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Regulatory Outlook for the Electric Vehicle Industry in the Next U.S. Administration

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Summary

The upcoming election in the United States will result in dramatic changes to U.S. regulatory policy if a Democrat is elected President. Even if President Trump is reelected, ongoing litigation by the State of California and other states and environmental organizations against regulations proposed and promulgated by the Trump Administration may result in significant changes. This paper will explore the possible U.S. regulatory changes at both the national and state levels that will affect electric vehicles in 2021 and in the coming years, depending upon the outcome of the election and ongoing litigation.

Keywords: government; policy; regulation; federal; state government

1 How Will the Presidential Election Affect EVs?

On November 3, 2020, the United States will hold its next Presidential Election, and our next President will be inaugurated on January 20, 2021. The Republican Party will nominate Donald Trump for reelection, but the Democratic nominee has yet to be decided. At the present time, both Senator Bernie Sanders and former Vice President Joe Biden are still running for the Democratic nomination, but Biden seems certain to be the Democratic candidate. [1] Although at least three Democratic primaries will have not yet occurred when EVS33 is held in June [2], and it is theoretically possible the Democratic Party could be heading to a “brokered” convention in August [3], it is probable that Biden will have the Democratic nomination clinched before EVS33. At any event, both of the Democratic candidates have promised to take action to combat Climate Change, including actions that will accelerate the adoption of EVs, in sharp contrast to President Trump, who is pursuing several policies that are detrimental to EVs.

1.1 What Would the Presidential Nominees do for EVs?

The Trump Administration has taken multiple regulatory actions that will lessen incentives for EVs, especially by issuing a Corporate Average Fuel Economy (“CAFE”) regulation that preempts the Zero Emission Vehicle (“ZEV”) Mandate issued by the State of California and several other states, but also by rolling back the stringency of the CAFE Standards and reducing the penalties for noncompliance with the Department of Transportation’s CAFE regulations. If President Trump is reelected, his Administration’s

hostility to EV interests is likely to continue, although some of the Administration's regulatory actions may be overturned in litigation.

In sharp contrast to the Trump Administration, the Democratic candidates for President have promised to reverse Trump's CAFE actions and to accelerate the adoption of EVs in the United States.

1.1.1 What if Trump is Reelected?

President Trump has consistently expressed skepticism for the need for governmental action to slow or reduce Climate Change and a strong preference for protecting the interests of carbon-emitting industries, including petroleum interests. The actions of his Administration during his first term in office have been consistent with Trump's disdain for reducing carbon emissions.

Of particular concern for EVs, the National Highway Traffic Safety Administration (NHTSA) of the Department of Transportation issued a regulation in September 2019 declaring that the CAFE regulations preempt California and other states from mandating the sale of ZEVs. [4] The State of California has for many years required that a percentage of the vehicles that auto manufacturers sell in the State must be electric. [5] Under the authority of Section 177 of the Clean Air Act, ten states -- New York, Massachusetts, Maine, Vermont, Connecticut, Rhode Island, New Jersey, Maryland, Oregon and Colorado -- have followed California in implementing the ZEV Mandate [6], and the States of Washington, Minnesota and New Mexico have begun the process to issue regulations to implement the ZEV Mandate, although their regulations have not yet gone into effect. [7] In addition to the NHTSA regulation purporting to preempt California and the other Section 177 states from enforcing the ZEV Mandate, the EPA has issued a revocation of the waiver under the Clean Air Act that allowed California to promulgate the ZEV Mandate. [8]

The Trump Administration has made other changes to the CAFE regulations that also have significant consequences for the EV industry. Just this week, NHTSA issued a final regulation weakening the CAFE Standards for light-duty vehicles (passenger cars and pickup trucks). [9] The "Safer and Affordable Fuel-Efficient (SAFE)" Vehicles Rule increases the stringency of the CAFE Standards for Model Years 2022 through 2026 by only 1.5 percent each year, while the previous regulations issued by the Obama Administration would have increased the stringency of the Standards by 5 percent each year. [10] Because electric vehicles do not burn any petroleum, the sale of electric vehicles provides credits to auto manufacturers for compliance with the CAFE Standards, and stringent CAFE Standards are a powerful incentive for the manufacture and sale of EVs. The weakening of the CAFE Standards therefore reduces the incentives for manufacturers to sell EVs in the United States. NHTSA's own analysis projects that the SAFE rule will slow electrification rates by 2029 to 7.9 percent, compared to 19.6 percent under the Standards issued under Obama. [11]

