AUTO ALLIANCE
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May 31, 2018

Sarah Carter
Air Resources Board
9480 Telstar Avenue, Suite 4
El Monte, California 91731

Re: Request for Public Input on Potential Alternatives to a Potential Clarification of the "Deemed to Comply" Provision for the LEV III Greenhouse Gas Emission Regulations for Model Years Affected by Pending Federal Rulemakings

Dear Ms. Carter:

On behalf of the Alliance of Automobile Manufacturers ("Alliance), thank you for the opportunity to comment on the California Air Resources Board ("ARB") May 7, 2018 Request for Public Input on Potential Alternatives to a Potential Clarification of the "Deemed to Comply" Provision for the LEV III Greenhouse Gas Emission Regulations for Model Years Affected by Pending Federal Rulemakings (the "May 7 Notice"). The Alliance is a trade association of automobile manufacturers representing approximately seventy percent of all car and light truck sales in the United States.[1]

The Alliance remains a strong advocate for One National Program, which enables auto manufacturers to make predictable investments in a nationwide fleet of light-duty vehicles while driving reductions in GHG emissions over time. The ARB's continued participation in One National Program is essential. In a recent White House meeting, the Alliance and other industry representatives urged the Trump Administration to pursue solutions that preserve the ARB's partnership in One National Program.

We are optimistic that continued dialogue will enable all stakeholders to find common ground to continue One National Program. Adhering in good faith to our prior commitments in support of a harmonized national program will provide the best possible foundation for the discussions to come.

According to the May 7 Notice, in response to EPA's April 13, 2018 determination that the MY 2022-2025 standards are not appropriate, "ARB disagrees and may consider amending its GHG standards to clarify the 'deemed to comply' provision applies to the current federal GHG standards should U.S. EPA change the standards for any model years." The ARB further states that "its regulatory text clearly refers to the current federal standards adopted as part of the national program" and that it is considering clarifying, without changing any of the requirements

[1] The Alliance's members include BMW Group, FCA US LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, Volkswagen Group of America, and Volvo Car USA. For more information, go to: https://autoalliance.org.

in its regulation that "compliance with any weakened federal standards" will not be deemed compliance with CARB standards for the model years affected."

As explained in the attached Alliance comments, the "deemed to comply" provision allows manufacturers to demonstrate compliance with the California greenhouse gas ("GHG") requirements by demonstrating compliance with the federal GHG program for MY 2017-2025, *even if the federal standards are amended.* The stakeholders' commitments in 2011 to the One National Program framework for MY 2017-2025, as well as the language and history of the ARB regulations, make this amply clear:

1. The ARB adopted the "deemed to comply" provision in late 2012 as part of a coordinated agreement among the ARB, EPA, NHTSA and the automobile manufacturers to support One National Program by making compliance with the federal GHG standards a compliance option, "even amended after 2012." The stakeholders recognized the need for a Mid-term Evaluation of the standards due to the long timeframe of the rule, and that EPA might change the standards as a result.

2. ARB's "deemed to comply" rule covering the 2017-2025 model years—unlike the corresponding provision for the 2012-2016 model years—is not tied to federal rules codified as of a specific date.

3. In the rulemaking to adopt the "deemed to comply" provision, ARB's Initial Statement of Reasons quotes EPA's own understanding that ARB's rules will deem compliance with the EPA standards, "even if amended after 2012, as compliant with California's." ISOR at 2-3.

The attached comments elaborate on these points in more detail.

The ARB's July 2011 commitment letter reserved California's ability "to contest final actions taken or not taken by EPA or NHTSA as part of or in response to the mid-term evaluation." But an attempt to limit the "deemed to comply" option to ARB's preferred version of the federal rules would go beyond a challenge to the Mid-term Evaluation outcome and depart from the One National Program framework upon which the stakeholders had agreed.

Thank you for your attention to these comments. We trust that all stakeholders including California will hold firm to their prior commitments while we collectively work toward the continuation of One National Program.

