

Paper Title: The Future is Electric: Congress and Biden Administration Aim to Increase Electric Vehicle Deployment.

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Session Title: The Future is Electric.

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Dommond is a seasoned trial attorney who provides aggressive and innovative legal representation and advice for his clients in product liability, class action, commercial and toxic tort litigation. Dommond implements litigation and investigation plans and manages all aspects of litigation and pre-suit claims to successful resolution. He has earned recognition in providing high level client service through timely and effective communication and is recognized as one of the top six lawyers nationwide for automotive litigation by *Legal 500 US* 2021.

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Mary Beth is a Government Policy Advisor who has been providing federal government relations services to Dykema's clients since 2008. She has developed and implemented successful advocacy strategies on behalf of clients that have both supported the advancement of policy proposals, for example, improving federal procurement of energy efficient goods, as well as prevented policies that would negatively impact clients from moving forward, such as protecting the public safety communications network of a local government from being auctioned.

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James is the leader of Dykema's federal government relations team. With more than 20 years of government relations experience on state, federal and international levels, he has extensive experience crafting and implementing legislative and political strategy; attracting, managing and retaining talented staff; and developing and managing multimillion dollar budgets. In addition, James has a proven track record of advancing important issues through the legislative process, and has strong professional relationships in both major political parties.

The Future is Electric **Congress and Biden Administration Aim to Increase Electric Vehicle** **Deployment**

Introduction

More often than not, federal policy is reactive rather than proactive. There are many examples of Congress or the President promoting a policy in response to a crisis to prevent a repeat of a problem or offer a solution to an ongoing emergency. In fact, President Obama's first chief of staff, Rahm Emanuel, famously said, "You never want to see a crisis go to waste. I mean, it's an opportunity to do things that you think you could not do before." A crisis often presents policymakers with the opportunity and justification to address longstanding problems that can result in the adoption of a policy that previously seemed unattainable.

In the case of electric vehicles (EVs), the worsening climate crisis is driving the Biden Administration and Democratically-controlled Congress to pursue an aggressive agenda to promote the dramatic increase in the adoption of electric vehicles in an effort to combat climate change. According to the U.S. EPA, greenhouse gas emissions from the transportation sector account for roughly 29 percent of the total U.S. greenhouse gas (GHG) emissions, making it the nation's most significant contributor. In the last thirty years, the level of GHG emissions generated by the transportation sector has increased more than any other sector. To address this worsening problem, the Biden Administration has pushed a series of policies through Executive Order and regulation to expand the production of electric vehicles and to dramatically increase the number of EVs in the federal fleet. Democrats in Congress are also pursuing a series of policies that promote the adoption of EVs in the bipartisan infrastructure legislation that the Senate has already approved and in the budget reconciliation process that is expected to dominate the fall agenda.

Executive Orders

Several executive actions are driving the Biden Administration's vehicles policy, which is a pillar of their plan to address climate change. Two were among the first actions President Biden took upon taking office. On January 20, 2021, the President issued Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which initiated a review of policies implemented under the Trump Administration, including the rules that revised vehicle fuel economy and greenhouse gas (GHG) emissions standards developed under the Obama Administration.

On January 27, 2021, President Biden issued Executive Order (EO) 14008, "Tackling the Climate Crisis at Home and Abroad," that directed federal officials to develop a plan for converting all federal, state, local, and tribal vehicle fleets to "clean and zero-emission vehicles." Key goals of the January 27 Executive Order include replacing the U.S. government fleet of roughly 645,000 vehicles with

electric models and purchasing electric vehicles built by union workers and comprised of at least 50 percent "American Made" materials.

The General Services Administration (GSA) is the lead agency implementing the green vehicle procurement policy. The original deadline for federal officials to issue a proposal for electrifying the federal fleet was the end of April 2021. The date was then extended to July 2021, but GSA has yet to release any material. GSA is considering how to address the types of vehicles that would qualify under the procurement guidelines. The federal government's existing definition of "green vehicles" broadly includes cars powered by biodiesel, hydrogen, natural gas, electricity, or a combination. However, the order to add zero-emission vehicles to the fleet may likely preclude some of the current technologies in favor of only vehicles powered by batteries and possibly plug-in charging and hydrogen fuel cells.

