

# THE OBAMA ADMINISTRATION'S NATIONAL AUTO POLICY: LESSONS FROM THE "CAR DEAL"

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*This Article is the first comprehensive analysis of the Obama Administration's national auto policy, which set the first federal greenhouse gas standards and strictest fuel efficiency standards for new cars and trucks in U.S. history. It describes the complicated legal, administrative and political background that led to a harmonized federal program, including the history of litigation and conflict among the auto industry, environmental groups, California and federal regulators. It explains how a confluence of events — a new administration, a domestic auto industry in crisis, a landmark Supreme Court decision, and collective exhaustion with a thirty-year struggle over fuel efficiency standards — primed all of the parties to support a solution, one that would require significant legal and administrative dexterity to devise and implement. The Article describes in detail the joint rulemaking by the U.S. Environmental Protection Agency and the National Highway Traffic Safety Administration, through which the agencies established a new uniform program. It explores how the joint rulemaking process afforded the agencies an opportunity to pool information and expertise, harmonize potentially inconsistent regulatory approaches and bridge cultural differences. It also chronicles the innovative use of commitment letters to formalize industry and state support for the joint rule, and to settle pending preemption litigation. The Article discusses the implications of the "car deal" for the Obama Administration, which at the time was bailing out the auto industry, pressing Congress for comprehensive energy and climate legislation, and anticipating the U.N sponsored climate negotiations in Copenhagen. It also discusses the importance of the car deal to environmental law. As the first binding federal regulation of greenhouse gas emissions under the Clean Air Act, this mobile source rule exerted a legal domino effect, leading, inexorably, to EPA regulation of stationary sources as well. The national auto policy thus unleashed the most powerful existing tool the administration had at its disposal for tackling the problem of global climate change. The Article concludes with a discussion of the implications for administrative law, arguing that one of the most important legacies of the car deal is the new prominence it brought to joint rulemaking, which has significant potential to improve the clarity and quality of regulation in situations where agencies share overlapping or closely related regulatory authority.*

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## INTRODUCTION

In May 2009, President Obama announced a national auto policy that would set the first federal greenhouse gas (“GHG”) emissions standards and the strictest fuel efficiency standards for new cars and trucks in American history.<sup>1</sup> Coinciding with the announcement, the U.S. Environmental Protection Agency (“EPA”) and National Highway Traffic Safety Administration (“NHTSA”) published a Notice of Intent (“NOI”) in the Federal Register, proposing to set these standards jointly under their respective statutory authorities, and explaining in some detail the anticipated level of stringency, compliance requirements, and timeline of implementation.<sup>2</sup>

The joint rule envisioned by the NOI would increase Corporate Average Fuel Economy (“CAFE”) standards to achieve an estimated fleetwide average of 35.5 miles per gallon (“mpg”) or 250 grams per mile (“gpm”) of carbon dioxide (“CO<sub>2</sub>”) by 2016, an average improvement in fuel efficiency and GHG reduction over the lifetime of the program of 4.3% per year.<sup>3</sup> To put the standards in perspective, the Energy and Independence Security Act of 2007<sup>4</sup> (“EISA”) had required NHTSA to set the industry-wide fleet aver-

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<sup>1</sup> Press Release, The White House, President Obama Announces National Fuel Efficiency Policy (May 19, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/President-Obama-Announces-National-Fuel-Efficiency-Policy](http://www.whitehouse.gov/the_press_office/President-Obama-Announces-National-Fuel-Efficiency-Policy).

<sup>2</sup> Notice of Upcoming Joint Rulemaking to Establish Vehicle GHG Emissions and CAFE Standards, 74 Fed. Reg. 24,007 (May 22, 2009). The standards apply to passenger cars and light trucks and consist of estimated combined average emissions levels and fuel economy levels. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324, 25,329–30 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, and 100; 49 C.F.R. pts. 531, 533, 536, 537, and 538) [hereinafter *GHG Emission Standards*].

<sup>3</sup> See *GHG Emission Standards*, *supra* note 2, at 25,330 (projecting 4.3% average annual increase relevant to Model Year 2011 standards). EPA’s standard of 250 gpm CO<sub>2</sub> would be equivalent to 35.5 mpg if the manufacturers were to meet the standard through fuel economy improvements alone. *Id.* at 25,328. The corresponding “maximum feasible” CAFE standard set by NHTSA is 34.1 mpg by Model Year 2016. *Id.* The difference in the two standards results from differences in EPA and NHTSA’s respective statutory authorities. While EPA sets GHG standards pursuant to the Clean Air Act under 42 U.S.C. § 7521(a), NHTSA sets CAFE standards pursuant to the Energy Policy and Conservation Act (“EPCA”) under 49 U.S.C. § 32902. *GHG Emission Standards*, *supra* note 2, at 25,328. EPA’s higher standard takes into account the expectation that manufacturers will take advantage of emissions-reducing opportunities presented by improving vehicle air conditioning systems, which produce GHGs. NHTSA’s lower standard reflects the fact that EPCA does not allow manufacturers to count air conditioning improvements toward compliance with CAFE standards. Such improvements are not measured by the testing procedure mandated by the statute. *Id.* EPCA requires EPA (which performs fuel economy testing for the CAFE program) to use a specific testing procedure that produces the same results whether air conditioning is turned on or not. *Id.* at 25,327.

<sup>4</sup> Pub. L. No. 110-140, 121 Stat. 1492 (2007) (codified as amended in scattered sections of 42 and 49 U.S.C.).

age fuel efficiency at 35 mpg by 2020.<sup>5</sup> The new rule thus would achieve this congressional mandate four years early, at an annual rate of improvement significantly greater than in the past.<sup>6</sup> Moreover, the standards would for the first time control emissions of GHG pollution from new cars and trucks.

As part of a negotiated agreement to support this program, all the major foreign and domestic auto companies signed letters of commitment promising not to challenge the new standards in court, provided that the final rule was substantially similar to the one described in the NOI.<sup>7</sup> The state of California, represented by the Governor, the Attorney General, and the Chair of the California Air Resources Board (“CARB”)<sup>8</sup> also agreed to support the new national program by treating compliance with the joint federal standards as compliance with California’s separate GHG standards for cars and trucks.<sup>9</sup>

In addition, the auto companies and their trade associations committed not to contest any grant of a waiver of federal preemption under the Clean Air Act<sup>10</sup> (“CAA”) authorizing California’s GHG standards for Model Years 2009–2016,<sup>11</sup> and to stay and ultimately dismiss more than a dozen pending lawsuits challenging California’s legal authority to regulate GHGs.<sup>12</sup>

<sup>5</sup> 49 U.S.C.A. § 32902(b)(2)(A) (West 2011).

<sup>6</sup> The standards are also projected to result in approximately 1.8 billion barrels of oil saved and 950 million metric tons of carbon dioxide equivalent emissions reduced over the lifetime of the vehicles sold in Model Years 2012 through 2016. *GHG Emission Standards*, *supra* note 2, at 25,328. The cost to consumers was projected to increase less than \$1000 on average for a vehicle sold in Model Year 2016. *Id.* The agencies together estimated that the standards would result in net benefits to society of \$190–240 billion over the lifetime of the vehicles sold in Model Years 2012–2016, and that net savings to consumers from lifetime fuels savings could exceed \$3000 for a model year 2016 vehicle. *Id.* at 25,328–29.

<sup>7</sup> Manufacturers submitted letters of commitment to the EPA Administrator and the Department of Transportation (“DOT”) Secretary, the agency heads responsible for issuing the regulations. Twenty-two letters of commitment are posted at the EPA website, including letters from Chrysler, Ford, General Motors, Honda, Toyota, and BMW as well as trade associations such as the Alliance of Auto Manufacturers, and officials from the State of California. *See Transportation and Climate, Regulations and Standards*, EPA, <http://www.epa.gov/oms/climate/regulations.htm> (last visited May 10, 2011).

<sup>8</sup> CARB is the California state administrative agency with authority to set vehicle emission standards under the Clean Air Act. *See History of Air Resources Board*, CARB, <http://www.arb.ca.gov/knowzone/history.htm> (last visited May 10, 2011).

<sup>9</sup> *See, e.g.*, Letter from Mary D. Nichols, Chairman, CARB, to Lisa Jackson, Adm’r, EPA, and Ray LaHood, Sec’y, U.S. Dep’t. of Transp. (May 18, 2009), *available at* <http://www.epa.gov/oms/climate/regulations/air-resources-board.pdf>. This commitment, and that of the auto companies, was based on the assumption that EPA would grant California a waiver of federal preemption under the Clean Air Act authorizing the state to implement its GHG vehicle emission standards, which the Bush Administration had denied. For a fuller discussion of the waiver, see *infra* note 43 and accompanying text.

<sup>10</sup> 42 U.S.C. §§ 7401–7671 (2006).

<sup>11</sup> *See* Letter from the Alliance of Auto. Mfrs. to Lisa Jackson, Adm’r, EPA, and Ray LaHood, Sec’y, U.S. Dep’t. of Transp. (May 18, 2009), *available at* <http://www.epa.gov/oms/climate/regulations/alliance-of-automobile.pdf>.

<sup>12</sup> *GHG Emission Standards*, *supra* note 2, at 25,328; *see also* Letter from the Alliance of Auto. Mfrs. to Lisa Jackson, Adm’r, EPA, and Ray LaHood, Sec’y, U.S. Dep’t. of Transp., *supra* note 11.

Thus, the joint rule, once final, would effectively create a uniform federal system for regulating fuel efficiency and controlling GHG pollution in a significant part of the U.S. transportation sector.<sup>13</sup>

Part I of this Article provides a detailed description of the EPA-NHTSA joint rulemaking. Part II explores the implications of the rulemaking for both environmental and administrative law. The most obvious accomplishment of the “car deal” is that it strengthened fuel efficiency standards while launching a program of federal GHG regulation in the United States. Yet among its most important legacies for regulation generally is the new prominence it afforded to joint rulemaking, which has significant potential to improve the clarity and quality of regulation in situations where agencies share overlapping or closely related regulatory authority.<sup>14</sup> The new auto policy relied on additional procedural innovations and dispute resolution strategies — including the use of “letters of commitment” to settle litigation and memorialize an implementation plan — which might be deployed in other rulemakings. Although in some respects the car deal is undoubtedly unique, it nevertheless offers a number of important lessons for improving the regulatory process and promoting inter-agency coordination.

## I. THE NATIONAL AUTO POLICY

### A. *The Legal and Political Context*

The context in which the national auto policy took shape was complicated legally, administratively, and politically. When President Obama took office in 2009, the auto industry was facing three different sets of vehicle standards: federal fuel economy standards set by NHTSA in mpg, federal GHG standards set by EPA in gpm, and separate GHG standards set by California, which thirteen other states had adopted.<sup>15</sup> To understand how this situation arose, it is necessary to review the important legal and political developments of the prior several years.

Vehicle fuel efficiency regulation has long been the domain of the federal government. In 1975, Congress enacted the Energy Policy and Conser-

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<sup>13</sup> Manufacturers would produce a single national fleet that would satisfy all applicable regulations. *GHG Emission Standards*, *supra* note 2, at 25,328.

<sup>14</sup> See Jody Freeman & Jim Rossi, *Agency Collaboration in Shared Regulatory Space*, 125 HARV. L. REV. (forthcoming 2012) (describing the potential of joint rulemaking and other coordination tools to improve inter-agency coordination, reduce transaction costs, and simplify complex regimes.); see also William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 7 (2003) (noting how the “regulatory commons” can produce both governance failures and overregulation); J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 800–06 (2003) (describing how regulation by multiple agencies can thwart a regulated entity’s ability to comply with the law).

<sup>15</sup> For a more detailed discussion of the California standards and the states that adopted them, see *infra* note 148 and accompanying text.

vation Act<sup>16</sup> (“EPCA”), establishing a fuel economy program to promote energy conservation and reduce oil consumption at a time of rising gas prices and fuel shortages after the Arab Oil embargo.<sup>17</sup> The statute required auto manufacturers to meet fleetwide average fuel economy standards for cars and trucks.<sup>18</sup> Congress authorized the Department of Transportation (“DOT”) to administer the CAFE program,<sup>19</sup> and DOT delegated this authority to NHTSA.<sup>20</sup>

Originally, EPCA established a fleetwide standard for passenger cars of 18 mpg for Model Year 1978 and called for doubling the fuel economy of the new car fleet, to 27.5 mpg, by 1985.<sup>21</sup> EPCA also authorized DOT to establish CAFE standards for other classes of vehicles including light duty trucks, which NHTSA set at 17.2 mpg beginning in 1979, raising incrementally to 20.7 in 2004.<sup>22</sup> Between 1985 and 2002, fuel economy standards for both cars and trucks remained stagnant, partially due to a congressional moratorium on using appropriations to raise CAFE standards that was in place for fiscal years 1996 through 2001.<sup>23</sup> After Congress lifted the moratorium, NHTSA only marginally increased the light duty truck standard for Model Years 2005–2007, and declined to raise the standard for cars.<sup>24</sup> As a result, U.S. fuel efficiency standards have lagged behind most other countries, including the European Union, Japan, and China.<sup>25</sup>

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<sup>16</sup> Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified as amended in scattered sections of 42 and 49 U.S.C.).

