

Executive Summary
Testimony of Forrest McConnell,
President, McConnell Honda & Acura, Montgomery, Alabama
on behalf of the National Automobile Dealers Association
Before the House Energy and Power Subcommittee
“EPA's Greenhouse Gas Regulations and Their Effect on American Jobs”
March 1, 2011

America's auto dealers support a single national fuel economy standard and increases in fuel economy that make sense to consumers. Our primary concern is not necessarily over the stringency of the fuel economy standard, but rather the overall structure of the fuel economy regulations that govern automobiles today, which currently emanate from three different programs established by three separate government agencies. A single national standard will more effectively increase fuel economy, enhance economic growth, protect passenger safety, and protect the environment. Unless and until consumers actually purchase new vehicles, none of these benefits will be realized.

California regulators should not set national fuel economy policy. National fuel economy policy should be set by Congress and not by CARB. California regulators wrote their fuel economy regulation solely for the California auto market. By law, CARB does not consider the impact of its fuel economy rules on job loss, consumer affordability or choice, or highway safety, outside of California.

CARB's regulation of fuel economy/CO₂ is very different from the CAFE program. California's regulation is similar to the CAFE program in one way: both regulate fuel economy. The methods, structure and stringency of the programs, however, are very different.

In California states, CARB's regulation could pose special challenges for auto dealers and consumers. Unlike the CAFE program based on a nationwide fleet fuel economy average, CARB's regulation requires that the fleet averaging be conducted on a state-by-state basis in each of the states that has adopted California's rules or in a pool of all the “California” states. If consumers do not buy the “right” mix of vehicles from a regulated automaker in each California state, then that automaker must either ration or stop selling certain vehicles with lower mileage ratings, or force dealers to take delivery of more vehicles with higher mileage ratings – *without regard to actual consumer demand in that state.*

Under explicit direction from Congress, NHTSA has the tools to strike the proper balance for a national fuel economy program. Unlike the Clean Air Act, the CAFE program was written by Congress specifically to regulate fuel economy. While Congress mandated that fuel economy be raised to its “maximum feasible level,” Congress also recognized that any fuel economy increases be tempered by its impact on job loss, consumer demand, and consumer choice.

State regulation is completely unnecessary and ineffective because the vigorous CAFE program Congress designed, coupled with EPA regulation of vehicle air conditioners, results in approximately the same amount of fuel saved and greenhouse gases reduced.

Congress must return to one true national standard for the reduction of CO₂ and the increase of fuel economy. The statute Congress designed provides a regulatory program within NHTSA that provides consistent increases in fuel economy with flexibility to consider the cars consumers are willing to buy. The faster that we can turn over the nation's aging auto fleet the faster we will increase energy security, enhance passenger safety, and improve environmental quality, and generate the economic activity that is necessary for restoring jobs in the automotive industry. Even after the Great Recession, auto retailing is still a significant percentage of our national economy. As a practical matter, any sustainable economic recovery must go through automotive showrooms across the nation.

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“EPA's Greenhouse Gas Regulations and Their Effect on American Jobs”

Mr. Chairman, Ranking Member Rush, my name is Forrest McConnell. I am President of McConnell Honda & Acura of Montgomery, Alabama. My grandfather started our business in 1919, and I have been an automobile dealer since 1987, employing 70 people. While I own and operate a Honda franchise, I do so as an independent business person, and am not in any capacity representing the American Honda Motor Company. Today I am testifying not simply as an auto dealer but also on behalf of National Automobile Dealers Association (NADA), where I serve on the Board of Directors and as a member and the immediate past chairman of the Regulatory Affairs Committee.

America's auto dealers support a single national fuel economy standard and increases in fuel economy that make sense to consumers. Our primary concern is not necessarily over the stringency of that fuel economy standard, but rather the overall *structure* of the fuel economy regulations that govern automobiles today, which currently emanate from three different programs established by three separate government agencies. A single national standard will more effectively increase fuel economy, enhance economic growth, protect passenger safety, and protect the environment. Unless and until consumers actually purchase new vehicles, none of these benefits will be realized.

In 2007, Congress passed a bipartisan bill entitled the “Ten-in-Ten Fuel Economy Act”,¹ as part of the Energy Independence and Security Act. This landmark law raised fuel economy standards by at least 40 percent and set out a single national fuel economy program administered by a single agency – the National Highway Traffic Safety Administration (NHTSA) – until 2030.

