



LANDMARK LEGAL FOUNDATION

THE RONALD REAGAN LEGAL CENTER

**Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks
for Model Years 2027-2032 and Fuel Efficiency Standards for Heavy-Duty Pickup
Trucks and Vans for Model Years 2030-2035**

Agency: National Highway Traffic Safety Administration

Comment Period Opens: August 17, 2023

Comment Period Closes: October 16, 2023

Comment Submitted: October 12, 2023

Landmark Legal Foundation (“Landmark”) respectfully submits these comments on National Highway Traffic Safety Administration’s (“NHTSA” or “Agency”) proposed rule, **Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks for Model Years 2027-2032 and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030-2035** (“Proposed Rule”). For the reasons set forth in this comment, NHTSA should immediately rescind the Proposed Rule.

Landmark has identified the following issues with the Proposed Rule:

1. The Proposed Rule uses a metric for analysis which was promulgated by an entity with no constitutional authority.

2. The Proposed Rule would have enormous detrimental economic impacts for consumers.
3. The Proposed Rule is an attempt by the bureaucracy to pick winners and losers in the economy.

Introduction:

NHTSA has been tasked with setting Corporate Average Fuel Economy (“CAFE”) standards for vehicles produced in five-year windows. In the most recent proposed iteration of CAFE standards, NHTSA notes the purpose of doing so, stating that “[i]mproving energy conservation by raising CAFE and HDPUV standard stringency not only helps consumers save money on fuel, but also improves national energy security and reduces harmful emissions.” 88 Fed. Reg. 56123 (Aug. 17, 2023).

NHTSA derives its statutory authority to set CAFE standards from 49 U.S.C. 32902, which, at subsection (a), states “[a]t least 18 months before the beginning of each model year, the Secretary of Transportation shall prescribe by regulation average fuel economy standards for automobiles manufactured by a manufacturer in that model year. Each standard shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year.”

U.S. Code also sets four considerations which the Secretary of Transportation must consider when setting “maximum feasible average fuel economy levels.” *Id.* Subsection (f) states “[w]hen deciding maximum feasible average fuel economy under this section, the Secretary of Transportation shall consider technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.” 49 U.S.C 32902(f).

With this in mind, Landmark takes issue with the Proposed Rule. First, NHTSA's CAFE standards utilize a metric for analysis, Social Cost of Greenhouse Gases ("SC-GHGs"), which was created by the Interagency Working Group ("IWG"), an entity with no statutory or constitutional authority. Second, the standards are neither economically practicable nor achievable for manufacturers in each model year and the Proposed Rule would impose billions of dollars in costs on auto manufacturers and on the public. Third, NHTSA appears to be attempting to force consumers and manufacturers alike to pick winners and losers by forcing those parties towards electric vehicles ("EV") For these reasons, the Proposed Rule should be revoked.

1. **The Proposed Rule utilizes a metric for analysis set forth by an entity with no constitutional authority, which violates federal rule making processes.**

NHTSA's projection of overall economic benefits from the Proposed Rule relies heavily on SC-GHG valuations which have been created by the IWG. The IWG, however, was created unconstitutionally by executive order. Presidents derive their power to create Executive Orders "either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). No such authority existed for President Biden to create an entity such as the IWG.

In addition to its unconstitutional creation, the IWG flouts the Administrative Procedures Act (APA). The IWG is given agency-like power and takes agency-like action, yet it does not follow the process laid out by the APA for promulgating binding rules. The IWG's creation of SC-GHG valuations, for example, are binding for other agencies when considering environmental policies. The Executive Order creating the IWG stated that the SC-GHG values are what "agencies shall use when monetizing the value of changes in

greenhouse gas emissions...” 86 Fed. Reg. 7040 (Jan. 25, 2021). However, SC-GHG values never underwent the normal and legally required comment and notice period.

The NHTSA’s Proposed Rule utilizes SC-GHG valuations unlawfully created, which thus makes the Proposed Rule unlawful.