<sup>17</sup> See BRENT YACOBUCCI & ROBERT BAMBERGER, CONG. RESEARCH SER., RL 33413, AUTOMOBILE AND LIGHT TRUCK FUEL ECONOMY: THE CAFE STANDARDS 2 (2007) (stating that the Arab oil embargo of 1973 and resulting dramatic increases in crude oil prices drove Congress to pass legislation requiring fuel economy standards for new cars and trucks).

<sup>18</sup> 49 U.S.C. § 32902 (2006).

<sup>19</sup> 49 U.S.C. § 32902(a).

<sup>20</sup> 49 C.F.R. § 1.50(f) (2008). EPCA was subsequently amended by EISA in 2007, which, among other things, requires NHTSA to set the fleetwide average fuel efficiency for cars and light trucks at 35 mpg by 2020. 49 U.S.C.A. § 32902(b)(2)(A) (West 2011).

<sup>21</sup> YACOBUCCI & BAMBERGER, *supra* note 17, at 2.

<sup>22</sup> *Id.*

<sup>23</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-336, VEHICLE FUEL ECONOMY: NHTSA AND EPA'S PARTNERSHIP FOR SETTING FUEL ECONOMY AND GREENHOUSE GAS EMISSIONS STANDARDS IMPROVED ANALYSIS AND SHOULD BE MAINTAINED 3-4 (2010) [hereinafter GAO VEHICLE FUEL ECONOMY REPORT].

<sup>24</sup> See *id.* (noting that the CAFE standard for cars remained at the 1985 setting of 27.5 mpg through Model Year 2010, and that the first increase for cars since 1985 was promulgated in 2009, by the Obama DOT, for Model Year 2011). Before leaving office, the George W. Bush Administration had proposed new car standards for Model Years 2011–2015, but never finalized them. See Average Fuel Economy Standards, Passenger Cars and Light Trucks; Model Years 2011–2015, 73 Fed. Reg. 24,352 (May 2, 2008). The CAFE program has historically been highly contentious, attracting criticism from proponents of stricter fuel economy, who believed the standards were too low, especially for light trucks (including sport utility vehicles), which grew from 20% to 55% of the U.S. auto market from 1980 to 2005. See YACOBUCCI & BAMBERGER, *supra* note 17, at 6. The auto industry has argued that the economic costs of stricter standards are too high and that raising them will restrict consumer choice and produce a safety penalty by creating incentives for downsizing. See *id.* at 5.

<sup>25</sup> See FENG AN & AMANDA SAUER, COMPARISON OF PASSENGER VEHICLE FUEL ECONOMY AND GREENHOUSE GAS EMISSION STANDARDS AROUND THE WORLD 1 (2004), available at

While federal fuel efficiency standards languished, the scientific data regarding global climate change was solidifying. The Intergovernmental Panel on Climate Change (“IPCC”) estimated in its Fourth Assessment Report that, in the absence of additional climate policies to reduce GHG emissions, baseline global GHG emissions from human sources would increase between 25% and 90% between 2000 and 2030, with CO<sub>2</sub> emissions from energy use growing between 40% and 110% over the same period.<sup>26</sup> The panel projected that global average temperatures would rise between 0.3°C to 6.4°C by 2100 while global sea level would rise between 0.18 m to 0.59 m.<sup>27</sup> To limit the risk of warming in excess of 2.0°C, the IPCC recommended that GHG emissions be reduced to 50 to 85% below year 2000 levels by 2050.<sup>28</sup>

At the same time, it became increasingly clear that controlling GHG emissions in the transportation sector would be an important part of any U.S. climate strategy, as well as key to reducing the nation’s dependence on oil.<sup>29</sup> GHG emissions from this sector are estimated to be 29% of U.S. and 5% of global emissions.<sup>30</sup> Moreover, transportation GHG emissions have been growing steadily in recent decades and are the fastest growing source of U.S. emissions.<sup>31</sup> In 2006, emissions from light-duty vehicles (passenger cars, sport utility vehicles, and pickup trucks) — the sources covered by the new EPA-NHTSA joint rule — accounted for 59% of emissions in the transport sector.<sup>32</sup>

In the waning days of the Clinton Administration, as the evidence about global climate change continued to crystallize, nineteen private groups petitioned EPA to regulate new motor vehicle emissions under the mobile source provisions of the CAA.<sup>33</sup> Once George W. Bush had taken office, EPA de-

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[http://www.pewclimate.org/docUploads/Fuel%20Economy%20and%20GHG%20Standards\\_010605\\_110719.pdf](http://www.pewclimate.org/docUploads/Fuel%20Economy%20and%20GHG%20Standards_010605_110719.pdf).

<sup>26</sup> IPCC, CLIMATE CHANGE 2007: SYNTHESIS REPORT 44 (2007).

<sup>27</sup> *Id.* at 45 tbl.3.1.

<sup>28</sup> *Id.* at 67 tbl.5.1.

<sup>29</sup> EPA, EPA 430-R-11-005, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2009, ES-8 (2011), available at [www.epa.gov/climatechange/emissions/downloads/11/US-GHG-Inventory-2011-Complete\\_Report.pdf](http://www.epa.gov/climatechange/emissions/downloads/11/US-GHG-Inventory-2011-Complete_Report.pdf) (footnote omitted).

<sup>30</sup> U.S. DEP’T OF TRANSP., TRANSPORTATION’S ROLE IN REDUCING U.S. GREENHOUSE GAS EMISSIONS ES-2 (2010) available at [http://ntl.bts.gov/lib/32000/32700/32779/DOT\\_Climate\\_Change\\_Report\\_-\\_April\\_2010\\_-\\_Volume\\_1\\_and\\_2.pdf](http://ntl.bts.gov/lib/32000/32700/32779/DOT_Climate_Change_Report_-_April_2010_-_Volume_1_and_2.pdf) (“From 1990 to 2006 alone, transportation GHG emissions increased 27 percent, accounting for almost one-half of the increase in total U.S. GHG emissions for the period.” *Id.* at ES-3.).

<sup>31</sup> *Transportation and Climate, Basic Information*, EPA, <http://www.epa.gov/oms/climate/basicinfo.htm> (last visited April 6, 2011) (“Transportation is . . . the fastest-growing source of U.S. greenhouse gas emissions, accounting for 47 percent of the net increase in total U.S. emissions since 1990, and is the largest end-use source of CO<sub>2</sub>, which is the most prevalent greenhouse gas.”).

<sup>32</sup> U.S. DEP’T OF TRANSP., *supra* note 30, at ES-3.

<sup>33</sup> Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,922–23 (Sept. 8, 2003).

nied the rulemaking petition,<sup>34</sup> reasoning that Congress had no intention of conferring regulatory authority on EPA to address climate change under the CAA and stating that, even if the agency possessed such statutory authority, it would decline to exercise it for other policy reasons.<sup>35</sup>

At the same time, frustrated with inaction at the federal level,<sup>36</sup> several states began to enact measures to control GHG emissions, either independently or through regional initiatives.<sup>37</sup> In 2002, California passed Assembly Bill 1493, requiring CARB for the first time to set vehicle emission standards for GHGs.<sup>38</sup> In 2004, CARB promulgated these standards, which would apply to Model Years 2009–2016, with stringency increasing over time. Ultimately the standards required an estimated 30% reduction in fleetwide GHG emissions by 2016.<sup>39</sup>

These new regulations could not take effect, however, without a waiver of federal preemption from EPA, which California sought in 2005. The CAA generally preempts states from setting emission standards for new motor vehicles, but allows California to seek a preemption waiver to set such standards providing certain statutory criteria are met;<sup>40</sup> among other things, the standards must be at least as protective of public health and welfare as the applicable federal standards, and must be necessary to meet “compelling and extraordinary conditions.”<sup>41</sup> Section 177 of the CAA authorizes other

<sup>34</sup> *Id.* (providing notice of denial of the petition for rulemaking). In denying the petition, EPA declined to make a determination about whether GHGs endangered health or welfare, the legal predicate to EPA regulation of new vehicle emissions under section 202(a) of the CAA.

<sup>35</sup> *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 528 (2007).

<sup>36</sup> President Bush withdrew the U.S. from the Kyoto Protocol. Edmund L. Andrews, *Bush Angers Europe by Eroding Pact on Warming*, N.Y. TIMES, Apr. 1, 2001, at 3. The Administration opposed taking domestic regulatory measures to reduce GHGs. *See* Spencer Abraham, *The Bush Administration’s Approach to Climate Change*, 305 SCIENCE 616, 616 (2004) (noting the Administration’s focus on market- and innovation-based policies).

<sup>37</sup> J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1525 (2007) (describing state initiatives to regulate GHGs including through regional GHG initiatives).

<sup>38</sup> 2002 Cal. Legis. Serv. 200 (West) (codified at CAL. HEALTH & SAFETY CODE §§ 42823, 43018.5 (West 2011)). The legislation requires that CARB standards achieve “the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles” while accounting for “environmental, economic, social, and technological factors.” *Id.*

<sup>39</sup> CAL. CODE REGS. tit. 13, § 1961.1 (2007). CARB promulgated thirteen regulations, the most important of which requires a 1 to 2% reduction in emissions by 2009, depending on vehicle category, rising incrementally to reach approximately 30% below projected 2009 levels by 2016. A 30% reduction is equivalent to a standard of 37 mpg. DANIEL SPERLING & DEBORAH GORDON, *TWO BILLION CARS: DRIVING TOWARD SUSTAINABILITY* 283 n.24 (2009).

<sup>40</sup> *See* CAA § 209(b)(1), 42 U.S.C. § 7543(b)(1) (2006). The exception to federal preemption is available to “any State which has adopted standards . . . for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966 . . .” *Id.* The only state that had adopted such standards by 1966 was California. *See* Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. N.Y. State Dept. of Env’tl. Conservation, 17 F.3d 521, 525 (2d Cir. 1994) (reviewing history of the CAA and California’s exemption from federal preemption). This statutory scheme recognizes California’s unique position as a leader in air pollution regulation, and assigned it a “first among equals” regulatory role.

<sup>41</sup> *See* CAA § 209(b)(1)(B), 42 U.S.C. § 7543(b)(1)(B).

states to adopt California's standards providing the standards are identical to California's.<sup>42</sup>

Over the prior thirty years, California had sought and been granted such preemption waivers dozens of times; indeed EPA had never denied one outright.<sup>43</sup> Yet the earlier waivers had concerned ground-level pollutants, such as pollutants that contribute to smog. This was the first application by California to regulate GHG emissions.<sup>44</sup>

In addition to needing a federal waiver, California faced another legal hurdle. In 2004, the auto industry had challenged CARB's GHG regulations arguing that they were preempted by EPCA,<sup>45</sup> which forbids states from setting standards "related to fuel economy."<sup>46</sup> Most of the GHG emissions from motor vehicles consist of CO<sub>2</sub>, which is produced from burning fuel.<sup>47</sup> Reducing those emissions essentially requires improving vehicle fuel economy, under the rationale that the less fuel burned, the lower the emissions of CO<sub>2</sub> from the tailpipe.<sup>48</sup> For this reason, the auto industry argued that the standards were "related to fuel economy" and therefore preempted.<sup>49</sup> Two federal district courts rejected this argument,<sup>50</sup> paving the way for California to implement its standards provided it could obtain a federal preemption

<sup>42</sup> See *id.* § 177, 42 U.S.C. § 7507. The CAA thus essentially authorizes a "two-car" country — the auto industry must meet EPA emissions standards nationally, and may also need to meet even more stringent standards in California (and the so-called "section 177 states" that adopt California's standards).

<sup>43</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-249R, CLEAN AIR ACT: HISTORICAL INFORMATION ON EPA'S PROCESS FOR REVIEWING CALIFORNIA WAIVER REQUESTS AND MAKING WAIVER DETERMINATIONS 2 (2009), available at <http://www.gao.gov/new.items/d09249r.pdf> (explaining that EPA's denial of California's 2005 waiver request for vehicle GHG regulations was both the first outright denial of a formal waiver request and the first time the "compelling and extraordinary conditions" criterion of the CAA was used to deny a waiver request); see also SPERLING & GORDON, *supra* note 39, at 193.

<sup>44</sup> Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emissions Standards for New Motor Vehicles, 73 Fed. Reg. 12,156, 12,156–57 (Mar. 6, 2008).

<sup>45</sup> See, e.g., *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

<sup>46</sup> 49 U.S.C.A. § 32902(b)(3)(A) (West 2011).

<sup>47</sup> In addition to CO<sub>2</sub>, automobiles also produce methane ("CH<sub>4</sub>") and nitrous oxide ("N<sub>2</sub>O") emissions through the tailpipe, as well as hydrofluorocarbon ("HFC") emissions from leaking air conditioners. See OFFICE OF TRANSP. AND AIR QUALITY, EPA, EMISSION FACTS: GREENHOUSE GAS EMISSIONS FROM A TYPICAL PASSENGER VEHICLE 4 (2005), available at <http://www.epa.gov/oms/climate/420f05004.pdf>.

<sup>48</sup> Currently, there is no technology capable of reducing the CO<sub>2</sub> produced by imperfect fuel combustion, or converting it into other compounds. Only technologies that improve fuel efficiency can reduce CO<sub>2</sub> emissions as well. See *GHG Emission Standards*, *supra* note 2, at 25,327; see also SPERLING & GORDON, *supra* note 39, at 192–93.

<sup>49</sup> Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss or Transfer, *Cent. Valley Chrysler-Jeep, Inc. v. Witherspoon*, 563 F. Supp. 2d 1158 (E.D. Cal. 2008) (No. Civ-F-04-6663), 2005 WL 4829561; Post-Trial Brief of Plaintiff Ass'n of International Automobile Manufacturers, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (Nos. 2:05-CV-302, 2:05-CV-304), 2006 WL 4757768.