Today, this law, whose passage was applauded by everyone from automakers to environmentalists, is at risk to being reduced to a near nullity. As the result of actions by the judicial and executive branches, there are now three fuel economy programs administered by three different agencies – NHTSA, the Environmental Protection Agency (EPA), and the California Air Resources Board (CARB) – under three different sets of rules, pursuant to three different laws. This tangle of fuel economy regulations was cobbled together in 2009 under the rubric of what is known as the “National Program.”

The National Program can be viewed as a necessary bridge until Congress reasserts its rightful role to set national fuel economy policy. To this end, NADA supports allowing the National Program to proceed as promulgated, expiring in model year 2016. For the next round of rulemaking, however, which is currently slated to be in effect from model years 2017-25,

¹ Pub. L. No.110-140, 121 Stat. 1492 (2007)

Congress must have the nation’s auto industry return to one national fuel economy standard under the Corporate Average Fuel Economy program (CAFE) program.² To be clear, we support a single national fuel economy standard, not a single set of standards as exists today.

While the next round of fuel economy rulemaking will not take effect until model year 2017, these rules are literally being drafted now in Sacramento and Washington. On September 1, 2011, they are expected to be formally proposed, with final rules issued by summer 2012. Congress must act now to ensure that beginning with model year 2017, Congress sets national fuel economy policy and the three-different-fuel-economy-regimes model is allowed to expire.

There are numerous advantages to returning to a single national fuel economy standard. First, its terms are set by Congress. Second, the CAFE program was specifically written to regulate fuel economy. The Clean Air Act (CAA), for all its virtues, was not. To be sure, California’s regulation was written also to regulate fuel economy – but only in California. Its application in other states results in what EPA Administrator Lisa P. Jackson calls “a patchwork of state standards.”³ In fact, the structure of CARB’s regulation is so disruptive to automotive manufacturing and retailing that, for model years 2012-2016, CARB amended it to accept federal compliance as compliance with its state regulation.

Next, a single national fuel economy program will always, by definition, be more uniform, consistent, and harmonized than three different programs. While the Administration has touted the National Program at various times as uniform, consistent and harmonized, that is simply not the case. The chart below shows the stark statutory differences between the different regulatory regimes:

Differences Among the Three Standards

AREA OF DIFFERENCE	CAFE	CARB	EPA
Complying Solely With One Standard Ensures Compliance with the Other Two Standards?	No	No for MY09-11 Yes for MY12-16 Unknown for MY17-?	No
Automakers Must Report To?	NHTSA	13 Different State Agencies and DC	EPA
Allowed to intentionally pay fines in lieu of compliance with standards?	Yes	Yes	No
Penalty for Non-Compliance	\$5.50 per 1/10 of a mile under the fleet average times number of vehicles	\$10,000 per vehicle	Fine of up to \$37,500 per vehicle/revocation of certificate to sell in the U.S.
Credit for Air-Conditioning? (new refrigerant, lower leaks)	No	Yes	Yes
Economic Considerations Taken Into Account When Setting a Standard (Job Loss, Consumer Choice, Market Demand)	Yes	Yes, in CA only	Limited “economic practicability” analysis
Highway Safety	Primary mission of the agency	“No Safety Issues”	Not its primary mission
Underlying Statute Designed to Regulate Fuel Economy?	Yes	Yes, in California only	No
Basis for Setting Standard	Attribute-based (mandatory)	“Flat” Standard	Attribute-based (discretionary)

² The CAFE program sets fuel economy standards for passenger cars and light duty trucks.

³ EPA Administrator Lisa P. Jackson, Remarks at the National Press Club, as prepared (March 8, 2010).

Absent a change in law, these differences cannot be reconciled, and they certainly cannot be properly characterized as “uniform,” “harmonized,” or “consistent.”

California regulators should not set national fuel economy policy. National fuel economy policy should be set by Congress and not by CARB.⁴ The automotive industry, which has for more than thirty years met fuel economy standards nationwide across all state lines, simply cannot afford the unnecessary complexity and cost of multiple, state-by-state rules which do nothing to enhance policy objectives. Importantly, while the CAA allows California to regulate air pollution unique to California, it does not and should not allow California or any other state to regulate fuel economy, an area of regulation Congress specifically reserved for the Federal government.

