



## Procopio Perspectives Podcast

# The Legal and Practical Challenges of California's Advanced Clean Fleets Regulation

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**Intro:** Welcome to Procopio Perspectives, a podcast featuring award-winning corporate and litigation attorneys providing useful legal insights on the latest issues of the day. Now here's your host.

**Kevin Wilson:** Hello everybody. My name is Kevin Wilson. I'm Chief Marketing Officer at the Procopio Law Firm and we are in Procopio's Environmental [00:00:30] and Energy Law podcast. I'm here today with Procopio partner John Lormon. John is leader of Procopio's Environmental and Energy Practice Group. And we are also joined today by Procopio Environmental and Energy Practice Group associate Matt Abbot. So welcome Matt, and welcome John. Today we're going to be continuing our discussion of the advanced Clean Fleets regulation that [00:01:00] will soon be taken in effect here in California, focusing on the requirements applicable to high priority and federal fleets today. And please note today's podcast is part two of our three-part series. In part three, coming soon, we'll be discussing the impact of advanced clean fleet regulation on Drayage trucks fleets. So let's begin today's discussion. [00:01:30] John, can you remind our listeners of the key elements of the advanced Clean Fleets regulation please?

**John Lormon:** Yes, thank you, Kevin. I think the important thing to recognize in regards to this regulation is who's covered by it and what's it require of you, but in addition, the context in which this regulation came to exist. So it's not legislation, it's regulatory [00:02:00] rulemaking that came out of a request from the governor initially in regards to zero emission vehicles. And it then implemented some legislation but with broad authority to the regulated body, in this case the California Air Resources Board. So this rule, the advanced clean fleet has three parts to it or three groups that are subject to it. [00:02:30] One is the state and local governments, and we provided a podcast regarding that segment of the regulated community previously and today we're discussing the high priority fleets, the private fleets. There's also the federal government that's included, but we're focused on the high priority fleets. And then thirdly, there's drayage trucks, mostly port type of trucks that move cargo [00:03:00] around. And so today in looking at the high priority segment that is subject to this rule, it applies to their fleet vehicles in regards to medium and heavy duty trucks, and it regulates those vehicles in regards to when and what type of conversion process they must go through to satisfy the zero emission component of the rule. So the end game [00:03:30] is to take carbon out of the transportation sector, in this case for trucks, and we'll talk more about that.

Kevin Wilson: Okay, that's great. Thank you so much for that overview, John. Matt, kind of getting into a little bit of the details here. Could you explain the basic requirements for high priority fleets under the ACF regulation, please?

Matt Abbot: Thanks Kevin. First I'll talk about the scope of the ACF regulation. [00:04:00] So the regulation applies to vehicles over 8,500 pounds gross vehicle weight rating, as well as light duty package delivery vehicles in yard tractors. It's worth noting that gross vehicle weight rating as defined in section 350 of the California vehicle code is the weight specified by the manufacturer as the loaded weight of the vehicle, not the empty or curb weight. So for example, this would include a 2024 Mercedes Sprinter [00:04:30] cargo van, which has a gross vehicle weight rating of 9,050 pounds. Light duty package delivery vehicles subject to the regulation can be less than 8,500 pounds, but they must have 100 or more cubic feet of cargo area and be regularly used to deliver packages or mail. So those are the vehicles subject to the regulation. Now we'll talk about the entities that are subject to the regulation.

So the regulation applies to any entity that owns, [00:05:00] operates, or directs the operation of one or more of these vehicles in California. So long as that entity has more than \$50 million in total gross annual revenue or owns, operates, or directs 50 or more vehicles in the total fleet, not just the California fleet or that entity is a federal government agency. So for an example, a company based in Reno, Nevada that has 50 or more vehicles [00:05:30] in Nevada would be subject to the ACF regulation if they operate any of those 50 vehicles across the border in California during any given year. The ACF regulation compliance requirements would only apply to those vehicles operated in California or what's called the California fleet. Next, I'll talk about compliance options under the regulation. There are two compliance options that fleets may select to comply with the regulation.

[00:06:00] Option one is called the model year schedule option, and that's the default option. Under the model year schedule compliance option beginning on January 1st, 2024, all vehicles added to the California fleet must be either zero emission vehicles, or ZEVs, or exempt internal combustion engine vehicles. So also under this option beginning in 2025, internal combustion engine vehicles must be removed from the California [00:06:30] fleet by January 1st of the calendar year after they exceed what's called their minimum useful life, which is the later date of either 13 years after the engine and emissions control system was certified or 800,000 miles or 18 years, whichever of those two metrics occurs first. There's some uncertainty regarding the mileage threshold. The regulation language under this option says internal combustion engine vehicles must be removed from the California fleet by January [00:07:00] 1st of the calendar year after the minimum useful life mileage threshold was exceeded.