<sup>50</sup> *Cent. Valley Chrysler-Jeep, Inc.*, 529 F. Supp. 2d 1151, *aff'd on reh'g*, 563 F. Supp. 2d 1158; *Green Mountain Chrysler Plymouth Dodge Jeep*, 508 F. Supp. 2d 295.

waiver (and survive appellate review). However, after two years of delay, the Bush Administration then denied California's waiver application.<sup>51</sup>

By 2009, the situation had changed. As a presidential candidate, Barack Obama had pledged that his administration's EPA would reconsider the waiver denial,<sup>52</sup> and once elected he issued a presidential directive to that effect.<sup>53</sup> In addition to reconsidering CARB's waiver application,<sup>54</sup> EPA itself was poised to set GHG standards for new cars and trucks for the first time, following the Supreme Court's decision in *Massachusetts v. EPA*.<sup>55</sup>

In 2007, the Court had reviewed the Bush EPA's 2003 denial of the rulemaking petition seeking EPA regulation of GHG motor vehicle emissions under section 202(a) of the CAA. Ruling for the petitioners, the Court held that GHGs fit the statutory definition of "pollutant" in the CAA, and thus fall within EPA's jurisdiction.<sup>56</sup> The Court also rejected EPA's various policy reasons<sup>57</sup> for declining to make the threshold decision necessary for setting the standards — whether GHG emissions from new motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>58</sup> The Court remanded the matter to EPA, instructing it to either make the endangerment determination, or establish that the science was too uncertain to make a reasoned decision.<sup>59</sup> As the Court noted, by the terms of the statute, if EPA were to render a positive endangerment finding, the Agency would be legally obligated to regulate GHGs.<sup>60</sup>

In response to this remand, EPA staff had prepared an exhaustive analysis of options for regulating GHGs under the CAA, including a scientific and technical assessment of whether GHGs emissions endangered public health or welfare.<sup>61</sup>

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<sup>51</sup> Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emissions Standards for New Motor Vehicles, 73 Fed. Reg. 12,156, 12,159 (March 6, 2008) (stating that "California does not need its [GHG] motor vehicle standards to meet compelling and extraordinary conditions.").

<sup>52</sup> See John M. Broder & Peter Baker, *Obama's Order is Likely to Tighten Auto Standards*, N.Y. TIMES, Jan. 26, 2009, at A1 (noting that President Obama's directive to EPA to reconsider California's waiver request fulfilled his campaign pledge).

<sup>53</sup> Memorandum from President Barack Obama on State of California Request for Waiver Under 42 U.S.C. § 7543(b), the Clean Air Act, to Adm'r, EPA (Jan. 26, 2009), available at <http://www.whitehouse.gov/the-press-office/Presidential-Memorandum-EPA-Waiver>.

<sup>54</sup> CARB had asked EPA to reconsider its previous denial on January 21, 2009. See Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Vehicles, 74 Fed. Reg. 32,744, 32,745 (July 8, 2009).

<sup>55</sup> 549 U.S. 497 (2007).

<sup>56</sup> *Massachusetts v. EPA*, 549 U.S. at 528.

<sup>57</sup> *Id.* at 533–34.

<sup>58</sup> CAA § 202(a), 42 U.S.C. § 7521(a) (2006).

<sup>59</sup> *Massachusetts v. EPA*, 549 U.S. at 534–35.

<sup>60</sup> *Id.* at 533 (interpreting CAA § 202(a), 42 U.S.C. § 7521(a)).

<sup>61</sup> See *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354 (July 30, 2008) (describing regulatory options and actions taken by the Bush Administration following the Supreme Court remand in the form of an advanced notice of proposed rulemaking).

The stakes of making such a finding would be especially high, and not only because the endangerment finding would lead inexorably to EPA issuing a GHG standard for new motor vehicles under section 202 of the CAA.<sup>62</sup> Indeed, another implication was even more consequential: a first-ever GHG standard set for new motor vehicles under section 202 of the CAA would exert a legal domino effect, ultimately resulting in the regulation of GHG emissions from stationary sources like coal-fired power plants, oil refineries, and many other industrial (and potentially residential) sources.<sup>63</sup> This is the result of a self-executing trigger in the law. Once EPA sets a binding standard for a pollutant under one section of the CAA, it becomes a so-called “regulated pollutant” for purposes of other CAA programs.<sup>64</sup>

Staunchly opposed to using the existing CAA to address climate change, senior officials in the George W. Bush Administration repudiated the agency’s analysis, and declined to pursue regulation.<sup>65</sup> Yet only months later, Barack Obama was elected President on a platform that included a commitment to regulate GHG emissions under the CAA.<sup>66</sup> It was a near certainty that EPA would finally propose the endangerment finding. By December of 2009, EPA had issued two findings: that emissions of GHGs from

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<sup>62</sup> See CAA § 202(a), 42 U.S.C. § 7521(a).

<sup>63</sup> See generally ROBERT MELTZ, CONG. RESEARCH SERV., R 40984, LEGAL CONSEQUENCES OF EPA’S ENDANGERMENT FINDING FOR NEW MOTOR VEHICLE GREENHOUSE GAS EMISSIONS (2009), available at <http://ncseonline.org/NLE/CRSreports/10Jan/R40984.pdf>.

<sup>64</sup> For example, under the “prevention of significant deterioration” program for stationary sources, all new or modified stationary sources in an area of the country designated as in attainment with air quality standards must undergo “New Source Review”. Among other things, these sources must obtain pre-construction permits that require application of best available control technology for “each pollutant subject to regulation” under the CAA. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4). In addition, Title V of the CAA requires major stationary sources to undergo a permitting process that mandates reporting of emissions. *Id.* § 504, 42 U.S.C. § 7661c. Thus, thousands (and perhaps millions) of facilities that had never before been required to obtain a pre-construction permit and apply controls to GHG emissions under the PSD program, or obtain an operating permit under the Act’s Title V program, would now have to do so. See also Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program, 74 Fed. Reg. 51,535 (Oct. 7, 2009) (describing when a pollutant becomes “subject to regulation” and therefore subject to PSD permitting); 40 C.F.R. 52.21(b)(50). For a comprehensive discussion of the implications of this self-executing trigger see Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (Jun. 3, 2010) (to be codified at 40 CFR pt. 51, 52, 70, and 71) (projecting the number of sources expected to require permits under the PSD and Title V programs and proposing to tailor the program initially to the largest sources). The “tailoring rule” has been challenged in federal court. See *Coalition for Responsible Regulation v. EPA*, No. 10-1073 (D.C. Cir.).

<sup>65</sup> See Letter from Susan E. Dudley, Adm’r, Office of Info. & Regulatory Affairs, to Stephen L. Johnson, Adm’r, EPA (July 10, 2008), available at [http://www.reginfo.gov/public/postreview/OIRA\\_letter\\_to\\_EPA\\_7\\_10\\_08.pdf](http://www.reginfo.gov/public/postreview/OIRA_letter_to_EPA_7_10_08.pdf) (stating that the staff draft “cannot be considered Administration policy or representative of the views of the administration,” and concluding that, “trying to address greenhouse gas emissions through the existing provisions of the Clean Air Act will not only harm the U.S. economy, but will fail to provide an effective response to the global challenge of climate change.”).

<sup>66</sup> Jim Efstathiou Jr., *Obama to Declare Carbon Dioxide Dangerous Pollutant*, BLOOMBERG, Oct. 16, 2008, available at [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=A2RHlj\\_6hvV0](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=A2RHlj_6hvV0).

new motor vehicles and motor vehicle engines contribute to air pollution, and that the air pollution may reasonably be anticipated to endanger public health and welfare.<sup>67</sup>

### B. Three Regulators

Thus, as the Obama Administration came into office, the auto industry was facing at least two regulators, and probably three. And because of considerable potential for inconsistency in their respective approaches, the prospect of confusion and conflict was significant.

The agencies possessed substantial flexibility under their respective statutes. Under EPCA, NHTSA must set CAFE standards at the “maximum feasible level”<sup>68</sup> using a four-factor balancing test including economic practicability, technological feasibility, the effect of other government standards on fuel economy, and the need for energy conservation.<sup>69</sup> While Congress has specified the factors, it has left to NHTSA the discretion to weigh and balance them.<sup>70</sup>

EPA also enjoys ample latitude to set emissions standards for new motor vehicles under section 202(a) of the CAA,<sup>71</sup> balancing relevant factors, including technological feasibility, cost, adequacy of lead-time, and safety.<sup>72</sup> Congress has directed EPA to provide lead-time “necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance,” but has left this assessment to the Administrator’s discretion.<sup>73</sup> Because both EPA and NHTSA have such discretion to set their respective standards, coordination was necessary to avoid potentially discordant regulation.

For example, the two federal regulators might have adopted different levels of stringency using different standard-setting methodologies. Non-uniform stringency itself may not pose an insurmountable problem, since manufacturers conceivably could comply with both standards by meeting the most stringent.<sup>74</sup> Yet if the agencies used different approaches to setting

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<sup>67</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,496 (Dec. 15, 2009).

<sup>68</sup> 49 U.S.C.A. § 32902(a) (West 2011).

<sup>69</sup> *Id.* § 32902(f). EPCA requires NHTSA to establish “the maximum feasible average fuel-economy level that it decides manufacturers can achieve in that Model Year” by balancing these four factors. *See id.* § 32902(a).

<sup>70</sup> *See* *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1195–97 (9th Cir. 2008) (holding that EPCA permits, but does not require, the use of a marginal cost-benefit analysis and that NHTSA has discretion to decide how to balance the statutory factors as long as that balancing does not undermine the fundamental statutory purpose of energy conservation).

<sup>71</sup> *See* *NRDC v. EPA*, 655 F. 2d 318, 322, 328 (D.C. Cir. 1981) (affording wide discretion to balance the statutory factors subject to reasonableness).

<sup>72</sup> *See* *GHG Emission Standards*, *supra* note 2, at 25,404 (“In setting the standards, EPA is called upon to weigh and balance various factors, and to exercise judgment in setting standards that are a reasonable balance of the relevant factors.”).

<sup>73</sup> CAA § 202(a)(2), 42 U.S.C. § 7521(a)(2) (2006).

<sup>74</sup> Indeed, as noted earlier, EPA and NHTSA did not ultimately choose the identical level of stringency in the final rule.

those standards, it could significantly complicate compliance and raise costs for manufacturers.

To illustrate, there are a variety of ways to set fuel efficiency and emissions standards, including weight-based standards or standards based on other attributes of the vehicle. Under an attribute-based standard, every vehicle model has a performance target, measured by GHG emissions (gpm) or by fuel economy (mpg). This target is specific to a category of vehicles, as defined by a particular attribute.<sup>75</sup>

EISA amended EPCA and required that NHTSA create “attribute-based standards” for passenger vehicles.<sup>76</sup> The agency’s regulations require it to calculate these standards using a vehicle’s footprint, defined as a vehicle’s wheelbase multiplied by its track width — the area enclosed by the points at which the wheels meet the ground.<sup>77</sup> In this system, “no *specific* vehicle is required to meet a *specific* fuel economy; but the average fuel economy required will vary from manufacturer to manufacturer. Manufacturers that produce smaller trucks will face [numerically] higher CAFE requirements for those vehicles; those that produce larger trucks will face lower requirements for those vehicles.”<sup>78</sup> Thus, each manufacturer must meet a specific fleetwide standard (calculated based on the sales-weighted average of the targets applicable to each manufacturer), which reflects the vehicles it chooses to produce.<sup>79</sup> Because fleetwide fuel economy targets are based on vehicle size and projections about sales, whether the fleetwide target is met depends on what consumers actually buy. A manufacturer might meet the mpg targets for all of its vehicle models, but consumers may buy more of the larger models, making actual fleetwide mpg higher than anticipated.<sup>80</sup>

Prior to 2009, EPA had not yet indicated which method it would use to set standards for manufacturers’ fleets, and had employed different approaches in past rulemakings.<sup>81</sup> California’s GHG standards, meanwhile, had

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<sup>75</sup> *GHG Emission Standards*, *supra* note 2, at 25,333; see also Kenneth C. Johnson, *Circumventing the Weight-Versus-Footprint Tradeoffs in Vehicle Fuel Economy Regulation*, 15 *TRANSP. RES. PART D: TRANSPORT & ENVT.* 503, 503 (2010) (describing examples from around the world, including weight-based standards, which “tend to focus regulatory incentives on technology rather than downsizing,” and footprint-based standards, which “motivate vehicle manufacturers to reduce weight without reducing footprint”).

<sup>76</sup> Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011, 74 *Fed. Reg.* 14,196, 14,200 (Mar. 30, 2009).

<sup>77</sup> 49 C.F.R. § 523.2 (2009) (defining footprint). Using a footprint-based approach, each vehicle type receives its own target, with stringency decreasing as car size increases. When setting GHG emissions targets using this approach, each vehicle type would receive a different CO<sub>2</sub> emissions compliance target depending on its size. Generally, the larger the vehicle footprint, the numerically higher the corresponding vehicle CO<sub>2</sub> emissions target. The slope of the curve determines whether a reduction in footprint makes achieving a given target technically easier or harder.

<sup>78</sup> YACOBUCCI & BAMBERGER, *supra* note 17, at 8.

<sup>79</sup> *GHG Emission Standards*, *supra* note 2, at 25,330, 25,399.