GSA is also considering how to fuel/charge the new vehicles because the U.S. requires significant build-out of charging infrastructure to support the level of electric vehicles envisioned by the Biden Administration. GSA must also contend with the underlying challenge that no electric cars "made in America by union workers" actually exist. The January 27 Executive Order, consistent with other executive actions, seeks to bolster existing "made in America" rules under the Buy American Act that set content requirements that determine if a vehicle can be considered U.S.-made depending on the percentage of content manufactured domestically compared to non-American made components in the vehicle.

Later action occurred on August 5, 2021, when President Biden issued another vehicle-focused Executive Order 14037, "Strengthening American Leadership in Clean Cars and Trucks," that calls for half of all new vehicles sold in 2030 to be zero-emissions vehicles, including battery-electric (EV), plug-in hybrid electric (PHEV), or fuel cell electric vehicles.

Rulemaking

The August 5 Executive Order coincided with announcements about related federal rulemakings as a result of EO 13990. Also, on August 5, the Environmental Protection Agency issued a Notice of Proposed Rulemaking (NPRM) indicating it is developing more stringent GHG emissions standards for cars and light trucks covering model years (MY) 2023 – 2026 with subsequent plans to initiate standards for MY 2027 and beyond. These new standards would replace existing GHG standards that have fluctuated over the course of the Phase 2 MY 2017 – 2025 guidelines initially set by the Obama Administration but revised in 2020 during the compulsory "mid-term evaluation" reinstated by the Trump Administration.

According to the EPA's proposal, the standards would achieve ten percent greater emissions improvement than the current standards for MY 2023 vehicles and then 5 percent greater emissions improvement each year after. To achieve these reductions, EPA assumes manufacturers will primarily employ advanced gasoline

technologies in MY 2023-2026 but expect PHEV sales in the U.S. to gradually increase to 8 percent market share and include more EVs by MY 2026. This is compared with MY 2019 data indicating EVs and PHEVs represent about 2 percent of the new vehicle market. Considering this data establishes a clear context for the ambitious level of market penetration zero-emission vehicles must achieve to reach the goals set by President Biden for 2030.

On August 8, in a separate NPRM, the Department of Transportation, National Highway Safety Administration initiated the process to implement 8 percent annual fuel economy improvements in cars and light trucks of MY 2023 – 2026 compared to the 2020 standards of 1.5 percent annual gains. The Biden Administration's goal of 8 percent annual improvements would result in an average industry fleetwide standard estimated at 48 miles per gallon (mpg) in 2026 – roughly 8.7 mpg higher than the current standard. The caveat is that real-world driving conditions differ from lab simulated testing, and this is an average across the national fleet with different vehicles and manufacturers achieving different fuel economy ratings. Similar to EPA's reasoning for a higher GHG emission standard, NHTSA assumes many manufacturers, seeing the potential market growth for EVs and having committed to producing them, have set the stage to be able to achieve this level of national average fuel economy. Conversely, the agency reasons the higher fuel economy requirements will prompt industry to develop technology so all vehicles may become more fuel-efficient and "economically practicable" to benefit more Americans and help the Administration meet its climate goals.

Whereas EPA and NHTSA coordinated on a joint rulemaking in 2020, the two agencies are now promulgating separate standards. This is due to a technicality where EPA is able to impact vehicles as early as MY 2023 with its updated GHG standard, but the earliest vehicles NHTSA can regulate at this point in the cycle are MY 2024.

To create market conditions that will support the standards proposed by EPA and NHTSA and the lofty goals of the Biden Administration for EV deployment, Congress is concurrently enacting and developing legislation to establish infrastructure and financial incentives to realize these policies.