Sincerely,

Chris Nevers
Vice President, Energy and Environment

COMMENTS OF ALLIANCE OF AUTOMOBILE MANUFACTURERS

The ARB's May 7 Notice indicates that the Board "may consider amending its GHG standards" in order to "clarify" the intent of its current GHG regulations to mean that "the 'deemed to comply' option is available only for the currently adopted federal regulations (as of the date of this notice) for the model years affected by the pending federal rulemaking if those rules are weakened." Notice at 2. As explained in detail below, the concept under consideration by ARB is not consistent with the understandings reached by the stakeholders when the 2017-2025 framework for One National Program was put in place. Under that framework, all parties understood that the "deemed to comply" provision would continue in force regardless of any changes made to the federal regulations as a result of the Mid-term Evaluation (or otherwise). Amending the "deemed to comply" provision now would constitute a significant departure from the commitments made by ARB in July 2011. Rather than pursue a course of action that would diverge from ARB's prior commitments, and that could potentially lead to a breakdown of One National Program, ARB should participate in the federal rulemaking. All parties have reserved their rights to challenge the outcome of that proceeding.

I. California Committed to Adopt Regulations to Deem Compliance with the Federal GHG Program, Even if Amended, to Satisfy California Requirements.

In July 2011, automakers, California, and the federal government committed to take a series of actions to develop national GHG standards for MY 2017 through 2025 motor vehicles. This approach was based generally on the One National Program that these same participants agreed upon in 2009 for MYs 2012 through 2016. For MYs 2012 through 2016, the auto manufacturers agreed to dismiss litigation challenging the California standards as preempted as long as the ARB revised its standards to specify that compliance with the EPA standards would be deemed compliance with the California standards.[1]

Building on the MY 2012-2016 program, the parties negotiated a similar agreement in 2011 for MYs 2017 through 2025, with an important distinction. Specifically, because the standards for MYs 2022 through 2025 were much further into the future at the time of the agreement than the MY 2012-2016 standards had been, the parties recognized that no one could accurately project the circumstances affecting the feasibility of those standards. *See* 77 Fed. Reg. 62,624, 62,652 (Oct. 15, 2012) (noting the "long time-frame of the rule and the uncertainty in assumptions due to this long timeframe"). Accordingly, the parties agreed that EPA, in coordination with NHTSA and the ARB, would undertake a Mid-Term Evaluation (referenced by the ARB as a "Mid-Term Review"), of the standards for MYs 2022-2025 to determine by April 1, 2018 whether those standards remained appropriate. *See* 40 C.F.R. 86.1818-12(h). If EPA determined that the standards were no longer appropriate, EPA would propose revised standards in tandem with NHTSA's rulemaking to adopt fuel economy standards. *Id.*; 77 Fed. Reg. at 62,785.

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[1] *See generally* Alliance of Automobile Manufacturers Commitment Letter (May 18, 2009), available at https://www.epa.gov/sites/production/files/2016-10/documents/alliance-of-automobile.pdf; CARB Commitment Letter (May 18, 2009), available at https://www.epa.gov/sites/production/files/2016-10/documents/air-resources-board.pdf.

The parties memorialized their understanding in "commitment letters." Emphasizing the importance of the Mid-Term Evaluation, the automakers committed not to contest final standards adopted by EPA, NHTSA and the ARB for MYs 2017-2025 assuming certain conditions were met. Those conditions were that: (a) the standards adopted were in accordance with those proposed; and (b) the ARB adopted standards "such that compliance with the GHG emissions standards adopted by EPA, even if amended after 2012, shall be deemed compliance with the California GHG emissions standards, in a manner that is binding on states that adopt and enforce California's GHG standards under Clean Air Act (CAA) section 177." (Emphasis added.)[2]

For its part, California's commitment letter likewise stated that it would not challenge the EPA/NHTSA standards and would propose to revise its standards for MYs 2017-2025 "such that compliance with the GHG emissions standards adopted by EPA for those model years that are substantially as described in the July 2011 Notice of Intent, even if amended after 2012, shall be deemed compliance with the California GHG emissions standards. . . ."[3] (Emphasis added.) California further stated in its letter that it "will fully participate in the mid-term evaluation." *Id.* Both California and the automakers reserved their rights to contest final actions taken or not taken as part of or in response to the Mid-Term Evaluation. *Id.* The automakers further committed not to contest EPA's granting California a waiver of preemption under section 209 of the CAA for its MY 2017-2025 standards if California revised its regulations to include the specified "deemed to comply" provision, but this commitment did not apply "to subsequent amendments California may make."[4]