<sup>80</sup> GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 14.

<sup>81</sup> EPA has used “flat” or “universal” standards and attribute-based standards in past rulemakings. See *GHG Emission Standards*, *supra* note 2, at 25,354.

been based on vehicle weight.<sup>82</sup> The auto industry had raised concerns that this approach — establishing one flat standard for all passenger cars and light trucks up to a certain weight, and another for trucks over that weight — would restrict consumer choice, and result in significant downsizing, leading to a “safety penalty,” among other problems.<sup>83</sup> Thus, whether EPA would follow California’s lead or NHTSA’s lead would be highly consequential.

Another concern was that the two agencies might rely on different models for estimating the cost and pace of technology innovation.<sup>84</sup> Since these estimates drive the agencies’ decisions about where to set the standards, they are crucially important.<sup>85</sup> NHTSA had historically relied on the so-called “Volpe” model to project costs and benefits,<sup>86</sup> while EPA had developed the

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<sup>82</sup> California had set different GHG emission fleet-average requirements for two different categories of vehicle, based on weight: the passenger car/light-duty truck 1 category (which includes all passenger cars regardless of weight and light-duty trucks weighing less than 3750 pounds) and the light-duty truck 2 category (for light trucks weighing between 3751 and 8500 pounds gross vehicle weight). See CAL. CODE REGS. tit. 13, § 1961(d) (2011) (adopted Aug. 5, 1999, as amended Aug. 4, 2005). A weight-based approach is thought to be less sensitive to fleet mix than a footprint-based approach. The footprint-based approach establishes different targets for individual vehicle models, based on the size of each vehicle, with smaller cars receiving stricter targets. Since every manufacturer has a different fleet mix, the result is that each manufacturer must meet a target tailored to what it sells. See Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454, 49,645 (Sept. 28, 2009). This is not the case with weight-based standards; under a weight-based system, manufacturers with a higher proportion of lighter (that is, typically smaller) cars will find it easier to comply. NHTSA has claimed that the footprint-based approach results in larger oil savings; better safety; more even allocation of the regulatory burden on manufacturers with relatively large cars as a high proportion of their fleet mix; and greater protection for consumer choice. See GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 12.

<sup>83</sup> Comments of the Alliance of Automobile Manufacturers on the Proposed Rulemaking to Adopt Regulations to Control Greenhouse Gas Emissions from Motor Vehicles at 30, 33 (Sept. 23, 2004), available at [http://www.heartland.org/custom/semод\\_policybot/pdf/16120.pdf](http://www.heartland.org/custom/semод_policybot/pdf/16120.pdf).

<sup>84</sup> The agencies use computer models to estimate the costs and benefits to manufacturers, consumers, and society of alternative standards of stringency. The models estimate the cost and effectiveness of technologies available to manufacturers, project how they might be adopted by manufacturers, and calculate cost and benefits of compliance with alternative levels of stringency using assumptions about various economic inputs such as the cost of fuel, the social cost of carbon, and the “rebound” effect. See *GHG Emission Standards*, *supra* note 2, at 25,329–30, 25,343–48.

<sup>85</sup> *Id.* at 25,329 (describing the joint technical work done by the agencies to reconcile inputs and assumptions for the “Volpe” and “Omega” models); see also GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 20–21 (noting structural differences between models).

<sup>86</sup> *CAFE Compliance and Effects Modeling System: The Volpe Model*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov/Laws+&+Regulations/CAFE+-+Fuel+Economy/CAFE+Compliance+and+Effects+Modeling+System:+The+Volpe+Model> (last visited May 10, 2011). The Volpe model relies on a number of assumptions and data inputs including forecasts about the baseline U.S. vehicle fleet and expected sales, the estimated costs to manufacturers and relative effectiveness of applying different fuel-saving technologies, and the likely sequence of technology adoption, as well as economic inputs such as the social cost of carbon and cost of fuel. It then simulates how a manufacturer could apply technologies to each vehicle model in its fleet in order to cost-effectively comply with alternative fuel economy standards. The Volpe model calculates the impact of these technology improvements on air pollutants (including GHGs), energy consumption, and new vehicle cost, among other fac-

OMEGA model, which made different assumptions about manufacturer cost and technology improvements.<sup>87</sup> To illustrate, NHTSA's Volpe model had no means of accounting for some of the steps manufacturers might take to reduce compliance costs (such as air conditioning improvements) whereas EPA's OMEGA model could.<sup>88</sup> Further, NHTSA and EPA originally did not agree on how to account for the fact that manufacturers engage in multi-year product planning and carry over technologies across Model Years.<sup>89</sup>

These different methodologies, combined with different economic assumptions, might have produced conflicting projections both about the likely manufacturer response to the standards and the costs and benefits of the standards for the manufacturers, consumers, and society. Any discrepancy between the agencies on such fundamental matters would be likely to provoke a reaction in Congress and among key stakeholders, potentially inflaming an already volatile situation. In addition, a lack of consistency between the agencies likely would have created problems internally, during regulatory review, at the stage when they must satisfy the Office of Information and Regulatory Affairs ("OIRA") that their rules are cost justified.<sup>90</sup>

Had the agencies set standards independently, they might also have designed quite different, and potentially inconsistent, substantive regulatory programs. Again, this stems in large part from their different statutory authorities. For example, the CAA offers EPA the ability to provide certain compliance flexibilities to manufacturers to reduce the overall cost of compliance. These consist primarily of a variety of credits — for things like air conditioning improvements — which can be banked, borrowed, and traded on an unlimited basis.<sup>91</sup> By contrast, the EISA places certain limitations on credit trading in the CAFE program, and prohibits NHTSA from considering air conditioning improvements when setting and enforcing CAFE standards.<sup>92</sup>

Acting independently, the agencies might also have produced discordant enforcement schemes. For example, whereas EPCA explicitly allows manufacturers to pay fines for non-compliance,<sup>93</sup> the CAA does not author-

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tors, which allows a comparison of the alternative fuel economy standards over the initial baseline. See GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 50–54.

<sup>87</sup> ASSESSMENT AND STANDARDS DIV., EPA, EPA-420-B-09-035, EPA OPTIMIZATION MODEL FOR REDUCING EMISSIONS OF GREENHOUSE GASES FROM AUTOMOBILES (OMEGA) 1–2 (2009) (describing factors relevant to the OMEGA model).

<sup>88</sup> See GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 16.

<sup>89</sup> *Id.* at 21.

<sup>90</sup> OIRA is empowered to conduct this review pursuant to Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended* in 5 U.S.C. § 601 app. at 83–87 (2006). Agencies must assess the costs and benefits of intended regulations, see *id.* § 1(b)(6), 3 C.F.R. at 639, and produce a detailed cost-benefit analysis justifying all economically significant rules, see *id.* § 6(a)(3)(C), 3 C.F.R. at 645.

<sup>91</sup> *GHG Emission Standards*, *supra* note 2, at 25,338–42 (describing variety of program flexibilities and relevant legal authorities, including credits for air conditioning improvements and flex-fuel and alternative vehicles and a temporary lead-time allowance for small volume manufacturers of high fuel economy vehicles).

<sup>92</sup> See GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 16.

<sup>93</sup> EPCA § 525, 42 U.S.C. § 6395 (2006).

ize manufacturers to pay fines as an intentional compliance strategy.<sup>94</sup> This raised an important issue for the European manufacturers in particular, since small volume manufacturers of high performance vehicles (for example, Mercedes, BMW, Jaguar, and Porsche), had historically paid fines in lieu of complying with CAFE standards.<sup>95</sup>

Other differences relating to timing rather than substance would also require alignment to avoid potential discrepancies. For example, whereas NHTSA may set CAFE standards only for five-year periods,<sup>96</sup> EPA faces no such constraint.<sup>97</sup> Additionally, EPCA requires NHTSA to provide at least eighteen months of lead-time for a new CAFE standard,<sup>98</sup> while there is no prescribed lead-time requirement in the CAA.<sup>99</sup>

Perhaps equally important and challenging to navigate, the two federal agencies have different missions and cultures. EPA's core mission is environmental and public health protection, whereas NHTSA must balance its vehicle energy conservation mandate with its duty to ensure auto safety.<sup>100</sup>

<sup>94</sup> *GHG Emission Standards*, *supra* note 2, at 25,342–43.

<sup>95</sup> GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 17; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, VEHICLE FUEL ECONOMY: REFORMING FUEL ECONOMY STANDARDS COULD HELP REDUCE OIL CONSUMPTION BY CARS AND LIGHT TRUCKS, AND OTHER OPTIONS COULD COMPLEMENT THESE STANDARDS 9–10 (2007) (listing CAFE penalties paid by European automobile manufacturers in lieu of compliance). Other aspects of the agencies' respective enforcement authorities also required harmonization. The CAA prohibits the sale of vehicles without a certificate of conformity indicating that the vehicle meets emission standards. EPA can prevent manufacturers from selling vehicles by declining to issue the certificate, and can recall non-compliant vehicles. CAA § 203(a)(1), 42 USC § 7522(a)(1) (2006). NHTSA may only levy fines, which are calculated not per vehicle, but on the basis of a manufacturer's entire non-complying fleet. *GHG Emission Standards*, *supra* note 2, at 25,341–42. Fines alone have been criticized as too low to incentivize compliance. GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 17.

<sup>96</sup> 49 U.S.C.A. § 32902(b)(3)(B) (West 2011).

<sup>97</sup> CAA § 202(a)(2), 42 U.S.C. § 7521(a)(2).

<sup>98</sup> 49 U.S.C.A. § 32902(g)(2).

<sup>99</sup> The Administrator is authorized to determine the lead-time "necessary to permit the development . . . of the requisite technology giving appropriate consideration to the cost of compliance within such period." CAA § 202(a)(2), 42 U.S.C. § 7521(a)(2).

<sup>100</sup> EPA was created in 1970 by executive order to "ensure the protection, development and enhancement of the total environment" by "rationally and systematically" organizing federal "environmentally-related activities." Reorganization Plan No. 3, *reprinted as amended in* 42 U.S.C.A. § 4321 note (West 2006) (including, in annotations, President Nixon's original reorganization plan). Congress subsequently passed the CAA in 1970, Clean Water Act of 1972, and other environmental legislation mandating that the agency set and implement public health and environmental standards. *See generally* RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW 67–97* (2004). NHTSA was founded in 1970 to implement substantive provisions of the Highway Safety Act of 1966. *See* Highway Safety Act of 1970, Pub. L. No. 91-605, § 202(a), 84 Stat. 1739 (codified at 49 U.S.C. § 105 (2006)); Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (codified as amended in scattered sections of 23 U.S.C.); About NHTSA, NHTSA, U.S. DEP'T OF TRANSP., <http://www.nhtsa.gov/About> (last visited Apr. 19, 2011). NHTSA's mission statement says that its main focus is "to save lives, prevent injuries and reduce traffic-related health care and other economic costs." 2020 Report, NHTSA, U.S. DEP'T OF TRANSP., <http://www.nhtsa.gov/nhtsa/whatis/planning/2020Report/2020report.html> (last visited Apr. 19, 2011). "[T]he agency's primary mission and expertise is in vehicle safety . . ." GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 24.

The two agencies traditionally have pursued their missions independently and operated at arms' length. Although EPA has always played a role in the CAFE program, that role has been limited to compliance testing,<sup>101</sup> and reviewing NHTSA's environmental impact statements.<sup>102</sup> The agencies had collaborated to a greater extent for the Model Year 2011 CAFE proposal,<sup>103</sup> yet this interaction fell well short of producing a rule together.<sup>104</sup>

Beyond the two federal agencies, of course, lay California and the so-called section 177 states that had adopted its GHG standards. As noted earlier, CARB had used a weight-based approach,<sup>105</sup> and had set targets that were more stringent than CAFE standards.<sup>106</sup> Whether and how these standards could work together with a new national CAFE standard, and a first-time federal GHG standard, remained to be seen.

Thus, under the circumstances, there was a significant likelihood that the regulators, acting independently, would produce inconsistent standards with different levels of stringency, along with duplicative or confusing compliance programs and incompatible enforcement policies, which could raise the costs to industry, and compromise the potential benefits of the new standards for consumers and the public. At the same time, the auto industry was pressing forward in the courts, appealing the preemption decisions it had lost, and hoping, ultimately, to block California's GHG program.<sup>107</sup> Years of conflict lay ahead. The situation cried out for coordination.

### C. *The EPA-NHTSA Joint Rulemaking*

The procedural format of joint rulemaking provided a means of overcoming these potential program discrepancies. In order to comply with the

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<sup>101</sup> See EPCA, Pub. L. No. 94-163, sec. 301, § 503(d), 89 Stat. 871, 871 (1975). EPCA requires NHTSA to use EPA testing and calculation procedures to measure fuel economy for each manufacturer for each Model Year, which is based on data supplied by the manufacturers including sales volume for different vehicle classes. Based on EPA's calculations, NHTSA determines whether each manufacturer is in compliance with requirements for that Model Year. GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 3 n.2.

<sup>102</sup> GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 19–20.

<sup>103</sup> *Id.* at 23. The additional interaction was the result of EISA, which required NHTSA to consult with EPA beginning with the Model Year 2011 standard. *See id.* at 25. In addition, soon after taking office, President Obama had directed NHTSA and the Secretary of Transportation to finalize the 2011 standard by March 2009 in order meet the statutory deadline for providing adequate lead-time. Memorandum from President Barack Obama to the Sec'y of Transp. and the Adm'r of the NHTSA (Jan. 26, 2009).