California’s fuel economy regulation was written by California regulators solely for the California auto market. By law, CARB does not consider the impact of its fuel economy rules on job loss, consumer affordability or choice, or highway safety, outside of California. Therefore, if an auto plant in my home state of Alabama were to be shuttered because of California’s fuel economy rule, the displaced workers would have virtually no recourse. In reality, California has been *de facto* empowered by the “California waiver”⁵ to set the national fuel economy standard. This power is derived from the fact that California can, and has reportedly indicated that it would implement its patchwork regime in the “California states” if it deems it necessary.⁶

CARB’s regulation of fuel economy/tailpipe CO₂ is very different from the CAFE program. California’s regulation is similar to the CAFE program in one way: both regulate fuel economy. The methods, structure and stringency of the programs, however, are very different. For example, the CAFE standard set by the Obama Administration is actually higher than the California standard. In model year 2016, the CAFE standard is 34.1 mpg; the equivalent California standard is 32.3 mpg.⁷ People often assume that California’s standards are always more stringent, but that is not true in this instance.

CARB’s exemption policy is also at odds with congressional policy, and has the potential to confer a regulatory advantage to certain automakers. California’s fuel economy program exempts (until 2016) automakers who sell less than 60,000 vehicles per year on average in California. Manufacturers exempt in California are also exempt in every CARB state, regardless of how many vehicles are sold outside of California. After 2016, CARB regulates these vehicles at a lower standard. At least fifteen different makes are exempt, and new entrants who expect to sell less than 60,000 vehicles in California would also be exempt.

In contrast, the CAFE law only exempts vehicle manufacturers that make fewer than 10,000 vehicles annually *worldwide*.⁸ Congress enacted this policy because exempting some automakers (1) does not increase fuel savings and (2) confers a regulatory advantage on the

⁴ CARB believes its fuel economy rules “would be a better ‘national solution.’” See CARB, “*Comparison of Greenhouse Gas Reductions for the United States and Canada Under U.S. CAFE Standards and California, An Enhanced Technical Assessment*,” (Feb. 25, 2008), pg. vii.

⁵ In 1977, Congress amended the CAA to allow other states to adopt and enforce standards set by CARB, if covered by an EPA preemption waiver.

⁶ Jim Witkin, “*California, U.S. Agree on Emissions-Standards Announcement Date*,” N.Y. Times, Jan. 26, 2011.

⁷ See Appendix B to compare the stringencies of both programs.

⁸ 49 U.S.C. § 32902(d)

exempt automakers. While the deleterious effects of these exemptions have been postponed under the National Program, the potential for this aspect of CARB's regulation to distort the auto market in the future is real.

For auto dealers and consumers in the California states, CARB's regulation could pose special challenges. Unlike the CAFE program, which is based on a nationwide fleet fuel economy average, CARB's regulation requires that the fleet averaging be conducted on a state-by-state basis in each of the states that has adopted California's rules, or in a pool of all the "California" states. If consumers do not buy the "right" mix of vehicles from a regulated automaker in each California state(s), then that automaker must either ration or stop selling certain vehicles with lower mileage ratings, or force dealers to take delivery of more vehicles with higher mileage ratings – *without regard to actual consumer demand in that state*. This method of compliance, called "mix shifting" does nothing to decrease greenhouse gas emissions (GHGs) or improve fuel economy on a national basis.

Additionally, another flaw in CARB's regulation is the loophole⁹ whereby vehicles purchased outside of the measuring state(s) do not count against an automaker's fleet-wide average in the measuring state(s). As a result, new car buyers can simply go across state lines to find the vehicle they want. Giving one state's auto dealers a sales advantage over another state's auto dealers distorts the retail auto market for no commensurate environmental benefit.

After years of denying the very existence of this "patchwork," a CARB official recently took credit in a letter to automaker CEOs for eliminating it.¹⁰ What CARB did was to allow compliance either in each California state (which is the "patchwork") or together in all the California states (which is a "patchwork light"). If regulating the fourteen "California" states as one is better than regulating each California state individually, then surely having the same rules for all 50 states would be the best. This, incidentally, describes the CAFE program Congress designed to meet national interests.