Or January 1st of the calendar year the engine model year is 18 years old, or whichever occurs first. However, there's no minimum useful life mileage threshold applicable prior to 13 years. So that part of the regulation is a little bit unclear. The second compliance option is called the ZEV Fleets Milestone option, which is available through [00:07:30] 2030. Under this option

beginning in 2025, fleet owners must continually meet or exceed specified ZEV California fleet percentage requirements over time based on three different vehicle milestone groups. So for example, milestone Group one vehicles include box trucks, vans and package delivery vehicles, and they must be 10% ZEV in 2025, 25% ZEV in 2028, 50% ZEV in 2031, 75% ZEV in 2033, [00:08:00] and then 100% ZEV in 2035 and beyond. Fleets have more time than that to meet milestone percentages for heavier vehicles in milestone groups two and three. Next I'll talk about exemptions under the ACF regulation. There are exemptions for certain types of vehicles and then there are exemptions for certain circumstances.

So some of the vehicles exempt from the regulation are school buses, military vehicles, [00:08:30] vehicles awaiting sale, emergency vehicles, historical vehicles, snow removal vehicles, two engine vehicles, heavy cranes, and some other types of specialized vehicles. There are also exemptions for certain circumstances, and I'll just run through these. There's a backup vehicle exemption for vehicles operated less than 1000 miles per year. There's a daily usage exemption if no battery electric vehicles available to purchase that meets the demonstrated daily needs of any existing vehicles in [00:09:00] the same configuration. There's a ZEV infrastructure delay exemption for both construction and site electrification delays. There's a vehicle delivery delay exemption. There's a ZEV purchase exemption if a needed configuration is not available to purchase based on a non-availability list that carb maintains. There's an emergency use exemption for declared emergency events and mutual aid assistance. And then there's also a five-day pass for vehicles that are temporarily [00:09:30] operated in California.

Finally, the last part of this long answer is that the regulation has extensive reporting record keeping and enforcement requirements. So annual reporting is due on February 1st of each year, beginning in 2024 and lasting through 2045. Any changes, additions or removals to the California fleet must be reported within 30 days and fleets must maintain documentation for five years. And then finally, with regard [00:10:00] to penalties, non-compliance, failure to report, false reporting or late reporting are all subject to penalties under the California Health and Safety Code. And these penalties range from up to \$10,000 per day for strict liability, and then they can increase for negligent knowing or willful violations all the way up to a maximum of \$1 million for corporations.

Kevin Wilson: Okay, Matt, thank you. Lots of information there, lots of details for our listeners and those involved, [00:10:30] interested parties to unpack here. Dare I say sounds like a fairly complicated regulation here. John, perhaps for the benefit of our listeners, in your mind, what are the biggest concerns that high priority and federal fleets should be having or should have about this regulation?

John Lormon: I think the first thing is to make sure that you understand and have a good record keeping program at your company regarding your fleet vehicles [00:11:00] that you understand what the obligations that record keeping program will now have that are new or additional to your fleet management

program. You'll need to factor in what the useful life is of your vehicles and plan in advance to replace those vehicles as needed depending on your compliance option choice, be it the model year or the milestone. So it takes [00:11:30] some planning and sorting through what are we going to do in terms of compliance and how do we plan for contingencies. Matt mentioned some of the exemptions, you want to figure how might I use an exemption? Would it be helpful? What's the process to obtain or secure the exemption and make sure it's in place timely and that it covers the use you want to make of that vehicle.

[00:12:00] You also need to know when and if that exemption expires and make sure that that information is implemented in the field, not just on paper. So there are other aspects about the infrastructure and the planning for the infrastructure so that the fleet, once you have command of what is your fleet and what's your compliance and exemptions and the replacement program. You need to have your infrastructure [00:12:30] in place, that can take time. Both your facility construction and the utility delivery of the additional power. You obviously will need to work with your budget to see what new impacts there might be to this program on your fleet budget and your construction budget for each of your facilities. The reporting program is an important part, but [00:13:00] also following what is happening at the California Air Resources Board, both in terms of modifications, if any to the rule, they do plan to form working groups and to listen to the working groups.

There have been lawsuits filed, Matt will talk further about some of those. And there have been at least in one case, a settlement that CARB is resolving some of the challenges that were in the lawsuit [00:13:30] through a negotiated path. We haven't mentioned, but Matt will speak to two other regulations, the Advanced Clean Truck and the Omnibus Regulation, and they can have an impact on the advanced clean fleet as well. So you want to keep an eye out for those already in place regulations that have been around for two or three years and the new Advanced Clean Fleet regulation, [00:14:00] which will go into effect on January 1. So those are some of the broader concepts that the regulated community needs to sit down and set a plan of action and implement it.