<sup>104</sup> GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 20.

<sup>105</sup> CARB, COMPARISON OF GREENHOUSE GAS REDUCTIONS FOR THE UNITED STATES AND CANADA UNDER U.S. CAFE STANDARDS AND CALIFORNIA AIR RESOURCES BOARD GREENHOUSE GAS REGULATIONS: AN ENHANCED TECHNICAL ASSISTANCE 24–25 (2008), available at [http://www.arb.ca.gov/cc/ccms/reports/pavleycafe\\_reportfeb25\\_08.pdf](http://www.arb.ca.gov/cc/ccms/reports/pavleycafe_reportfeb25_08.pdf).

<sup>106</sup> *See id.* at vi–v (concluding CARB standards more stringent than CAFE when modeled out to 2020).

<sup>107</sup> *See, e.g.*, Cent. Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), *aff'd on reh'g*, 563 F. Supp. 2d 1158 (E.D. Cal. 2008); Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007), *appeal filed*, No. 07-4342, -4360 (2d Cir.).

requirements of their respective statutes, NHTSA and EPA chose to set separate fuel efficiency and GHG standards, but agreed to align their standards so that manufacturers could build a single fleet of vehicles to comply with both. The agencies expected that the same technology improvements would help manufacturers satisfy both standards simultaneously. This is because improvements in fuel economy, which reduce the amount of fuel burned, directly reduce GHG emissions from the vehicle.<sup>108</sup> In theory, the agencies could have done this by issuing compatible rules without going through the time-consuming and intensive process of joint promulgation. Yet in practice, working through the details together made the prospect of successful harmonization much more likely. Better integration of their approaches not only would reduce transaction costs and overall compliance costs for the auto industry, but it might also produce a more robust, defensible, and manageable program for the agencies.

Among its most important effects, the joint rulemaking allowed EPA and NHTSA to move beyond their traditional arms-length relationship. According to a Government Accountability Office (“GAO”) report reviewing the process, the agencies worked much more closely together than ever before, sharing responsibility for the rule from preamble to conclusion.<sup>109</sup>

As evidence of this close cooperation, the report notes that staff from both agencies met regularly and “collaborated on major tasks.”<sup>110</sup> They formed joint technical teams, whose work is reflected in the comprehensive joint Technical Support Document that describes the harmonization of their standard-setting methodologies and models.<sup>111</sup> As a result of this close cooperation, the GAO concluded that, “each agency had significant input into the development of both sets of standards.”<sup>112</sup>

This joint rulemaking process had several important benefits. It led the agencies to pool resources and expertise. According to the GAO, EPA contributed a greater share of research and funding.<sup>113</sup> This helped to compensate for a resource deficit at NHTSA created by the six-year congressional moratorium on NHTSA using appropriated funds to improve CAFE standards, and the resulting attrition in staff.<sup>114</sup> EPA also had established a well-regarded vehicle emissions lab to test and develop emissions-reducing tech-

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<sup>108</sup> See *GHG Emission Standards*, *supra* note 2, at 25,327–29 (noting that harmonizing the agencies’ approaches would allow a single national fleet to meet both (and with California’s cooperation, all three) sets of standards, “greatly simplifying the industry’s technology, investment and compliance strategies.”).

<sup>109</sup> See generally GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 19–20.

<sup>110</sup> *Id.* at 19 (noting in addition that “[o]fficials of both agencies told us that staff from both agencies met on a regular basis, often daily, to coordinate their efforts throughout the rulemaking process”).

<sup>111</sup> See generally EPA, & U.S. DEP’T OF TRANSP., FINAL RULEMAKING TO ESTABLISH LIGHT-DUTY VEHICLE GREENHOUSE GAS EMISSION STANDARDS AND CORPORATE AVERAGE FUEL ECONOMY STANDARDS: JOINT TECHNICAL SUPPORT DOCUMENT (2010), available at <http://www.epa.gov/oms/climate/regulations/420r10901.pdf>.

<sup>112</sup> GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 19.

<sup>113</sup> *Id.* at 21–24.

<sup>114</sup> *Id.* at 23.

nologies, and had in recent years invested millions of dollars in related research.<sup>115</sup>

The sharing of resources and expertise resulted in some important updates to NHTSA's model, which enabled the agency to convey more accurately and completely the costs and benefits of improved fuel economy. NHTSA revised its estimates of both the cost and effectiveness of a number of fuel-saving technologies after reviewing new studies, including work EPA had procured from independent consultants and EPA's own technical analysis.<sup>116</sup> In addition, EPA had collected new information about the indirect costs to manufacturers of adding new technology, which enabled both agencies to use more accurate estimates of indirect costs.<sup>117</sup> All of these inputs are consequential because they help to drive the cost estimates, which are a critical consideration for both agencies in determining where to set the standards.<sup>118</sup>

In addition, sustained engagement during rule development undoubtedly broadened the perspectives of agency staff, exposing NHTSA officials to EPA's views about the environmental and energy security implications of the CAFE program, and the need for emissions reduction strategies in light of the pressing problem of global climate change,<sup>119</sup> and requiring EPA in turn to respond to NHTSA's pronounced concerns about the potential safety implications of different strategies for tightening standards.<sup>120</sup> There is strong evidence that the agencies also learned from each other.<sup>121</sup> It seems likely that over the course of the rulemaking process, to bridge their cultural differences and fulfill their respective missions, each agency had to compromise on at least some matters some of the time.

The joint rulemaking also provided a forum for designing workable program elements and resolving important legal questions. As noted above,

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<sup>115</sup> See *id.* at 23–24. Since 1971, EPA has housed the National Vehicle and Fuel Emissions Laboratory, which conducts research on emissions-reducing technologies. *Id.* NHTSA's relative strength lay in vehicle safety, not emissions reducing (and fuel efficient) technologies. *Id.* at 24.

<sup>116</sup> *Id.* at 30–31.

<sup>117</sup> *Id.* at 32.

<sup>118</sup> See 49 U.S.C.A. § 32902(f) (West 2011).

<sup>119</sup> GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 19–20.

<sup>120</sup> NHTSA's safety analysis relied on a study by Charles Kahane suggesting that stricter CAFE standards would lead to downsizing, which would have negative safety implications. See CHARLES J. KAHANE, DEP'T OF TRANSP., VEHICLE WEIGHT, FATALITY RISK AND CRASH COMPATIBILITY OF MODEL YEAR 1991–99 PASSENGER CARS AND LIGHT TRUCKS, vii (2003). NHTSA's reliance on the study has been criticized by some experts as potentially overestimating safety risks because the Kahane study used crash statistics from cars that lacked the latest safety technology and did not consider materials substitution as an alternative compliance strategy. See GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 36–38 (noting controversy over NHTSA's reliance on the Kahane study). For the agencies' joint discussion of "contentious" safety issues, see *GHG Emission Standards*, *supra* note 2, at 25,382–95 (discussing NHTSA's use of Kahane study, EPA's support of an alternative study by Dynamic Research Inc., and concluding that the agencies believe safety effects will be lower than anticipated).

<sup>121</sup> See GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 23–24 (describing the respective expertise of the agencies).

Congress had barred NHTSA from considering the availability of certain kinds of technological improvements when setting fuel efficiency standards while allowing EPA to consider the very same improvements,<sup>122</sup> leading EPA alone to provide certain credits. To resolve the discrepancy between EPCA and the CAA on whether manufacturers could pay fines in lieu of compliance, the agencies proposed an alternative compliance path for small volume manufacturers.<sup>123</sup> By harmonizing their credit trading systems (e.g., allowing the same number of years for carrying credits forward and back)<sup>124</sup> and taking advantage of the additional flexibilities provided by the CAA (e.g., unlimited credit trading), the agencies were able to provide a set of flexibilities that would improve the overall cost-effectiveness of the program.<sup>125</sup> And by coordinating their compliance programs to the extent possible (e.g., requiring a single set of reporting requirements and using the same testing procedures), and specifying their expectations about how penalties would be administered and reconciled, the agencies created a simplified, uniform compliance program.<sup>126</sup>

The joint rulemaking also required the agencies to grapple with the unique limitations and authorities provided by their respective statutes. Although, as noted above, both agencies enjoy considerable flexibility to balance factors when setting standards, the joint rulemaking provided an opportunity to align those approaches, and required the agencies to address certain interpretive questions. For example, when setting standards for light trucks in 2007, NHTSA had used marginal cost-benefit analysis to determine levels of stringency.<sup>127</sup> Historically, NHTSA had taken the view that the statutory “maximum feasible” analysis required only the consideration of cost as one among other factors, but did not mandate marginal cost analysis as a decision rule.<sup>128</sup> Whether the agency would revert to this historical practice or not could make a difference — the agencies might find it more difficult to harmonize standards if NHTSA used marginal cost analysis, while EPA merely considered cost as one among many factors. This problem never materialized, however, because NHTSA returned to its long-held view.<sup>129</sup>

It is plausible if not likely that the joint rulemaking process ultimately strengthened the agencies’ positions on these and other matters, compared to what might have happened had they developed their positions indepen-

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<sup>122</sup> *Id.* at 15–16.

<sup>123</sup> Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454, 49,483 (Sept. 28, 2009) (describing “Temporary Lead-Time Allowance Standards”).

<sup>124</sup> EPA adopted NHTSA’s three year carry-back and five year carry-forward limitation on banking. See *GHG Emission Standards*, *supra* note 2, at 25,339.

<sup>125</sup> *Id.* at 25,338–41.

<sup>126</sup> See *id.* at 25,341–42.

<sup>127</sup> See *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d 508, 530 (9th Cir. 2008) (upholding NHTSA’s discretion under EPCA to use marginal cost analysis to set fuel efficiency standards).

<sup>128</sup> *Id.* at 529–30.

<sup>129</sup> See *GHG Emission Standards*, *supra* note 2, at 25,557.

dently. Joint rulemaking provided a forum for the agencies to engage with each other early, directly, and continuously. It bound them together in the production of the rule, enabling closer coordination than would have occurred otherwise. In a typical rulemaking, agencies are far along in the rule development process before they receive formal input from other agencies through OIRA-led regulatory review.<sup>130</sup> At this relatively late stage, when an agency is already deeply invested in its product, and statutory or court deadlines loom, it can be quite difficult to make substantive changes to a complicated rule. As former OIRA Director John Graham has noted, efforts to make substantial revisions once a rule is proposed are likely to “make waves and bruise egos, which means that they will be resisted, sometimes fiercely and effectively.”<sup>131</sup>

Nevertheless, OIRA regulatory review is rigorous,<sup>132</sup> and it can benefit agencies that share regulatory authority over closely related matters to align their postures before submitting proposed rules. The agencies’ effort here — to harmonize the technical and economic inputs of their models using the latest research, and carefully design a program that would fulfill both of their statutory mandates — was likely helpful for undergoing OIRA review.

A unified approach presumably also helped the administration persuade California that the federal policy would be sufficiently robust and that the state should agree to support it. This was of course essential. To achieve a truly national program, the administration would either need the explicit support of California (in the form of an agreement not to implement a separate program) or EPA would have to deny the state’s preemption waiver request — an awkward prospect, since the agency had already agreed, at the direction of the President, to reconsider the Bush administration’s denial.

The rulemaking record also suggests that the two agencies engaged in considerable consultation and exchange of information with the auto manufacturers.<sup>133</sup> Of course, a certain amount of interaction between the regulator and regulated entities is typical in any rulemaking, but the agencies here

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<sup>130</sup> See CURTIS W. COPELAND, CONG. RESEARCH SERV., R 40713, THE UNIFIED AGENDA: IMPLICATIONS FOR RULEMAKING TRANSPARENCY AND PARTICIPATION 4–6 (2009), available at <http://www.fas.org/sgp/crs/secretary/R40713.pdf> (noting that many important decisions are made while proposed rules are under development at the agencies prior to submitting them to OIRA, and that agencies are reluctant to make fundamental changes to those rules after the notice of proposed rulemakings are published).

<sup>131</sup> *Id.* at 5.

<sup>132</sup> Agencies must produce an elaborate regulatory impact analysis for all “significant” rules, which includes a complete accounting of costs and benefits and analyses of alternatives, even those that are statutorily precluded. Office of Management and Budget (“OMB”) Circular A-4, stipulates requirements for agency cost-benefit analyses, and specifies appropriate methodologies. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR No. A-4 (Sept. 17, 2003), available at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf>.

<sup>133</sup> The various compliance flexibilities appear to be designed with the needs of the industry in mind, which presumably required familiarity with industry product planning. See *GHG Emission Standards*, *supra* note 2, at 25,331–32. The agencies also used confidential manufacturer estimates of the effectiveness of various technologies when setting the standards. *Id.* at 25,376.

clearly had engaged in substantial outreach to the auto industry. There is no better evidence of this than the letters of commitment signed by each manufacturer showing that the companies — foreign and domestic, large and small alike — were comfortable enough to agree *in advance* not to challenge final rules they had yet to see, providing those rules turned out to be “as substantially proposed” in the NOI.<sup>134</sup> And while the final rules ultimately were challenged by business groups,<sup>135</sup> the auto manufacturers and their trade associations (remarkably, given the history of acrimony over such standards) intervened in the lawsuit on the side of the government.<sup>136</sup>

Thus, agreeing to proceed jointly enabled the two federal agencies to present a united front both internally to the rest of the Administration, and externally, to a variety of crucial stakeholders: California and the section 177 states; the auto industry; members of Congress (who would surely be interested in a new rule strengthening CAFE standards and proposing to regulate GHGs); other interested parties such as the United Auto Workers;<sup>137</sup> and environmental groups.<sup>138</sup> In addition, the deeply consultative and deliberative process allowed for development of a strong record in anticipation of review by the courts.