Under Trump, NHTSA has also reduced the penalties for noncompliance with the CAFE Standards, another action that will likely result in fewer EVs being sold in the United States. At the end of the Obama Administration, the penalty for noncompliance with the CAFE Standards was adjusted for inflation from \$5.50 to \$14 per tenth of a mile per gallon per vehicle that a manufacturer's fleet falls short of the CAFE requirements. After an unsuccessful attempt to cancel the Obama Administration's increase of the penalty that was enjoined by the courts, last year NHTSA finally completed a new rulemaking to reset the penalty back to the \$5.50 rate that had been in place since 1997. [12] The credits that EV manufacturers can sell to other auto manufacturers who fall short of the CAFE Standards were very valuable for Tesla and enabled Tesla to stay afloat in its early years. By reducing the CAFE penalty rate, while simultaneously reducing the stringency of the CAFE Standards, the Trump Administration has seriously undermined the value of the CAFE credits that EV manufacturers would have been able to earn if the Obama regulations had remained in place.

President Trump also made clear his personal animus to the electrification of vehicles by killing the EV tax credit earlier this year. Renewal of the EV tax credit had bipartisan support in the Congress in December was included in the FY 2020 appropriations bill needed to keep the Government open. However, Trump threatened to veto the bill if it included the tax credit, so the credit was deleted from the bill at the last minute. [13] The Trump Administration has also attempted to zero out funding in each year's budget for the Department of Energy's Advanced Technology Vehicles Manufacturing (ATVM) Program, the government loan program that provided critical funding to Tesla and Ford before they were ready to begin production of

their electric vehicles. Congress has restored funding to the ATVM Program in each year's budget, but there is no reason to expect that Trump will not continue to kill that program in future budgets. [14]

In addition to these actions that have a direct impact on EVs, Trump has directed several other actions that will indirectly affect the EV industry. The Trump Administration has been criticized for curtailing enforcement by the EPA and other agencies of environmental laws. [15] Most recently the EPA issued a broad policy of non-enforcement for industries affected by the Covid-19 Pandemic. [16] The Trump Administration is also instituting policies that are intended to reduce the number and scope of future federal rulemakings, including a "two-for-one" rule requiring the repeal of two regulations for each new regulation, new methodologies for calculating costs and benefits that will increase the total costs while limiting the benefits calculated for new rulemakings, and limitations on the scientific studies that can be used to support EPA rulemakings. [17] All of these policies will limit the possibility that the federal government takes action to increase the electrification of vehicles in a second term of the Trump Administration, or in a new Administration, until the policies are reversed.

In a second term in office, Trump will likely continue with his policies reversing governmental action to combat Climate Change, including his rollback of the regulations issued by the State of California and the Obama Administration that are now putting EVs on the roads in the United States. If the courts allow these regulatory actions to go into effect, the number of EVs in the United States by the year 2035 is expected to decrease by 12 to 14 million vehicles from current projections, according to one analysis. [18]

On the other hand, the Trump Administration has taken a few actions that are of potential benefit to the EV industry. Trump has tweeted his support for an EV manufacturer that acquired the closed GM auto plant in Lordstown, Ohio and announced plans to reemploy autoworkers in a state critical to Trump's reelection. [19] The Trump Administration has issued a CAFE regulation for Medium- and Heavy-Duty Vehicles that will provide some impetus for the electrification of trucks and buses, and received little criticism from the environmental community, in contrast to the Light-Duty CAFE regulations. [20] Unlike previous Republican Presidents, Trump has also seemed indifferent to mounting budget deficits and has frequently voiced support for infrastructure spending. Accordingly, notwithstanding his animus towards EVs, it is foreseeable that, in a second term, Trump could support increased spending on EV charging infrastructure as part of a stimulus package to reinvigorate the economy after the recession caused by the Covid-19 Pandemic.

1.1.2 What if the Democratic Nominee Is Elected?

During the Democratic debates, both Joe Biden and Bernie Sanders, as well as the entire field of Democratic candidates who were once serious contenders but have now ended their campaigns, all committed to fighting Climate Change as one of the main planks of their campaigns. Biden and all of the other Democratic candidates pledged to rejoin the Paris Agreement on Climate "on Day One" after the Inauguration in 2021, and to restore the CAFE Standards and other climate change measures issued by the Obama Administration that were rolled back by Trump.