In other words, at the time the ARB committed to adopt the "deemed to comply" provision for MY 2017 through 2025 motor vehicles, all stakeholders involved understood that compliance with the federal standards – even if those standards were later amended – would be deemed compliance with the California GHG requirements. They anticipated that EPA and the ARB might revise the standards based on the Mid-Term Evaluation, and the automakers and the ARB reserved their rights regarding the outcome of that review. Importantly, EPA memorialized in the preamble to its 2011 proposed rule its understanding that the ARB would submit its regulations to EPA for a waiver that "will include such a mid-term evaluation" and "will deem compliance with EPA greenhouse gas emission standards, even if amended after 2012, as compliant with California's." Proposed Rule, 76 Fed. Reg. 74,854, 74,987 (Dec. 1, 2011) (emphasis added). In short, California's commitment in July 2011 to adopt a "deemed to comply" provision for MY 2017 through 2025 motor vehicles contradicts the ARB's current position that "its regulatory text clearly refers to the current federal standards" adopted by EPA in 2012. Put differently, the ARB's proposed amendments to the "deemed to comply" option are not a mere "clarification" of the regulatory text.

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[2] *See, e.g.*, Letter from Alan Mulally, President and CEO, Ford Motor Company, to The Honorable Lisa Jackson, Administrator, United States Environmental Protection Agency and The Honorable Ray LaHood, Secretary, United States Department of Transportation, July 29, 2011 ("Ford Commitment Letter"), available at https://www.epa.gov/sites/production/files/2016-10/documents/ford-commitment-ltr.pdf.

[3] CARB Commitment Letter (July 11, 2011), available at https://www.epa.gov/sites/production/files/2016-10/documents/carb-commitment-ltr.pdf.

[4] *See, e.g.*, Ford Commitment Letter.

II. CARB's Regulatory Language and Rulemaking Record Demonstrate that the "Deemed to Comply" Option Is Not Tied to Specific Federal GHG Standards.

As adopted, the ARB regulations are consistent with the commitment it made, deeming compliance with the EPA standards sufficient to demonstrate compliance, without incorporating specific EPA standards. The provision states:

> For the 2017 through 2025 model years, a manufacturer may elect to demonstrate compliance with this section 1961.3 by demonstrating compliance with the 2017 through 2025 MY National greenhouse gas program…

13 CCR § 1961.3(c). The reference to the national "program" reasonably encompasses any revisions to the program, which the parties well understood could happen. Indeed, such a general incorporation would also encompass an EPA determination in response to the Mid-Term Evaluation to make the federal program *more* stringent.

Lest there be any question, the ARB has an established practice for incorporating specific date-delimited EPA regulations by reference, and routinely does so in other related contexts – but not here. The ARB explained this practice in March 2012, when it adopted certain test procedures that were incorporated by reference in 13 CCR § 1961.2(d). In those test procedures, the ARB explained:

> The provisions of Subparts B, C, and S, Part 86, Title 40, Code of Federal Regulations, <u>as adopted or amended on May 4, 1999 or as last amended on such other date set forth next to the 40 CFR Part 86 section title listed below</u>, and to the extent they pertain to exhaust emission standards and test procedures, are hereby adopted . . . , with the following exceptions and additions.[5]

In other words, the ARB explicitly identifies the specific date of the CFR regulations when it means to adopt them by reference.

In fact, the ARB followed just this approach in the very same rulemaking in which it adopted the "deemed to comply" provision. On December 6, 2012, the ARB amended the test procedures incorporated by reference at 13 CCR § 1961.2(d) to include the "deemed to comply" provision, among other changes.[6] The ARB did so *after EPA's October 2012 final rule*

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[5] California 2015 and Subsequent Model Criteria Pollutant Exhaust Emission Standards and Test Procedures and 2017 and Subsequent Model Greenhouse Gas Exhaust Emission Standards and Test Procedures for Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles, at A-1 (March 22, 2012), available at https://www.arb.ca.gov/msprog/levprog/cleandoc/ldtps_2015+_cp_or_2017+_ghg_my_lev_iii_clean_complete_8-12.pdf.