Moreover, although the process was clearly labor intensive, the agencies produced the rule in under a year,<sup>139</sup> meeting NHTSA’s statutory eighteen-month lead-time requirement for new CAFE standards.<sup>140</sup> Indeed, the process took less time than other recent CAFE rulemakings.<sup>141</sup> Given the complexity of the issues and the enormity of the task, the rulemaking seems remarkably efficient.

Finally, the joint effort set an important precedent for future coordination. In a Rose Garden ceremony one year later, the President announced a similar historic agreement, involving different industry players, to set fuel

<sup>134</sup> See, e.g., Letter from Dave McCurdy, President & CEO, Alliance of Auto. Mfrs., to Ray LaHood, Sec’y, Dep’t. of Transp., and Lisa Jackson, Adm’r, EPA (May 18, 2009), *available at* <http://www.epa.gov/oms/climate/regulations/alliance-of-automobile.pdf>.

<sup>135</sup> Petition for Review, Nat’l Ass’n of Mfrs. v. EPA, No. 10-1044 (D.C. Cir. Feb. 16, 2010) *available at* <http://lawcenter.nam.org/Results.aspx?P=national%20Association%20of%20Manufacturers&Y=active>.

<sup>136</sup> See Motion of Alliance of Automobile Manufacturers for Leave to Intervene at 8, Coal. for Responsible Regulation v. EPA, No. 10-1092 (D.C. Cir. June 7, 2010).

<sup>137</sup> United Auto Workers President Ron Gettlefinger appeared at the side of the President along with other key stakeholders at the May 19, 2009, announcement of the new policy. See President Barack Obama, Remarks by the President on National Fuel Efficiency Standards (May 19, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-on-national-fuel-efficiency-standards](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-national-fuel-efficiency-standards).

<sup>138</sup> Environmental groups like the Natural Resources Defense Council supported the new national policy enthusiastically. See, e.g., David Doniger, *Clean Car Peace Treaty at White House*, SWITCHBOARD: NRDC STAFF BLOG (May 19, 2009), [http://switchboard.nrdc.org/blogs/ddoniger/clean\\_car\\_peace\\_treaty\\_at\\_whit.html](http://switchboard.nrdc.org/blogs/ddoniger/clean_car_peace_treaty_at_whit.html).

<sup>139</sup> GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 24 (noting that the agencies hit all of the key milestones for publishing and taking comment on the rule).

<sup>140</sup> 49 U.S.C.A. § 32902(g)(2) (West 2011).

<sup>141</sup> GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 24 (noting that other recent NHTSA rulemakings were reported to have taken fourteen months).

efficiency and GHG standards for medium and heavy-duty trucks.<sup>142</sup> With the support of the auto industry, the President also directed NHTSA and EPA to begin work on a post-2017 strategy for cars and trucks modeled on the 2012–2016 process.<sup>143</sup>

## II. IMPLICATIONS OF THE CAR DEAL

The national auto policy ended, or at least imposed a truce on, a thirty-year battle over fuel efficiency standards that had played out in Congress and the courts.<sup>144</sup> The new policy benefited the auto industry by harmonizing a patchwork of potentially inconsistent regulations,<sup>145</sup> and removing, at least through 2016, the threat that California would implement its own separate and more stringent standards.<sup>146</sup> The new policy thus responded to the auto industry's wish for regulatory clarity, certainty, and uniformity, which it had long sought from Congress and the courts.<sup>147</sup>

The rule satisfied California (and the states that had adopted California's standards) because a national GHG standard increasing at an annual rate of 4 to 5% likely would achieve greater cumulative reductions than a two-standard system, with then-proposed NHTSA standards applying nationally and the stricter California standard applying to approximately 40% of the nation's auto market.<sup>148</sup>

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<sup>142</sup> President Barack Obama, Remarks at the Signing of Presidential Memorandum on Fuel Efficiency Standards (May 21, 2010), AVAILABLE AT <http://www.whitehouse.gov/the-press-office/remarks-president-signing-presidential-memorandum-fuel-efficiency-standards>.

<sup>143</sup> See President Barack Obama, Improving Energy Security, American Competitiveness and Job Creation, and Environmental Protection Through a Transformation of Our Nation's Fleet of Cars And Trucks, 75 Fed. Reg. 29,399 (May 21, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-fuel-efficiency-standards>. This effort has the support of the auto manufacturers. See, e.g., Letter from the Alliance of Auto. Mfrs. to Lisa Jackson, Adm'r, EPA, and Ray LaHood, Sec'y, U.S. Dep't. of Transp., *supra* note 11 (committing to work with the federal agencies and California to continue the program post-2016). See John M. Broder, *Carmakers and White House Haggling Over Mileage Rules*, N.Y. TIMES, July 3, 2011, <http://www.nytimes.com/2011/07/04/business/energy-environment/04mileage.html>.

<sup>144</sup> SPERLING & GORDON, *supra* note 39, at 47.

<sup>145</sup> For an auto industry perspective on the state-federal overlap, see NAT'L AUTO DEALERS ASS'N, PATCHWORK PROVEN: WHY A SINGLE NATIONAL FUEL ECONOMY STANDARD IS BETTER FOR AMERICA THAN A PATCHWORK OF STATE REGULATION (2009), available at <http://www.nada.org/NR/rdonlyres/DBCC625E-2E8E-4291-8B23-B94C92AFF7C4/0/patchwork-proven.pdf>.

<sup>146</sup> CAL. CODE REGS. tit. 13, § 1961(d) (2011) (adopted Aug. 5, 1999, as amended Aug. 4, 2005).

<sup>147</sup> SPERLING & GORDON, *supra* note 39, at 192–93.

<sup>148</sup> *GHG Emission Standards*, *supra* note 2, at 25,327 (noting that since 2004, thirteen states and the District of Columbia had adopted California's standards, representing approximately 40% of the auto market). The ultimate cumulative impact on GHG emissions of this program and the then-existing national CAFE program was difficult to predict. See Lawrence H. Goulder, Mark R. Jacobsen & Arthur A. van Benthem, *Unintended Consequences from Nested State & Federal Regulations: The Case of the Pavley Greenhouse-Gas-per-Mile Limits* (Nat'l Bureau of Econ. Research, Working Paper No. 15377, 2009) (modeling interaction of the two standards and showing potential for up to 100% leakage of GHG emissions from states

Still, operationalizing the agreement would be more complicated than simply promulgating a joint federal rule. How would California formalize its commitment? In this regard, the national policy was rather ingenious: without legally preempting California from setting separate standards, the policy required the state to amend its regulations to treat compliance with the new federal standards as equivalent to compliance with its own program. This effectively achieved federal preemption through 2016 but without depriving California of its unique CAA authority to set more stringent standards in the future (subject of course to a new federal waiver).<sup>149</sup>

California also agreed to modify aspects of its program governing 2009–2011 before the new federal rule would take effect to facilitate the agreement.<sup>150</sup> And for their part, as noted above, the auto companies consented to drop all the pending litigation challenging California's legal authority to set GHG standards, and pledged not to challenge a federal preemption waiver through 2016, if EPA were to grant it.<sup>151</sup> All of this accomplished at least temporary mutual disarmament.

#### A. *The Obama Administration*

The Obama Administration itself stood to gain considerably from the agreement, both domestically and internationally. The policy coincided with the Administration's financial bailout of two domestic auto manufacturers: Chrysler and General Motors. After accepting billions of dollars of public investment from taxpayers, the Administration could say, the domestic auto industry not only would survive, but would also start down a path of making cleaner cars.<sup>152</sup>

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adopting Pavley standards to non-adopting states, the likely substitution of used for new cars, and the potential positive spillover of new technology). CARB had concluded that nationwide adoption of the Pavley standards would produce significantly greater emission reductions by 2020 than would CAFE standards that had been proposed by the Bush Administration. See CARB, *supra* note 105, at 23 fig.5. The final rule estimates that combined EPA-NHTSA standards will "reduce GHG emissions from the U.S. light duty fleet by approximately [twenty-one] percent by 2030 over the level that would occur in the absence of the National Program." *GHG Emission Standards*, *supra* note 2, at 25,328.

<sup>149</sup> See Letter from Mary D. Nichols, Chairman, CARB, to Lisa Jackson, Adm'r, EPA, and Ray LaHood, Sec'y, U.S. Dep't. of Transp., *supra* note 9, at 1.

<sup>150</sup> *Id.* at 2.

<sup>151</sup> See *Transportation and Climate, Regulations and Standards*, EPA, <http://www.epa.gov/oms/climate/regulations.htm> (last visited May 10, 2011) (describing a "new generation of clean vehicles" and linking to commitment letters of industry parties).

<sup>152</sup> In February 2009, the President established an "auto task force," led by Treasury Secretary Timothy Geithner and National Economic Advisor Larry Summers, to develop a plan for addressing the financial crisis in the domestic auto industry. See Kenneth R. Bazinet, *President Obama to Unveil Task Force to Give Boost to Auto Industry*, N.Y. DAILY NEWS, Feb. 16, 2009, available at [http://articles.nydailynews.com/2009-02-16/news/17916237\\_1\\_auto-industry-white-house-general-motors-and-chrysler](http://articles.nydailynews.com/2009-02-16/news/17916237_1_auto-industry-white-house-general-motors-and-chrysler). The federal government loaned and ultimately invested billions of dollars in Chrysler and General Motors and oversaw their financial restructuring. See President Barack Obama, Remarks by the President on the American Automotive Industry (Mar. 30, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-on-the-American-Automotive-Industry-3/30/09](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-the-American-Automotive-Industry-3/30/09); see also EXEC.

The announcement also demonstrated strong executive leadership in reducing GHGs and cutting oil consumption at a time when the prospects of Congress passing a comprehensive new energy and climate bill were still uncertain.<sup>153</sup> This helped to advance the Administration's energy and climate change agenda by demonstrating that the President was prepared to use his executive power rather than wait for Congress to act. Internationally, moving forward with EPA regulation would help to establish the U.S.'s bona fides on tackling climate change heading into the United Nations Climate Change Conference in Copenhagen later that year.<sup>154</sup> By the time of the Copenhagen meeting, the House of Representatives had passed the American Clean Energy and Security Act,<sup>155</sup> but the Senate had not yet acted on a bill. Thus, the U.S. government could point to the new auto standards as the first binding federal regulation of GHGs in U.S. history, which represented a marked departure from the policies of the prior Administration.

### B. Environmental Law

From an environmental law perspective, the car deal seems undeniably important. The transportation sector is responsible for approximately 30% of GHG emissions,<sup>156</sup> and joint EPA-NHTSA regulation of new vehicles will make significant progress in reducing those emissions over time, as the national fleet turns over.<sup>157</sup>

Granted, the 2012–2016 standards are only a first step. The agencies' analysis shows that the auto industry will largely meet the new requirements using existing technologies that make the internal combustion engine more

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OFFICE OF THE PRESIDENT, A LOOK BACK AT GM, CHRYSLER AND THE AMERICAN AUTO INDUSTRY (2010), available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/one\\_year\\_later\\_autos\\_report.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/one_year_later_autos_report.pdf); *What's Next for Obama's Auto Task Force?*, ASSOCIATED PRESS, July 15, 2009, available at <http://www.msnbc.msn.com/id/31927359/ns/business-autos/t/whats-next-obamas-auto-task-force>. That the domestic auto industry's financial difficulties would help to produce an agreement on regulatory standards was by no means a foregone conclusion. The companies might have argued successfully that the additional cost of meeting stringent new standards was too great a burden at a time of economic recovery and pressed, at a minimum, for delay. Moreover, the companies were differently situated. Ford had not received a government bailout.

<sup>153</sup> The American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (as passed by House, Jun. 26, 2009), had not yet passed the House when the President announced the new auto standards. See President Barack Obama, Remarks by the President on National Fuel Efficiency Standards, *supra* note 137.

<sup>154</sup> COP15, MINISTRY OF FOREIGN AFFAIRS, DENMARK, <http://www.denmark.dk/en/menu/Climate-Energy/COP15-Copenhagen-2009/cop15.htm> (last visited Apr. 19, 2011). The Copenhagen meeting was the Fifteenth Conference of the Parties to the United Nations Framework Convention on Climate Change, *opened for signature* May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 164.

<sup>155</sup> H.R. 2454, 111th Cong. (2009).

<sup>156</sup> EPA, *supra* note 29.