Biden does not offer many details but he does promise to accelerate the electrification of vehicles in his plan for combating Climate Change. Biden's "Plan for a Clean Energy Revolution and Environmental Justice" includes "developing rigorous new fuel economy standards aimed at ensuring 100% of new sales for light- and medium-duty vehicles will be electrified and annual improvements for heavy duty vehicles." [21] Biden does not say when he will achieve this goal, except that he promises a 100% clean energy economy no later than 2050.

Biden's Plan does make some additional specific promises related to EVs:

- He "will work with our nation's governors and mayors to support the deployment of more than 500,000 new public charging outlets by the end of 2030."
- "Biden will restore the full electric vehicle tax credit to incentivize the purchase of these vehicles."
- He will use "the Federal government procurement system . . . to drive towards 100% clean energy and zero-emissions vehicles" for federal government fleets.
- "[H]e will work to develop a new fuel economy standard that goes beyond what the Obama-Biden Administration put in place."

As reflected in its title, Biden's Plan includes an emphasis on Environmental Justice. Biden's plan recognizes that in addition to combating Climate Change, reducing emissions can improve the health of America's black and Hispanic communities. [21] Eliminating pollution from trucking by replacing diesels with electric trucks is one of the most effective ways to follow up on the Plan's Environmental Justice commitments.

In contrast to Biden's Plan, which provides no specific timetable for achieving the goal of 100 percent electric vehicles before 2050, Bernie Sanders' Plan pledges to make transportation carbon-free by 2030. Sanders also plans to spend more than \$2.8 Trillion on electrification of vehicles, which dwarfs the spending proposed by Biden; the price tag for Biden's entire Plan is \$1.7 Trillion, less than the amount Sanders is proposing to spend just on vehicle electrification. Of course, Congress, rather than the President will ultimately decide the spending levels during the next administration. Sanders has also pledged to implement "the Green New Deal," which has been criticized by conservatives and many moderates as too expensive and unrealistic. [22] Although Biden says complimentary things about it in his Plan, Biden does not go so far as to express support for every element of the Green New Deal. However, this difference may be more rhetorical than substantive, because the implementation of a Green New Deal will require Congressional action and cannot be accomplished by regulation or executive order.

Many of the Democratic candidates who have now dropped out of the race had released detailed plans for addressing Climate Change that included incentives for EVs. The most comprehensive plan came from the campaign of Washington Governor Jay Inslee, who dropped out of the race in August. Inslee's Climate Mission Agenda consisted of five separate plans that were widely praised by environmental activists and even by the other candidates. [23] Inslee's Climate Mission Agenda was subsequently adopted in total by Senator Elizabeth Warren, before she too dropped out. [24] Mayor Pete Buttigieg's plan also echoed many of the goals in Inslee's Agenda, although Buttigieg's implementation timeline was somewhat less aggressive than Inslee's. [25] Many of the Inslee staffers and volunteers who helped draft Inslee's plans subsequently worked with the remaining candidates after Inslee dropped out and have now gravitated to the Biden campaign as the presumptive Democratic nominee. It appears that Biden's initial climate change plan has already been modified to incorporate some of the ideas that Inslee had proposed in his Climate Mission Agenda.

Although Inslee is now running for reelection for Governor of the State of Washington, he has combined the five plans of his presidential campaign's Climate Mission Agenda into three plans that Inslee hosts on his gubernatorial campaign website. [26] Only limited portions of his climate change plans can be implemented on the state level, so it is clear that Inslee is offering his plans as a blueprint for the eventual Democratic nominee. There has been speculation that most of the elements of Inslee's plans will be adopted as part of the official Democratic Party Platform at the Democratic National Convention this summer. There has also been a lot of speculation that if the Democratic nominee wins the White House, Inslee will be named to a position such as Administrator of the EPA where he can lead the implementation of his Climate Mission Agenda.