The loopholes, exemptions, market distortions, and inability to balance national factors when setting a fuel economy regulation of CARB's regulation do not favorably compare to the CAFE program, which has none of these defects. Congress needs to address whether fuel economy policy is going to be set by its rules, or whether California regulators will dictate national fuel economy policy.

NHTSA should be the sole regulator of fuel economy/tailpipe CO₂ emissions. Under explicit direction from Congress, NHTSA has the tools to strike the proper balance for a national fuel economy program. Unlike the CAA, the CAFE program was written by Congress specifically to regulate fuel economy. While Congress mandated that fuel economy be raised to its "maximum feasible level," Congress also recognized that any fuel economy increases be tempered by its impact on job loss, consumer demand, and consumer choice. For example, if NHTSA found that raising fuel economy to a certain level would cause job losses, highway fatality increases, or limit consumer choice, those important considerations would be given appropriate weight while setting a maximum feasible fuel economy standard. This is a vital part of the CAFE program, because Congress knew that as important as it is to improve fuel

⁹ This loophole is known as the "cross border sales loophole."

¹⁰ Letter from Mary Nichols, Chairman, CARB, to CEOs of seven automakers (February 11, 2011).

economy, it is also important not to have policies that increase unemployment or cause additional deaths on our nation’s roads.

In contrast, since the Clean Air Act was not designed to regulate fuel economy, there is no identical “economic practicability” analysis when EPA sets a standard under that Act. Job loss, highway safety, and affordable vehicle choice are important considerations that are diminished when EPA regulates fuel economy.

Some supporters of the three-fuel-economy-regulations-regime contend that EPA is only regulating CO₂ emissions and not fuel economy, and since the CAA has been successful in regulating other criteria air pollutants, the regulation of tailpipe CO₂ is no different. But regulation of tailpipe CO₂ emissions and fuel economy are different sides of the same coin.¹¹ No device (such as a catalytic converter for criteria air pollutants) exists to reduce tailpipe CO₂ emissions. The only way to reduce tailpipe CO₂ emissions is to increase a vehicle’s fuel economy.

Apart from the Congressionally-established statutory provisions that make NHTSA the more appropriate regulator of fuel economy/tailpipe CO₂, EPA’s approach to regulating fuel economy/tailpipe CO₂ is not consistent with the congressional design. Justice Stevens wrote in *Massachusetts v. EPA* that “there is no reason to think [NHTSA and EPA] cannot both administer their obligations and yet avoid inconsistency.”¹² Yet the following chart shows that even where EPA had the discretion to harmonize with the policy set out in the CAFE program by Congress, EPA instead chose to substitute its policy judgment instead.

Policy Areas Where EPA Chose to Disregard the Fuel Economy Policy Set by Congress			
AREA OF INCONSISTENCY	CAFE	CARB	EPA
Statutory Limit on Length of Rule	5 years	No Limit	No Limit
Import/Domestic Fleets Separate?	Yes	No	No
Transfer of Credits Between Car and Truck Fleets Allowed?	Limited	Unlimited	Unlimited
Production of E-85 vehicles (FFV credit)	Allows credit for manufacturing E-85 vehicles. Phased out in 2019	Automaker must prove motorist is using E-85 to receive credit	Allows credit for manufacturing E-85 vehicles until 2015. In 2016, automakers must prove motorist is using E-85 to receive credit
Exemption for Major Manufacturers? (see charts)	No	Yes	Lower standard for some till '15; lower standard for others till '16; no standard for small automakers
Potential exemption for new entrants (e.g. Chinese automakers)?	No	Yes	No (75 Fed. Reg. 25416)

¹¹ In fact, under CAFE, fuel economy is actually calculated by measuring a vehicle’s carbon emissions and then converting those emissions into MPGs using a simple mathematical formula. Recognizing this fact, both EPA and NHTSA have acknowledged that “the only way at present to reduce tailpipe emissions of CO₂ is by reducing fuel consumption.” 74 Fed. Reg. at 49632. Not surprisingly, every single vehicle technology identified by CARB to reduce tailpipe CO₂ emissions was also cited by NHTSA as a way to improve fuel economy (see Appendix C).

¹² 549 U.S. at 532 (2007).