<sup>157</sup> The program is estimated to reduce GHG emissions by over 960 million metric tons and save 1.8 billion barrels of oil. Press Release, EPA, EPA and NHTSA Finalize Historic National Program to Reduce Greenhouse Gases and Improve Fuel Economy for Cars and Trucks (Apr. 5, 2010), available at <http://www.epa.gov/oms/climate/regulations/420f10014.pdf>.

efficient, and anticipates only initial commercialization of plug-in hybrid and electric vehicles.<sup>158</sup> Yet this first step is a crucial foundation for the future. The relatively high annual rate of increased stringency provides a strong signal that more technology forcing is to come.<sup>159</sup> Moreover, in their Commitment Letters, the parties expressed a desire to continue a similar process beyond 2016, anticipating even more stringent federal standards in exchange for uniformity, clarity, and flexibility.<sup>160</sup>

Even in the short term, the agreement had positive spillover effects. Within months, the Administration used the joint rule as a blueprint for negotiating a similar set of standards for medium and heavy-duty trucks, increasing fuel efficiency and reducing GHG emissions for an even greater share of the transport sector.<sup>161</sup>

The car deal also announced the arrival of EPA as an equal partner in regulating the efficiency of the nation's cars and trucks. The joint rulemaking with NHTSA would be the first time EPA exercised its CAA authority over GHG pollution, following the Supreme Court's landmark decision in *Massachusetts v. EPA*.<sup>162</sup>

Perhaps most significantly, due to a self-executing trigger in the CAA, setting this initial GHG standard would ultimately result in EPA's regulation of stationary source emissions of GHGs as well.<sup>163</sup> Thus, the car deal tipped the first legal domino in a chain reaction leading to domestic regulation of GHGs in the transport, industrial, utility, and building sectors, which are responsible for the majority of GHG emissions in the U.S. economy.

This strategy was never the Obama Administration's preferred option for addressing climate change. The President had called on Congress to adopt new legislation imposing a market-based cap on carbon and other GHGs.<sup>164</sup> This, it was thought, would produce a more comprehensive strategy than could be achieved under the existing CAA, which, despite its

<sup>158</sup> *GHG Emission Standards*, *supra* note 2, at 25,328.

<sup>159</sup> *See supra* note 3.

<sup>160</sup> *E.g.*, Letter from Frederick A. Henderson, CEO, General Motors, to Lisa Jackson, Adm'r, EPA, and Raymond LaHood, Sec'y, U.S. Dep't. of Transp. (May 17, 2009), *available at* <http://www.epa.gov/oms/climate/regulations/gm.pdf>. Indeed, as this Article went to press, the President announced a new agreement among all the parties, modeled on the 2012–2016 process, to increase fuel economy to 54.5 miles per gallon for cars and light-duty trucks by Model Year 2025. *See* Bill Vlasic, *Carmakers Back Strict New Rules for Gas Mileage*, N.Y. TIMES, July 29, 2011, at A.

<sup>161</sup> Presidential Memorandum Regarding Fuel Efficiency Standards from President Barack Obama to the Sec'y of Energy, the Adm'r of EPA, and the Adm'r of NHTSA (May 21, 2010), *available at* <http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-fuel-efficiency-standards>.

<sup>162</sup> 549 U.S. 497 (2007).

<sup>163</sup> CAA §§ 165(a)(4), 202(a), 42 U.S.C. §§ 7475(a)(4), 7521(a) (2006). *See also supra* notes 63–64 and accompanying text (discussing trigger mechanism and related implications).

<sup>164</sup> *See, e.g.*, President Barack Obama, Address Before a Joint Session of Congress, (Feb. 24, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress](http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress) (urging Congress to pass legislation placing a market-based cap on carbon pollution).

strengths, is not designed optimally for GHG regulation.<sup>165</sup> In retrospect, however, given that climate legislation did not materialize in the 111th Congress, the car deal proved crucial to unleashing the most important domestic regulatory tool the executive branch had for beginning to tackle the problem.<sup>166</sup>

### C. Administrative Law

From an administrative law perspective, the new policy was equally noteworthy. Joint rulemaking was, at the time, a little known process that had never been used for such a high profile rule,<sup>167</sup> and it would require much stronger coordination than the agencies had ever undertaken before. This would be challenging because, as noted above, the agencies had distinct cultures and different expertise. While NHTSA's fuel efficiency regulations had remained all but stagnant for twenty years,<sup>168</sup> EPA had in the same period promulgated stricter pollution standards to keep pace with the relevant science,<sup>169</sup> and was preparing to address GHG emissions under its CAA authority.<sup>170</sup> By issuing a joint notice of intent to coincide with the President's announcement of a new national policy, EPA and NHTSA strongly signaled that they would overcome any cultural tensions that might exist between the agencies and work hand-in-hand to create a consistent, clear, and highly implementable program.

The announcement was also striking for being made not by the Secretary of Transportation or the EPA Administrator, who are of course legally responsible for promulgating the regulations, but by the President in a Rose Garden ceremony. This signaled a strong White House interest in the rules

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<sup>165</sup> See, e.g., Robert W. Hahn, *Climate Policy: Separating Fact from Fantasy*, 33 HARV. ENVTL. L. REV. 557, 579 (2009) (arguing that the lack of any mechanism in the CAA to ensure cost-effectiveness in regulation could lead to a time consuming and wasteful "sector-by-sector" approach); see also Kim Chipman, *Clean Air Act Not 'Ideal' to Regulate Carbon in U.S.*, JACKSON SAYS, BLOOMBERG, Apr. 26, 2011, available at <http://www.bloomberg.com/news/2011-04-26/clean-air-act-not-ideal-to-regulate-carbon-jackson-says-1-.html>.

<sup>166</sup> The CAA is the principle federal regulatory statute for addressing the GHG emissions that cause climate change, although it is not the only one. EPCA (as amended by EISA) requires NHTSA to set fuel efficiency standards for cars and trucks, 49 U.S.C.A. § 32902(a) (West 2011), and authorizes the Department of Energy ("DOE") to set appliance efficiency standards, 42 U.S.C. § 6295 (2006). Other federal statutes create a variety of incentives for non-fossil fuel based sources of energy, but these are at best indirect policies for reducing GHG emissions. E.g., Energy Policy Act of 2005 § 202, 42 U.S.C. § 13317 (incentivizing renewable energy projects through production tax credits).

<sup>167</sup> See *infra* note 177 and accompanying text.

<sup>168</sup> GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23, at 8 fig. 1 (presenting a timeline of significant CAFE and GHG emission standards).

<sup>169</sup> E.g., Control of Emissions of Hazardous Air Pollutants from Mobile Sources, 66 Fed. Reg. 17,230 (Mar. 29, 2001) (to be codified at 40 C.F.R. pts. 80 and 86); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,863 (Jul. 18, 1997) (to be codified at 40 C.F.R. pt. 50); National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,654 n.3 (Jul. 18, 1997) (to be codified at 40 C.F.R. pt. 50).

<sup>170</sup> See Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (July 30, 2008) (describing that the regulatory options EPA might use).

and invested them with considerable political capital.<sup>171</sup> The White House Office of Energy and Climate Change (“OECC”) has been credited with “spearheading” the joint rulemaking effort between EPA and NHTSA.<sup>172</sup> The President thanked the OECC, along with the two federal agencies, for its hard work in producing the new policy, indicating that the office had played an important coordinating role.<sup>173</sup>

Finally, the new policy relied on a number of creative procedural innovations beyond joint rulemaking. The “letters of commitment” signed by the stakeholders, although not legally binding, resemble legal documents.<sup>174</sup> They envision a detailed step-by-step process of implementation, which requires reciprocal demonstrations of good faith by regulators and industry: the auto companies would stay the lawsuits upon issuance of the NOI; EPA would make a final decision on California’s preemption waiver; EPA and NHTSA would propose the new rule; California would formally amend its regulations to implement the new agreement; the auto industry would dismiss its preemption lawsuits; and so on.<sup>175</sup> All of this was done, not under a consent decree and with the imprimatur of the court in the context of litigation, but voluntarily. Thus the parties entered an agreement that is best described as a “trust, but verify” regime.

The car deal illustrates some of the potential benefits of joint rulemaking in particular. This procedural format enabled the agencies to pool expertise, information, and resources, and provided a forum for them to harmonize potentially inconsistent methodologies and legal interpretations. Joint rulemaking might be an especially useful tool for helping agencies to overcome coordination challenges that arise due to overlapping or closely related delegations of authority by Congress.<sup>176</sup> Such delegations can lead to regulatory inconsistency, over-regulation, and high transaction costs unless agencies make an effort to align their approaches.

Yet judging from the dearth of academic commentary and empirical studies, the joint rulemaking process appears little known and not well understood. Academic articles on joint rulemaking are few<sup>177</sup> and those that do

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<sup>171</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250 (2001) (discussing presidential control over administrative agencies and “personal ownership” of their regulatory activity).

<sup>172</sup> Jim Tankersley, *Auto Emissions Deal: Behind the Scenes*, L.A. TIMES, May 20, 2009.

<sup>173</sup> President Barack Obama, Remarks by the President on National Fuel Efficiency Standards, *supra* note 137 (“I want to applaud the leadership of the folks at the Environmental Protection Agency, the Department of Transportation, and the White House Office of Energy and Climate Change who’ve worked around the clock on this proposal which has now been embraced by so many.”).

<sup>174</sup> *E.g.*, Letter from Mary D. Nichols, Chairman, CARB, to Lisa Jackson, Adm’r, EPA, and Ray LaHood, Sec’y, U.S. Dep’t. of Transp., *supra* note 9 (specifying mutual expectations and obligations).

<sup>175</sup> *Id.* at 2–3 (envisioning a timeline of specific actions).

<sup>176</sup> See Freeman & Rossi, *supra* note 14.

<sup>177</sup> Based on a search of JSTOR, Academic Search Premier, SSRN, Westlaw, Lexis, Google Books, Google Scholar, Web of Knowledge, and HeinOnline, there appears to be no in-depth analysis of joint rulemaking in the academic literature. Nor is there any substantive

discuss it do so only in passing.<sup>178</sup> The Administrative Procedure Act<sup>179</sup> (“APA”) does not mention it. There are no comprehensive studies of the incidence of joint rulemaking as a percentage of total rules over time, which would allow a comparison of the frequency and context of joint rulemaking in different administrations. An estimate provided by the National Archives and Record Administration (“NARA”), found that from 2008 to 2010, joint rulemakings climbed from 98 to 139. Thus as a percentage of total annual rules, joint rules appear to be quite small: 2.4% for 2010.<sup>180</sup>

As the EPA-NHTSA mobile source rule illustrates, a typical joint rulemaking involves two or more agencies agreeing to adopt a single regulatory preamble and text. The process might be described as something like an interagency regulatory negotiation.<sup>181</sup> Many recent notices about the promulgation of regulations mention “joint rulemaking,” most often in the areas of: (1) environmental protection;<sup>182</sup> (2) health and labor regulation;<sup>183</sup> and

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discussion of it in a search of three comprehensive treatises on administrative law and Congressional Research Service Reports.

<sup>178</sup> See, e.g., Iver P. Cooper, *The FDA, the BATF, and Liquor Labeling: A Case Study of Interagency Jurisdictional Conflict*, 34 FOOD DRUG COSM. L.J. 370, 370 (1979) (discussing how two agencies with overlapping jurisdictions may reconcile competing mandates in the absence of statutory consent for joint rulemaking); Richard D. Marsico, *The 2004–2005 Amendments to the Community Reinvestment Act Regulations: For Communities, One Step Forward and Three Steps Back*, 2006 CLEARINGHOUSE REV. J. POVERTY LAW & POL. 534, 534 n.2 (2006) (noting several instances of proposed joint rulemaking by the regulatory agencies involved).

<sup>179</sup> 5 U.S.C. §§ 551–559 (2006).

<sup>180</sup> See Email from Michael White, Dir., NARA, to author (Feb. 17, 2011, 21:18:10 EST) (on file with author) (conveying data from 2008 to 2010). NARA counts total joint rulemakings for 2008 at 98, 2009 at 137, and 2010 at 139. *Id.* Total rulemakings for 2008 are 3578, for 2009 are 3453, and for 2010 are 3572. *Id.* However, joint rules may be a somewhat higher share of total rules than these numbers suggest, depending on how one calculates the denominator. Empirical assessments of the total annual volume of final rules vary significantly depending on the methodology used by investigators, and the time periods they cover. See JAMES GATTUSO & STEPHEN KEEN, BACKGROUND, THE HERITAGE FOUNDATION, RED TAPE KEEPS RISING: REGULATION IN THE OBAMA ERA 4 (2010), available at [http://thf\\_media.s3.amazonaws.com/2010/pdf/bg\\_2394.pdf](http://thf_media.s3.amazonaws.com/2010/pdf/bg_2394.pdf) (noting that in 2009, 3503 rulemakings were reported in the Federal Register); Steven P. Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 846 (2003) (noting 1693 “economically significant” rules between 1981 and 2000, using data supplied by the Regulatory Information Service Center, which publishes the Unified Agenda of Federal Regulatory and Deregulatory Activities); Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 936–40 (2008) (finding final rule counts between 600 and 1400 per year between 1985 and 2009 for major rules promulgated by a subset of cabinet, executive, and independent agencies based on data in the Unified Agenda). Using a smaller denominator for all rulemakings would of course result in a higher percentage of joint rules.

<sup>181</sup> See Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 62–63 (2000) (describing regulatory negotiation as a multi-stakeholder public-private negotiation to achieve consensus on regulatory or implementation issues).

<sup>182</sup> See, e.g., *Compensatory Mitigation for Losses of Aquatic Resources*, 73 Fed. Reg. 19,594 (Apr. 10, 2008) (to be codified at 33 C.F.R. pts. 325 and 332; 40 C.F.R. pt. 320).

<sup>183</sup> See, e.g., *Interim Final Rules Prohibiting Discrimination Based on Genetic Information in Health Insurance Coverage and Group Health Plans*, 74 Fed. Reg. 51,664 (Oct. 7, 2009) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pts. 144, 146, and 148).

