump administration's SAFE 2 Rule by July 2021. The new proposed standards are expected to include more stringent GHG emissions requirements than the Trump era rules that could be applicable as early model year 2023.

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