Supporters of the three-different-fuel-economy-regimes model seem to justify EPA's contrary policy choices as superior to what Congress enacted. For example, despite a statutory restriction that the CAFE program can only be set in five year increments, EPA and CARB plan to propose a rule this year setting a fuel economy standard all the way to 2025. A CARB official contends the 5-year restriction makes for automakers, "long-term product planning, investment and capital decisions more difficult."¹³ Even if the CARB official's statement were true, setting fuel economy rules beyond 5 years is simply EPA and CARB substituting their policy judgment over the law Congress wrote.

Moreover, it is my understanding that no automaker has firm product plans beyond 2020. Essentially, this means that regulators will be taking educated guesses on what new car buyers will want to buy fourteen years from now. Of course, automakers will have to build to the specifications the regulators dictate, and I hope, as an auto dealer who has to meet market demand every day, that they guess right. I cannot possibly tell you what consumers in my market will want to buy 14 years from now. This one provision demonstrates, in a nutshell, one of the greatest drawbacks of the three-different-fuel-economy-regimes model – it gives regulators license to override congressional policy. Congress included the 5-year limitation in the Ten-in-Ten Fuel Economy Act precisely to prevent regulators from guessing what automakers planned to produce years into the future. Congress understood that the regulatory process has to be linked closely with the commercial reality of meeting consumer demand, rather than being pushed into the realm of theoretical possibilities. Unless Congress acts, we will have a situation where regulators in 2011 are proposing a fuel economy standard for 2025 – which is exactly the situation Congress legislated to avoid.

Supporters of the three-different-fuel economy-regimes model argue that only EPA can regulate refrigerant GHGs from vehicle air conditioners. This authority is then used to justify the redundant federal regulation of fuel economy, which is the same as regulating CO₂ tailpipe emissions. There is, however, a simple solution to this situation that does not entail the double regulation embedded in the National Program: have EPA regulate refrigerant GHGs utilizing the authority the agency already has under Title VI of the Clean Air Act with regard to these refrigerants. There is no reason why EPA cannot regulate refrigerant GHGs contained in vehicle air conditioners while NHTSA regulates fuel economy/tailpipe CO₂. Such an arrangement would achieve the Administration's policy goals, as this question for the record from Senator John Thune to Secretary Ray LaHood demonstrates:

Q. "Under authorities that existed before the Massachusetts vs. EPA litigation, and still exist to this day, NHTSA was perfectly capable of increasing CAFE standards. In fact, even in the context of the tailpipe rule, NHTSA involvement accounts for 34.1 of the 35.5 miles per gallon mandate. Furthermore, it appears to be the case that EPA could make their 1.4 miles per gallon contribution to these environmental improvements under the separate authority of Title VI of the Clean Air Act. Would you agree with this statement?

*A. Yes... "*¹⁴

¹³ *Hearing on H.R. ___ the Energy Tax Prevention Act of 2011 before the Subcomm. on Energy and Power of the House Comm. on Energy and Commerce, 112th Congress, 1st Sess. (February 9, 2011)(statement of James Goldstene, executive officer, California Air Resources Board)*

¹⁴ *Hearing on Toyota's Recalls and the Government's Response before the Senate Commerce, Science and Transportation Committee, 111th Congress, 2nd Sess. (March 2, 2010)(question for the record by Sen. John Thune to U.S. Department of Transportation Secretary Raymond LaHood).*

If the Administration were to adopt this approach, Justice Stevens' quotation regarding "the two agencies administer[ing] their obligations and yet avoid[ing] inconsistency" would finally be realized. More importantly, the fuel economy system passed in 2007 could be implemented the way Congress intended.

* * * * *

Mr. Chairman, the vigorous CAFE program Congress designed, coupled with EPA regulation of vehicle air conditioners, results in approximately the same amount of fuel saved and greenhouse gases reduced. State regulation is completely unnecessary and ineffective. EPA regulation of tailpipe CO₂ is also redundant. It is now incumbent on Congress to impose order on these conflicting regulations and have the final say on policy.

This is not an esoteric debate simply about bureaucratic turf. This is all about jobs and about whether automobiles in the future will still be affordable to my customers. The National Program fuel economy regulations that were jointly issued by NHTSA and EPA last year will cost the American people \$51.7 billion. The next rulemaking, which is apparently being rushed through the process (under law, NHTSA has until 2014 to set standards for 2017 and beyond) is likely to be the most expensive auto regulation ever. It is important that the *structure* of the fuel economy program is sound, so the *stringency* of the fuel economy standard will be correct.