[6] California 2015 and Subsequent Model Criteria Pollutant Exhaust Emission Standards and Test Procedures and 2017 and Subsequent Model Greenhouse Gas Exhaust Emission Standards and Test Procedures for Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles, at 17 (December 6, 2012), available at https://www.arb.ca.gov/regact/2012/leviiidtc12/ldtps2015+cp2017rev.pdf (hereinafter "December 2012 Test Procedures"). The ARB amended the test procedures again on September 2, 2015, but did not make any modifications to the "deemed to comply" provision.

promulgating the MY 2017-2025 standards, when it could readily have followed its practice of incorporating those standards by specific reference to the CFR with an associated date. Indeed, in several other places in the amended test procedures, the ARB did include specific date references next to the 40 CFR Part 86 section to indicate that the provision was incorporated by reference as it existed on a specific date. *See, e.g.*, December 2012 Test Procedures at 5 (incorporating the version of 40 CFR § 86.1810-09 as it existed on October 15, 2012). The ARB did so deliberately, revising the regulations in response to comments that it should reference specific promulgation dates where it intended to freeze them in time. *See* Final Statement of Reasons at 2 (Dec. 2012).

But the ARB's "deemed to comply" provision for MYs 2017-2025 does not include reference to the Code of Federal Regulations or the Federal Register as of a specific date. Rather, the ARB specifically defined "2017 through 2025 MY National greenhouse gas program" in the test procedures and, unlike the test procedures incorporated with CFR references as of specific dates, the definition omits any such references:

> "2017 through 2025 MY National greenhouse gas program" or "2017 through 2025 MY National greenhouse gas final rule means the national program that applies to new 2017 through 2025 model year passenger cars, light-duty trucks, and medium-duty passenger vehicles as adopted by the U.S. Environmental Protection Agency as codified in 40 CFR Part 86, Subpart S, as incorporated in and amended by these test procedures.

December 2012 Test Procedures at 4. Even more telling, by contrast, the ARB defined "2012 through 2016 MY National greenhouse gas program" in the same test procedures section of its regulations and *did* specify that the program was incorporated as it existed on a specific date:

> "2012 through 2016 MY National greenhouse gas program" or "2012 through 2016 MY National greenhouse gas final rule" means the national program that applies to new 2012 through 2016 model year passenger cars, light-duty trucks, and medium-duty passenger vehicles <u>as adopted by the U.S. Environmental Protection Agency on April 1, 2010</u> (75 Fed. Reg. 25324, 25677 (May 7, 2010)), as incorporated in and amended by these test procedures.

Id. at 3 (emphasis added). The reason that the ARB omitted any specific reference to the October 2012 final EPA GHG standards for MYs 2017-2025 is plain: Unlike the other incorporated standards, the ARB acted consistent with its commitment and the parties' understanding that compliance with the national program would constitute compliance with the ARB's regulations, even if EPA amended those standards subsequently, as part of the Mid-Term Evaluation or otherwise. The omission was clearly intentional.

Finally, the ARB's rulemaking history makes clear that the ARB intended the provision to follow through on the commitment letters. In its Initial Statement of Reasons for Rulemaking ("ISOR"), the ARB recited its own commitment letter and quoted EPA's statement of its

understanding that the ARB's rules will deem compliance with the EPA standards, "even if amended after 2012, as compliant with California's." ISOR at 2-3 (Sept. 14, 2012). Also, acknowledging that "most if not all manufacturers are expected to use compliance with the national rule to satisfy California requirements, *id.* at 5, the ARB justified retaining its own Advanced Clean Car standards so that "the ARB regulation would remain in place in the event the National Program ceases." *Id.* This demonstrates that the ARB intended the "deemed to comply" provision to refer to federal standards however amended by EPA, and contradicts the ARB's suggestion in the May 7 notice that the ARB locked in the federal standards as adopted in 2012. After all, if the ARB enshrined in its own regulations the federal standards as of 2012 by reference, cessation of the federal program would have no impact on the California compliance options: automakers would continue to have the choice to option to comply with the federal standards as adopted in 2012. The ARB's concern that it needed to retain its own standards in case the National Program might cease shows that ARB understood that it was providing a federal compliance option that was subject to change.