Infrastructure Legislation

After months of negotiations between Democratic and Republican Senators and with considerable input from the White House, the Senate approved a bipartisan infrastructure bill, known as the Infrastructure Investment and Jobs Act. This bill is now awaiting consideration by the House of Representatives and is currently scheduled to be considered by September 27 under Speaker Pelosi's recently announced agreement.

The legislation has a price tag of \$1.2 trillion. Most of the more than 2,700 pages of the bill are dedicated to addressing the nation's transportation, water, and broadband infrastructure deficiencies. However, the legislation also includes

several provisions aimed at expanding the adoption of EVs. The bill creates several new programs with the primary goal of expanding the nation's charging infrastructure. President Biden has proposed creating a network of 500,000 charging stations across the country to allow for significant adoption of electric vehicles and address the concern expressed by many consumers that the range of the vehicles will be limited by a lack of access to charging infrastructure.

The legislation attempts to achieve the President's proposal by providing \$7.5 billion for charging infrastructure build-out. The most significant amount of funding will come from creating the National Electric Vehicle Formula Program that the Department of Transportation will administer. The program is funded at \$1 billion per year for five years for a total of \$5 billion for funding to states for the acquisition, installation of EV charging infrastructure, the operation and maintenance of charging stations, and data sharing related to EV infrastructure. It is worth pointing out that the federal government is only providing five years of operation and maintenance funding, after which the responsibility will fall entirely upon the state. These grants will require a 20 percent cost-share by the states, which mirrors the standard cost-share for other federal highway formula funds to the states. Eligible projects for these funds must be located along a designated alternative fuel corridor, which must meet standards about publicly accessible places to charge your vehicle. Only after the designated alternative fuel corridors in a state are completely built out can a state then use the remaining funds for charging infrastructure on any public road or public facilities like parks or schools.

The additional \$2.5 billion for charging infrastructure comes from a second charging and refueling grant program. States, local governments, metropolitan planning organizations (MPOs), and other public sector entities are all eligible for these grants. Fifty percent of the funding for this grant program must be dedicated to deploying charging stations located on alternative fuel corridors. But unlike the National Electric Vehicle Formula Program, these grants include a fifty percent set-aside for community grants. These community grants are not required to be located on alternative fuel corridors and instead be located on any public road or publicly accessible location. Under the community set-aside, priority will be given to rural areas, low and moderate-income neighborhoods, and communities with low ratios of private parking for residents or high percentages of multiunit dwellings. One of the biggest challenges around charging infrastructure is equity and accessibility for population-dense low and moderate-income urban areas and rural communities that regularly travel long distances. The community set-aside is aimed at tackling these concerns.

The legislation also provides significant resources to the EPA to administer a Clean School Bus Program. Under the \$5 billion program, the EPA would provide grants to replace existing school buses. Fifty percent of the funds must be allocated to replace existing school buses with zero-emission school buses. The other fifty percent of the money could be used to replace existing school buses with low emission alternative fuel buses. Similar to the community set-aside discussed

previously, funds are prioritized for rural and low-income communities. Unlike the previous programs discussed, there is not a required cost-share associated with this program so that EPA can cover up to 100 percent of the cost of replacement buses.

Also included in the bipartisan infrastructure bill is a provision that establishes an electric vehicle working group. The working group will be co-chaired by the Secretaries of Transportation and Energy and will consist of not more than 25 members. The make-up of the working group will include representatives from additional federal agencies like the EPA and non-federal stakeholders like automotive manufacturers, auto parts suppliers, vehicle battery manufacturers, automotive dealers, labor organizations, and the trucking industry. The group will be tasked with providing three reports to Congress over roughly five years after the working group is established. The reports will focus on the status of electric vehicle adoption, including recommendations related to consumer behavior, charging infrastructure, manufacturing and battery costs, and adoption of EVs among low and moderate-income individuals, and analysis of efforts to overcome adoption barriers.