For all these reasons, it is reasonable to assume that the proposals in Inslee's plans on EVs stand a good likelihood of coming to fruition in a Biden Administration, even if they are not currently reflected in Biden's Plan for a Clean Energy Revolution. Among the proposals in Inslee's plans that could be implemented in a Biden Administration are:

- investments in the United States EV manufacturing base (one way this could be accomplished would be expansion and reinvigoration of DOE's ATVM Program)
- investments in battery recycling
- expanded EV tax credits
- "feebates" that reduce the cost of fuel-efficient vehicles and impose higher fees on vehicles that consume more fuel
- a "Clean Cars for Clunkers" program that would provide trade-in rebates for consumers to exchange their fuel-inefficient cars or trucks for new EVs

- federal financing for state and local efforts to retire gas and diesel buses in exchange for electric buses (this could be accomplished through modification of the existing Diesel Emissions Reduction Act (DERA) program)
- a national low-carbon fuels standard, which would encourage low-emissions transportation fuels (and could be tailored to specifically incentivize electricity as a fuel)

2 What Will Happen in Congress?

Although there is a good likelihood that a Democrat will be elected President, it is also likely that the Republicans will maintain their majority in the Senate. There is some support among Republicans in Congress for EV interests, so if Trump is gone from the White House it is quite possible that legislation favorable to EVs could be passed by Congress. Nevertheless, continued Republican control of the Senate after the 2020 elections would be an impediment to the aggressive measures to address Climate Change that are being pushed by Democrats. On the other hand, if the Democrats manage to win the Presidency, take control of the Senate, and maintain control of the House of Representatives, we should expect the enactment of much legislation that will accelerate the adoption of EVs.

Although President Trump and many Republican elected officials routinely question the need for governmental action to mitigate Climate Change, or even the existence of Climate Change, there are Republican Senators and Members of Congress who are not adverse to EV interests. For example, several Republicans are members of the House Climate Solutions Caucus and support vehicle electrification and other measures to address Climate Change. In addition, some of the states where EVs are manufactured – for example, Ohio, Indiana, Michigan and Tennessee – are “Red” or “Purple” states represented in the House and Senate by Republicans. Republican Senators and Members of Congress from these states are likely to support legislation that is good for the EV industry because of the economic benefits to their constituents.

Almost all of the plans for EVs offered by Biden (or by Sanders should he manage to win the nomination and then the election in November) will require enactment of legislation by Congress. For example, Biden’s apparently straightforward promise to deploy 500,000 new public charging stations will require not only an appropriation from Congress, but also repeal or amendment of existing law (23 U.S.C. Section 111), assuming that the Biden Administration wants to deploy EV charging stations at interstate rest areas and charge customers to plug in. Even if the Democrats obtain a majority in the Senate, the continued existence of the Senate filibuster will allow Republican Senators to block legislation necessary to achieve the new Administration’s EV goals. Accordingly, it will be necessary for the Democrats to work with the Republican Senators who are supportive of EV interests, and to make compromises to the ambitious goals for EVs in the Democratic Platform, in order to secure passage of legislation through the Senate.

Although Biden and Sanders are not proposing an increase in the gas tax in their campaign platforms, the federal tax on gasoline and diesel has not been increased since 1993, and many members of Congress recognize that an increase in the gas tax is necessary in order to fund long-delayed highway improvements. An increase in the gas tax in conjunction with infrastructure spending could gain traction in the next Congress, especially if the Democrats gain control of the Senate. A gas tax increase should increase demand for EVs, but the effect would likely be marginal.

3 What Will Happen in the Courts?

To date, the Trump Administration has been almost uniformly unsuccessful in litigation over the regulatory rollbacks ordered by the President. However, Trump has been very successful in getting his appointees approved by the Senate and on the bench at the district court and appellate court levels, as well as in the Supreme Court, and he will continue to appoint conservative judges for the remainder of his time in Office. The judges appointed by Trump will not all be adverse to EV interests, but as more of his appointees fill the federal courts, it should be expected that the courts will rule more favorably for Trump. Should the Democrats take the White House, litigation in the federal courts could put the brakes on some of the regulatory actions that a Democratic Administration would take to advance the electrification of transportation.

The Trump Administration's changes to the CAFE regulations to preempt the ZEV Mandate and to reduce the CAFE penalty rate are currently in litigation. [27] The State of California and environmental groups have promised to sue to overturn the new SAFE Rule weakening the CAFE Standards for Model Years 2022-2026, and that litigation will unquestionably be ongoing by EVS33. [28] This litigation will continue into a second term of a Trump Administration, but will be settled immediately if Biden wins the Presidency.