Likewise, the ARB's response to comments in its FSOR confirm the understanding at the time that the "deemed to comply" provision applies even for federal standards as might be amended. FSOR at 10. There, the ARB recited the Alliance's comment that the ARB's commitment reserved the right to contest actions taken or not taken in response to the Mid-Term Evaluation and to revise its standards to provide that "compliance with EPA's 2017-2025 motor vehicle greenhouse gas standards, '<u>even if amended after 2012</u>,' shall be deemed compliance with California's motor vehicle greenhouse gas standards." *Id.* The quoted Alliance comment further explained that California's remedy if dissatisfied with the outcome of EPA's Mid-Term Evaluation is to seek judicial review of EPA's determinations, not to eliminate the "'deemed to comply' provisions and begin enforcing its own program." *Id.* The Alliance was thus explicit that it understood the ARB regulations to mean that the "option to comply with the federal program will continue through 2025, whatever the final outcome of the mid-term evaluation." *Id.* The ARB did not disagree with this basic premise in its response to the Alliance's comment.

III. The ARB May Not Revise the Deemed to Comply Meaning Without Rulemaking.

The "deemed to comply" provision in the current ARB regulations means that compliance with the federal program for MY 2017-2025 satisfies California's requirements, even if EPA changes its regulations; the ARB may not "clarify" that provision to mean otherwise without rulemaking. Rather, if the ARB wishes to modify its regulations to specify that the "deemed to comply" option is available only for the currently adopted federal program, the ARB must do so following rulemaking procedures under the California Administrative Procedure Act ("APA").

The APA requires rulemaking for the ARB to adopt or modify a regulation, defined as any requirement of general applicability "to implement, interpret or make specific the law enforced or administered by it, or to govern its procedures." Cal. Gov't Code § 11342.600. Further, the APA prohibits ARB from issuing, using, enforcing or attempting to enforce a guideline, instruction, standard of general application or other rule that is a regulation unless it is adopted pursuant to the APA rulemaking requirements. *Id.* § 11340.5(a); *see also, e.g.*, *Union of Am. Physicians & Dentists* v. *Kizer* Cal. App. 3d 490, 506 (1990) ("If an agency adopts a regulation without complying with the APA requirements it is deemed an 'underground

regulation' and is invalid."). Indeed, even if the "deemed to comply" provision were ambiguous as having more than one meaning on its face, the ARB would be required to amend it because "clarity" is a requirement for all California regulations. *See* Cal. Gov't Code §§ 11349(c), 11349(a)(3) (requiring clarity) and 1 C.C.R. § 16(a)(1) (California Office of Administrative Law rules defining lack of clarity). As described above with regard to the auto manufacturers' commitment letters, ARB changes to the "deemed to comply" provision to limit the compliance option to currently adopted federal regulations would constitute amendments potentially relevant to EPA's actions concerning California's program, the manufacturers' obligations and reservation of rights under their commitment letters, and ultimately the validity of the California regulations.

* * *

The ARB's "deemed to comply" provision fulfills its commitment to allow compliance with the federal program, even if amended after 2012, to constitute compliance with the California program. That has been the universal understanding of the automakers, EPA and the ARB itself from the time they entered into an agreement to pursue the One National Program for MYs 2017-2025. The ARB has never until now suggested otherwise. The ARB may not, without rulemaking, modify the "deemed to comply" provision to limit the compliance option only to the currently adopted federal regulations regardless of any changes to the federal program. The ARB should not make such changes to the "deemed to comply" regulation. Rather than acting now to disrupt the One National Program, the ARB should participate in the federal rulemaking and, like other stakeholders, consider whether further recourse is warranted at the conclusion of that process.