(3) securities regulation.<sup>184</sup> In many cases, the agencies share the same field of regulation. For example, the numerous agencies responsible for regulating the financial sector, including the Office of the Comptroller of the Currency (“OCC”), the Federal Deposit Insurance Corporation (“FDIC”), the Office of Thrift Supervision (“OTS”), and the Federal Reserve Board (“FRB”) regularly have worked together to promulgate rules.<sup>185</sup> The Security Exchange Commission (“SEC”) often conducts joint rulemaking with other agencies, notably the FRB and the Commodities Future Trading Commission (“CFTC”).<sup>186</sup> And the regulated community in the financial sector has tended to support joint rulemaking because of its potential to increase uniformity.<sup>187</sup>

In some instances, Congress mandates joint rulemaking.<sup>188</sup> In others, agencies within the same regulatory sphere use joint rulemaking voluntarily to remedy inconsistencies that have resulted from regulations initially adopted separately or to address conflicts that arise from newly adopted legislation.<sup>189</sup> In certain cases, the agencies promulgating rules jointly do not generally work on related issues, yet share an interest in implementing one particular law.<sup>190</sup> Thus, joint rulemaking appears to be used by agencies on

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<sup>184</sup> Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 51429 (Aug. 20, 2010) (to be codified at 17 C.F.R. pts. 1 and 240).

<sup>185</sup> See, e.g., Community Reinvestment Act Regulations, 74 Fed. Reg. 31,209, 31,209 (June 30, 2009) (to be codified at 12 C.F.R. pt. 25, 12 C.F.R. pt. 228; 12 C.F.R. pt. 345) (issuing a notice of proposed rulemaking for the joint revision of rules by the OCC, FRB, FDIC, and OTS to implement the Community Reinvestment Act); Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69,405 (Nov. 18, 2008) (to be codified at 12 C.F.R. pt. 233; 31 C.F.R. pt. 132) (promulgating joint rules of the FRB and the DOT to implement the Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–5367 (2006)); Risk-Based Capital Standards; Recourse and Direct Credit Substitutes, 62 Fed. Reg. 59,944, 59,944 (Nov. 5, 1997) (to be codified at 12 C.F.R. pts. 3, 208, 225, 325, and 567).

<sup>186</sup> See, e.g., Eric J. Pan, *Single Stock Futures and Cross-Border Access for U.S. Investors*, 14 STAN. J.L. BUS. & FIN. 221, 248 (2008) (discussing joint rulemaking authority of the SEC and CFTC under the Commodity Futures Modernization Act).

<sup>187</sup> See, e.g., Letter from Am. Bankers Ass’n to House Comm. on Fin. Servs. (Sept. 18, 2007), available at <http://www.aba.com/NR/rdonlyres/76DCD307-2D7E-48A6-A10F-623175FOAEAD/49397/UDAPABALetter091807.pdf> (“Joint rulemaking is important to ensure uniformity of regulation for all insured depository institutions.”).

<sup>188</sup> See, e.g., 12 U.S.C. § 1831m(g)(4)(B) (2006) (“Joint rulemaking. The appropriate Federal banking agencies shall jointly issue rules of practice to implement this paragraph.”); 15 U.S.C. § 78c(a)(4)(F) (2006) (“Joint rulemaking required. The Commission and the Board of Governors of the Federal Reserve System shall jointly adopt a single set of rules or regulations to implement the exceptions in subparagraph (B).”).

<sup>189</sup> See, e.g., Group Health Plans and Health Insurance Issuers Providing Dependent Coverage of Children to Age 26 Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 27,141, 27,141 (May 13, 2010) (to be codified at 26 C.F.R. pt. 54) (promulgating substantially similar interim final regulations by the Internal Revenue Service, Department of Labor, and Department of Health and Human Services); Manufactured Home Tires, Parts and Accessories Necessary for Safe Operation; and Manufactured Home Construction and Safety Standards, 61 Fed. Reg. 18,014, 18,014 (Apr. 23, 1996) (to be codified at 24 C.F.R. pt. 3280; 49 C.F.R. pt. 393) (adopting identical regulations to correct inconsistent rules related to the transportation of manufactured housing by the Department of Housing and Urban Development and the Federal Highway Administration).

<sup>190</sup> See, e.g., Documents Required for Travelers Departing From or Arriving in the United

an ad hoc basis to promote uniformity primarily where the agencies perform closely related regulatory missions and where Congress has allocated each of them a role implementing one or a set of related statutes. The Dodd-Frank Act,<sup>191</sup> the financial regulatory reform legislation enacted by Congress in 2010, requires joint rulemaking in numerous provisions,<sup>192</sup> and mandates interagency consultation prior to rule promulgation in several others.<sup>193</sup> Still, given the volume of rules promulgated each year, the proliferation of agencies and statutes over time, and the extent to which regulatory problems often seem to cut across agency boundaries,<sup>194</sup> agencies may be missing opportunities to use joint rulemaking as a harmonization tool.

Of course, if executive agencies are reluctant to align their regulatory programs, the President can request greater coordination.<sup>195</sup> And if the sub-

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States at Sea and Land Ports-of-Entry from Within the Western Hemisphere, 72 Fed. Reg. 35,088 (June 26, 2007) (to be codified at 8 C.F.R. pts. 212 and 235; 22 C.F.R. pts. 41 and 53) (proposing joint rules by the U.S. Department of Homeland Security and Department of State propose to implement document requirements for persons entering); Americans With Disabilities Act Accessibility Guidelines; Detectable Warnings, 61 Fed. Reg. 39,323, 39,323 (Jul. 29, 1996) (to be codified at 28 C.F.R. pt. 36; 36 C.F.R. pt. 1191) (suspending certain requirements in the Americans with Disabilities Act Accessibility Guidelines by the Architectural and Transportation Barriers Compliance Board, the Department of Justice, and the DOT).

<sup>191</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (to be codified at 12 U.S.C. § 5330).

<sup>192</sup> The Congressional Research Service (CRS) reports:

[N]early 80% of the relevant provisions in the Dodd-Frank Act (258 of 330) assign rulemaking authorities or responsibilities to four agencies: the SEC, the Board of Governors, the CFTC, and the CFPB. In addition to the rules they may promulgate independently, these four agencies are also required or permitted to issue rules with one or more other agencies. For example, of the 25 provisions that give rulemaking responsibilities to three or more agencies, at least seven of them specifically involve the Board of Governors and the CFPB. Some of the Dodd-Frank Act rulemaking provisions require multiple agencies to issue certain rules jointly, other provisions require multiple agencies to issue rules separately, and some provisions involve a mix of these approaches.

CURTIS W. COPELAND, CONG. RESEARCH SERV., R 41472, RULEMAKING REQUIREMENTS AND AUTHORITIES IN THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 6-7 (2010) [hereinafter CRS DODD-FRANK RULEMAKING REPORT] (footnote omitted), *available at* <http://www.llsdc.org/attachments/files/255/CRS-R41472.pdf>; *see also* CURTIS W. COPELAND, CONG. RESEARCH SERV., R 41380, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: REGULATIONS TO BE ISSUED BY THE CONSUMER FINANCIAL PROTECTION BUREAU 28, 29, 36 (2010), *available at* <http://www.llsdc.org/attachments/files/236/CRS-R41380.pdf> (including a chart listing Dodd-Frank provisions that involve joint rulemaking).

<sup>193</sup> CRS DODD-FRANK RULEMAKING REPORT, *supra* note 192, at 7–8 (providing several examples of consultation requirements in the Act).

<sup>194</sup> *See* Teresa M. Schwartz, *Protecting Consumer Health and Safety: The Need for Coordinated Regulation among Federal Agencies*, 43 GEO. WASH. L. REV. 1031, 1032 (1975) (describing proliferation of health, safety, and consumer legislation and resulting regulatory overlaps). On regulatory overlaps and the need for coordination generally, *see* Freeman & Rossi, *supra* note 14.

<sup>195</sup> Where such consultation is insufficient, the President may sign executive orders or presidential memoranda requesting that agencies coordinate. For example, beyond the orders to EPA and NHTSA that are described in this Article, President Obama has penned a variety of executive devices directing several agencies to work together, including a presidential memorandum to EPA, DOE, DOI, and other agencies to develop a strategy on carbon capture and

ject of a rulemaking is sufficiently important to the President, he may formally request that the agencies propose rules jointly.<sup>196</sup> In some cases, the President may also deputize a White House office to play an active coordinating role, as President Obama did in the case of the national auto policy, by tapping the OECC.<sup>197</sup>

Currently, however, there is no comprehensive executive branch policy on joint rulemaking, or inter-agency coordination more generally.<sup>198</sup> Indeed, aside from the occasional GAO report<sup>199</sup> we also lack basic information about joint rulemakings that have been conducted in the past. We know little about how, for example, agencies might adapt their pre-existing rulemaking procedures to participate in joint rulemaking; whether they tend to strike joint teams and share resources to develop the analytic underpinnings of the rule (as was done in the EPA-NHTSA rule); how they resolve impasses; whether they are more likely to consult with the White House, members of Congress, or private stakeholders more often or in a different way than when they issue rules on their own; and whether White House coordination makes a material difference to their efforts. Nor do we know whether joint rules on average take longer or are produced more quickly than rules promulgated independently, and whether they are more or less resource intensive.

Among other things, a new executive branch policy might recommend when agencies should consider using joint rulemaking or similar processes, help agencies to identify and share best practices, and request that GAO or another independent body conduct retrospective studies. Given that the volume of federal joint rulemakings soon will be increasing as a result of the Dodd-Frank Act, and perhaps other legislation, it would be worthwhile, at a minimum, to track and gather data about these efforts from the start.<sup>200</sup>

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sequestration, *see* President Barack Obama, A Comprehensive Federal Strategy on Carbon Capture and Storage, 75 Fed. Reg. 6087 (Feb. 3, 2010), *available at* <http://www.whitehouse.gov/the-press-office/presidential-memorandum-a-comprehensive-federal-strategy-carbon-capture-and-storage>, and an executive order to several agencies to recommend a new oceans policy, *see* Stewardship of the Ocean, Our Coasts, and the Great Lakes, Exec. Order No. 13,547, 75 Fed. Reg. 43,023 (July 19, 2010).

<sup>196</sup> *See, e.g.*, Presidential Memorandum Regarding Fuel Efficiency Standards, *supra* note 161.

<sup>197</sup> White House offices, such as the Domestic Policy Council, the Council on Environmental Quality, or the National Economic Council, can play a powerful role in helping to coordinate agency action by calling meetings to keep negotiations on track, helping to mediate disagreements, communicating the priorities of the President to the agencies, explaining the constraints faced by the agencies to the President, navigating the internal White House policy process, and managing interest groups and members of Congress. Their proximity to the President and ability to draw on White House resources can make them especially effective at prompting agencies to overcome conflicts and work together.

<sup>198</sup> For a discussion of the extent to which OIRA could help to promote regulatory coordination using its authority under Executive Order 12866, *see* Freeman & Rossi, *supra* note 14. *See also*, Executive Order 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (directing agencies to promote coordination, simplification and harmonization).

<sup>199</sup> *E.g.*, GAO VEHICLE FUEL ECONOMY REPORT, *supra* note 23.

<sup>200</sup> *See* CRS DODD-FRANK RULEMAKING REPORT, *supra* note 192.

## CONCLUSION

One might take the view that the Obama Administration's national auto policy is unique — the product of a confluence of events that would be hard to replicate: a new administration, a domestic auto industry in financial crisis, a landmark Supreme Court decision, and collective exhaustion with a thirty year struggle that primed all the parties for a solution. Certainly, the problem the administration faced was supremely complex. Solving the legal, administrative, and political puzzles required playing six dimensional chess.

Yet although in some respects the car deal was unique, much of its innovation can be replicated, including the use of joint rulemaking or similar uniformity-promoting mechanisms, along with extralegal tools like commitment letters that can memorialize agreements and specify implementation plans. Indeed, one of the most lasting legacies of the car deal may be its example of how agencies might use such regulatory and dispute resolution techniques to simplify and harmonize regulation. This, which has many benefits, including reducing costs to industry and easing the administrative burden on government. Joint rulemaking in particular is also highly visible, easy for Congress to monitor, and subject to judicial review.<sup>201</sup> To the extent this procedural format has been underutilized, especially by administrative agencies that share related or overlapping authority, it represents an overlooked opportunity to improve the regulatory process.

Moreover, it would be incomplete to view these methods and instruments as secondary matters of procedure, and therefore tangential to forging agreement on substantive issues like levels of stringency. When they work well, such processes allow agencies to learn from each other, pool expertise and test legal interpretations, which inevitably affects substantive policy choices.<sup>202</sup> Other key features of the approach used to generate the mobile source rule might also be replicated: early and extensive outreach to the regulated industry and other key stakeholders, and the leadership of a deputized White House office charged with coordination. While these things cannot guarantee a successful outcome, they greatly enhance its prospects.

The car deal was a striking success for many reasons — it has been the most important environmental policy of the Obama Administration to date, and it took a crucial initial step toward meaningful greenhouse gas regulation at the federal level. Yet, most enduring may be the car deal's example of how the federal government can mobilize its resources and coordinate even the most complicated of matters when it really puts its mind to it.

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<sup>201</sup> In theory, joint rulemaking should help to improve accountability, or at least not undermine it, and reduce shirking. For a discussion of potential objections to the process, see Freeman & Rossi, *supra* note 14.

<sup>202</sup> Regulations produced jointly are governed by the administrative procedure Act's notice and comment provisions. 5 U.S.C. § 553 (2006).