Budget Reconciliation

In order to strike the bipartisan deal on infrastructure, several Democratic priorities were left out of the legislation. However, that does not mean Congressional Democrats are abandoning those objectives. Instead, they will turn to the partisan budget reconciliation process to accomplish many of their remaining goals. The significance of the budget reconciliation is that it is protected from a filibuster in the Senate and therefore only requires 51 votes in the Senate to pass. This is one of the few, if not only, times Democrats can pass the legislation without any Republican support in the Senate. While much of the legislation is expected to focus on a social policy like paid family and medical leave, universal pre-kindergarten, and expansion of the Affordable Care Act, Medicaid and Medicare, the bill is also expected to include climate-related provisions that Republicans rejected during the negotiations on the bipartisan infrastructure bill. While reaching an agreement among just Democrats will still not be easy, budget reconciliation does provide the best opportunity for President Biden and the Democratic Congress to enact significant components of their agenda.

One of the policies expected to be included in the final budget reconciliation package is the extension and expansion of the electric vehicle tax credit. Under current law, buyers of a qualifying electric vehicle are eligible for a federal income tax credit of up to \$7,500. The credit begins to phase out once a vehicle manufacturer exceeds 200,000 vehicles sold. At this point, both General Motors and Tesla have reached this threshold.

Under proposals being floated for inclusion in the budget reconciliation, the credit would lift the 200,000 vehicle cap per manufacturer completely. Supporters of the credit are also pushing to increase the incentive to as much as \$12,500 per vehicle. One other change being proposed is to the existing credit structure to allow

consumers to receive the credit at the point of sale rather than having to wait until they file their income taxes.

The existing credit has also faced criticism in that it was primarily a tax break for wealthy Americans buying luxury electric vehicles. In response, during consideration of the budget resolution in the Senate, an amendment offered by Senator Deb Fischer (R-NE) was narrowly approved to limit the credit to electric cars that cost less than \$40,000 and limit the credit to consumers with an income of less of than \$100,000. It should be pointed out that Senator Fischer's amendment is non-binding, but it does indicate Congressional support for putting limits on the purchase price and income of the buyer. It seems unlikely that Congress would enact an income threshold for the credit in the final bill, but the final bill will probably include a cap on the price limit. While a cap of \$40,000 would likely exclude a significant number of vehicles from the credit, proposals have been introduced that set the limit as high as \$80,000 to allow for union-made luxury SUVs to remain eligible. Regarding union-made vehicles, Democrats are also pushing for a bonus credit to be given for domestic and union-made vehicles. While final details of the EV credit will be negotiated over the next several weeks, there is strong support for clean transportation incentives among House Democrats, as demonstrated by a letter signed by 186 members to Speaker Pelosi calling for the extension and expansion of clean energy incentives to be included in the reconciliation package.

Democratic members of Congress have also called for significantly more funding for charging infrastructure to be included in the reconciliation package. In a letter led by Congresswoman Debbie Dingell and signed by 27 other Democrats, they were critical of the level of funding included in the infrastructure bill, saying that it "falls far short of the needed level of investment." The letter goes on to call for Congress to include \$85 billion for investment in charging infrastructure. While it is unlikely Congress would include this level of funding, there is a strong possibility the budget reconciliation package will include additional dollars for charging infrastructure.

Since both the House and Senate have passed a budget resolution that includes instructions to Congressional committees to draft language in support of the policy laid out in the budget framework, Congress will spend the next several weeks putting together a budget reconciliation package that can garner the necessary votes in both the House and Senate. While the goal is to complete this package by the end of September, it is certainly possible it could stretch into October and perhaps even longer.

Conclusion

Whether through Executive Order, budget reconciliation, or other legislative avenues, electric vehicle policy will continue to be a focus of the Biden Administration and the Congress as long as Democrats remain in the majority. Over the next several months, Congress and the White House will advance

significant policies to promote the rapid adoption of electric vehicles and transform the vehicle sector to tackle the ongoing climate crisis. After all, you never want to see a crisis go to waste.