2. The Proposed Rule will have detrimental economic consequences for consumers.

The Proposed Rule imposes heavy economic burdens upon consumers. The CAFE standards require increasing the fuel efficiency of passenger cars by 2% each year, of light trucks by 4% each year, and heavy duty pick-up trucks and vans by 10% each year. 88 Fed. Reg. 56128 (Aug. 17, 2023). NHTSA provides a variety of estimates of net costs and benefits for increasingly stringent fuel efficiency options for such vehicles. At NHTSA’s proposed levels of increase and a 3% discount rate of the SC-GHGs. NHTSA claims CAFE standards would lead to \$21.9 billion in net benefits for light trucks, \$2.25 billion in net benefits for HDPUVs, and most interestingly, and \$5.1 billion in *net costs* for passenger cars. 88 Fed. Reg. 56341, 56353 (See: Tables V-8, V-9, V-20) (Aug. 17, 2023). NHTSA admits that “the cost increases associated with applying technology (or paying civil penalties) in response to more stringent standards would be passed on to consumers as higher retail prices.” 88 Fed. Reg. 56340 (Aug. 17, 2023). The Proposed Rule would punish consumers of passenger cars.

Estimates for the benefits of the CAFE standards are also undoubtedly inflated. For starters, NHTSA does not consider opportunity costs in their cost-benefit analysis. Improving the fuel efficiency of vehicles requires removing other features to reduce weight, such as trunk space and towing capacity. Michael Buschbacher and James Conde, *Shocking*

Candor on Fuel Standards, The Wall Street Journal, August 23, 2023, <https://www.wsj.com/articles/transportation-department-fuel-standards-car-ev-electric-vehicle-auto-industry-climate-change-388d6dd0>, (Accessed October 11, 2023). Incorporating these tradeoffs is necessary to produce accurate cost-benefit analyses and would reduce net benefits for all three categories further.

Furthermore, the use of SC-GHG valuations calls into question the validity of the cost-benefit analyses from a purely economic standpoint. As Landmark noted in a previous regulatory comment, SC-GHG valuations may be used to manipulate regulatory cost-benefit analyses to support otherwise unjustifiable proposed rules. SC-GHG benefits from the Proposed Rule were estimated by NHTSA to be \$1.3 billion for passenger cars and \$12.7 billion for light trucks. 88 Fed. Reg. 56341 (See: Tables V-8, V-9) (Aug. 17, 2023). If SC-GHG numbers are inflated to support greater environmental rule making, the true net benefits of these policies would be substantially lower.

3. The Proposed Rule is an attempt to pick winners and losers in the economy through bureaucratic methods.

The Proposed Rule includes hefty fines for failing to comply with increasing fuel efficiency standards. The Alliance for Automotive Innovation (AAI) have noted that the Proposed Rule “exceeds maximum feasibility.” AAI, which includes General Motors, Toyota, Volkswagen, and others has further stated that “manufacturers will pay over \$14 billion dollars in noncompliance penalties between 2027 and 2032.” David Shepardson, *Automakers say they face \$14 billion in fines from Biden's 'unfeasible' fuel rules*, Reuters, September 29, 2023, available at <https://www.reuters.com/business/autos-transportation/automakers-warn-biden-vehicle-rules-not-feasible-could-cost-14-blm-fines->

2023-09-29/ (Accessed October 11, 2023). In a separate statement, GM, Ford, and Stellantis noted they would face at least \$10 billion dollars in penalties over the same period.

The unattainability of the proposed CAFE standards, and the subsequent fines, are a clear attempt by the government to pick winners and losers. NHTSA has previously stated that automakers “are free to use electric vehicles to comply and avoid penalties altogether.” *Id.* It is difficult to view this Proposed Rule outside of the context of other agencies such as the EPA pushing regulation requiring two thirds of all cars produced by 2032 to be electric. The government is seeking to force companies toward greater production of EVs by heavily penalizing them for failing to comply with completely unreasonable standards.

The economic impact of this regulation, as well as the use of metrics which violate the APA, necessitate the revocation of the Proposed Rule. Finalization and implementation of the Proposed Rule will have enormous economic implications. Further it is also unlawful to promulgate at all, having used IWG metrics which themselves were unlawfully created. NHTSA violates its statutory authority by doing anything less than this.

Conclusion

For these reasons, the National Highway Traffic Safety Administration should rescind the Proposed Rule immediately.

Respectfully submitted,

LANDMARK LEGAL FOUNDATION

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