4 What Will Happen in the States?

For the past three years, since Trump took office, state and local governments in the United States have been responsible for most of the legislative and regulatory actions of benefit to EVs. California has been the leader, but other states and cities, especially on the West Coast and on the East Coast of the United States, are implementing various programs to require the sale of EVs and to provide incentives for the purchase and operation of EVs in their jurisdictions. These actions are primarily occurring in "Blue" states controlled by the Democrats, and they will likely continue into the next federal administration.

In addition to the ZEV mandates for light-duty vehicles discussed earlier in this paper, the States of California and Washington are considering implementation of a ZEV mandate for medium- and heavy-duty trucks and buses. [29] Other states will probably follow suit. These mandates could be extended to off-road vehicles as well. Some states are also considering "cap and trade" programs to limit the carbon emissions from vehicles. The Transportation & Climate Initiative (TCI) of the Northeast and Mid-Atlantic States stretching from Virginia to Maine is an example of such a cap and trade program that would limit total emissions from gas and diesel distributors and use fees from the program to fund transportation electrification and other projects to mitigate climate change. [30]

ZEV mandates are the "stick" approach, but the states also use "carrots" to encourage electrification of vehicles. The best example is California's Hybrid and Zero-Emission Truck and Bus Voucher Incentive Project (HVIP). This program provides vouchers usually worth several thousands of dollars per vehicle that fleets can use to acquire electric trucks and buses. [31] New York and a few other jurisdictions have similar voucher programs but they have not been as generous and as consistently funded as California's program. Some states and cities are seeking to incentivize electrification by committing to purchase EVs for government fleets. The Climate Mayors Electric Vehicle Cooperative Purchasing program enables cities that are taking this approach to combine their vehicle requirements for bulk purchasing. [32]

The Trump Administration is actively attempting to preempt state and local government action that would require manufacturers to sell EVs, such as the ZEV Mandate. The 2020 election and the courts will decide whether Trump's preemption policies will be effective in slowing down the transition to EVs in the United States. Should the Democrats take control in Washington, we should expect the end of federal preemption efforts and instead that the federal government will encourage state and local governments to enact measures that help put EVs on American roads and that the federal government will try to coordinate those efforts to make them more effective.

The arguments for preemption do not apply when states implement programs that provide financial incentives to encourage electrification, rather than regulatory programs that coerce manufacturers to sell EVs in a state. Financial incentives such as California's HVIP program and state and local government fleet purchases of EVs should therefore continue regardless of the outcome of the Presidential election, but are likely to accelerate if Biden wins.

5 What Will Happen Internationally?

The withdrawal of the United States from the Paris Agreement on Climate takes effect the day after the 2020 election. [33] If Trump is reelected, America will lock in its position as the sole holdout refusing to recognize the necessity of transitioning away from fossil fuels, and will concede to China and Europe the race to develop and produce EVs that make obsolete the internal combustion engine. Government policy in China and in most of the European nations is clear; they are making their transportation systems all-electric and doing that on a rapid timetable. If a Democrat wins the U.S. Presidency, he will immediately upon office announce the United States' reentry in the Paris Agreement and try to resume America's leadership in the development and

production of EVs. China and Europe certainly will not concede to the United States on this and it is by no means certain that the United States can regain its role as the leader in EV development.

Although Trump has announced that the United States is leaving the Paris Agreement, a significant portion of the United States is not going along. The “We Are Still In” movement is a collaboration of state and local governments as well as private companies in the United States that have committed to continue working with the rest of the world to follow through on the Paris Agreement. The movement is to a large extent rhetorical rather than substantive, but the We Are Still In website lists as the first commitment it recommends to states and cities that they “[a]dopt policies to accelerate the transition to electric vehicles for commercial fleets and personal vehicles.” [34] Another interesting example of international cooperation on EVs at the state, rather than federal, level is the West Coast Electric Highway. In this project, the States of California, Oregon and Washington are working with the Province of British Columbia in Canada to create and maintain a network of EV charging stations that will allow EVs to travel from Vancouver to San Diego without worrying about finding a place to recharge. [35] Regardless of the outcome of the Presidential election, some state and local governments in the United States will continue to cooperate with international efforts to mitigate Climate Change, including through electrification of vehicles.

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