In closing, I want to emphasize that we at NADA fully appreciate the complexity of this public policy challenge. We urge the subcommittee to return to one true national standard for the reduction of CO₂ and the increase of fuel economy. NHTSA has been regulating fuel economy for over 30 years, and we are confident their regulatory program will provide consistent increases in fuel economy that consumers are willing to buy, because that's what the statute Congress designed was intended to do. The faster that we can turn over the nation's aging auto fleet, the faster that we will increase energy security, enhance passenger safety, improve environmental quality, and generate the economic activity that is necessary for the restoration of the employment base within the automotive industry. Even after the Great Recession, auto retailing is still a significant percentage of our national economy. As a practical matter, any sustainable economic recovery must go through our showrooms across the nation.

Thank you for your consideration.

APPENDIX A: History of California's Fuel Economy Program

- Carbon dioxide (CO₂) is the primary greenhouse gas that will be regulated – just like in the federal CAFE program.
- Regulating carbon dioxide is equivalent to regulating fuel economy. In fact, EPA measures carbon emissions from the tailpipe to determine the fuel economy of new vehicles.
- Federal law prohibits states from setting fuel economy standards.
- To implement these standards, California needed to apply for a waiver from the Environmental Protection Agency (EPA).
- 2002: The California legislature passed AB 1493, which directed the Air Resources Board (CARB) to create a regulation to reduce greenhouse gas emissions from motor vehicles. In 2005, CARB promulgated the regulation for MY 2009-2016.
- 12/07: EPA announced its intention to deny California's waiver. In March 2008, EPA formally denied the waiver. While EPA had previously granted waivers that dealt with local or regional air quality, GHG pollution is neither unique to California nor caused in significant part by air quality unique to California.
- 1/21/09: CARB petitions EPA for reconsideration of the California waiver denial to establish its own fuel economy regime in California.
- 5/19/09: The "National Program" is announced. In exchange for EPA granting the waiver, CARB will enforce its fuel economy regulation for model years (MY) 2009-11 but accept federal enforcement for MY 2012-16. CARB officials agree to a federal standard higher than the CARB standard. Later that day, a CARB official tells the press CARB is already working on its own fuel economy standards for MY 2017 and beyond. (Reuters, 5/19/09)
- 7/8/09 – EPA grants the California waiver, allowing CARB's patchwork fuel economy regime to be enforced. Other states can adopt CARB's regime and fourteen states and DC have done so. Automakers must comply with both.
- 3/3/10 -- A CARB official indicates that CARB plans to set fuel economy standards until 2050.

Appendix B: The Obama CAFE Standard is Higher Than California's Standard

Combined Industry Average Fuel Economy for Cars and Light Trucks (in mpg)

Sources: CARB, "Comparison of Greenhouse Gas Reductions for the United States and Canada Under U.S. CAFE Standards and California, An Enhanced Technical Assessment," Feb. 25, 2008, Table 6, page 10, 75 Fed. Reg. 25330 (May 7, 2010)

Model Year	CAFE	CARB
2011	27.6	26.7
2012	29.7	29.5
2013	30.5	29.9
2014	31.3	30.4
2015	32.6	31.3
2016	34.1	32.3

Appendix B: Is CARB's Regulation "Related to" Fuel Economy?

Automotive Technologies	Identified by NHTSA to Raise Fuel Economy	Identified by CARB to Decrease GHGs
Cylinder deactivation	✓	✓
Six-speed automatic transmission	✓	✓
Automated Shift Manual Transmissions	✓	✓
Variable valve timing and lift	✓	✓
Turbocharging	✓	✓
Stoichiometric Gasoline Direct Injection	✓	✓
Integrated Starter-Generator	✓	✓
Camless valve actuation	✓	✓
Homogeneous Charge Compression Ignition	✓	✓
Low-leak air conditioning		✓
<p>Source: 73 Fed. Reg. 24396 (May 2, 2008). CARB, Report to the Legislature and the Governor on Regulations to Control GHG Emissions From Motor Vehicles, pages 7-8, December 2004.</p>		