Kevin Wilson: Understood. Thank you, John. So yes, you just mentioned two companion regulations, the Advanced Clean Trucks Regulation and the Omnibus Regulation. Matt, could you explain, reiterate, perhaps how those impact [00:14:30] the ACF regulation?

Matt Abbot: Yes. The Advanced Clean Trucks Regulation, which became effective in March of 2021, requires manufacturers to sell a specified percentage of ZEVs over 8,500 pounds in California from 2024 through 2035. This regulation implements a cap in trade system in which manufacturers incur deficits based on internal combustion engine vehicle sales, and then [00:15:00] they incur credits based on ZB sales. And those credits may be traded, sold, or transferred between manufacturers. There are also reporting and record keeping requirements associated with the Advanced Clean Trucks regulation, including a one-time reporting requirement for large entities. The

intent of the Advanced Clean Trucks Regulation is to ensure that manufacturers develop and produce a sufficient number of ZEVs to enable ACF regulation compliance. [00:15:30] The second regulation that John mentioned is called the Heavy Duty Engine and Vehicle Omnibus Regulation or the Omnibus Regulation. This regulation sets more stringent nitrogen oxide and particulate matter emission standards for on-Road heavy duty vehicles over 14,000 pounds for model years 2024 through 2031.

The omnibus regulation creates a similar cap in trade system in [00:16:00] which sales of Legacy or non-omnibus emissions compliant internal combustion engines incur a deficit that must be offset by sales of omnibus emissions compliant engines or ZEV powertrains. If manufacturers do not comply with these omnibus requirements, they may actually be subject to engine recalls. CARB recently proposed amendments to the omnibus regulation, and they'll hold an executive officer hearing on October [00:16:30] 20th to consider those amendments. The amendments are in response in part to internal combustion engine and vehicle availability concerns. This impacts the ACF regulation because of the ACF requirement that new internal combustion engine vehicles must be certified to applicable California emission standards and emission related requirements. CARB may interpret this requirement to mean that new internal combustion engine vehicles added to ACF fleets [00:17:00] after '24 must be purchased in California or Section 177 states, which are states that have adopted California emission standards under Clean Air Act section 177.

Ultimately the concern for fleets under the ACF Regulation is that the Omnibus and Advanced Clean Trucks Regulations may actually restrict the number of internal combustion engines and vehicles for sale in California by imposing these expensive [00:17:30] deficits on the sales of those engines and vehicles. So in other words, a fleet that has a valid exemption to purchase an internal combustion engine vehicle under the ACF regulation may actually have trouble finding an internal combustion engine vehicle to purchase based on these restrictions imposed by the Advanced Clean Trucks and Omnibus Regulations.

Kevin Wilson: Okay, thank you. Matt, not unusual when new regulations are being adopted that there are illegal or procedural challenges. [00:18:00] Are we seeing any such challenges regarding the adoption of ACF regulation?

Matt Abbot: Yes, we are. First, the Western States Petroleum Association filed an action against the California Air Resources Board in California Superior Court on July 21st, seeking to set aside the Advanced Clean Fleets Regulation because as they allege the regulation violates state and federal law, including the California Environmental [00:18:30] Quality Act or CQA for failure to consider a reasonable range of alternatives. The California Health and Safety Code and Administrative Procedures Act for failure to adequately consider economic impacts and the commerce clause of the US Constitution for imposing a substantial burden on interstate commerce. There are also two federal court cases underway in the DC circuit related to emission standards. First, in Texas VEPA, a group [00:19:00] of 15 states led by Texas are

challenging a 2021 EPA rule for greenhouse gas emission standards for light duty vehicles for model years 2023 through 2026. The challengers believe that EPA overstepped its authority with this new emission standard arguing that costs associated with the rule, its potential impact on electric grid reliability and possible risks to national security trigger review under what's called the major [00:19:30] questions doctrine.

Another federal case in the DC circuit is Ohio VEPA, in which many of the same states are challenging EPA's restoration of a California Clean Air Act waiver that permits the state to set its own emission standards and run a zero emissions truck program. So arguments for the federal cases were heard in September and implementation of the ACF regulation may be delayed if any of the plaintiffs [00:20:00] in these cases are ultimately successful.

Kevin Wilson: Okay, thank you. John, bearing in mind these challenges are taking place, to summarize what do large fleet and business entities operating in California, what do they need to know right now about the ACF regulation?

John Lormon: Well they need to know if it applies to them. They need to know what the timing is for that application by each [00:20:30] of the applicable requirements that they're subjected to. They need to know that they have the ability to comply or have in place a plan how to achieve compliance. They need to fund that effort, maybe even staff that effort in some cases, if not already in place, or obtain assistance to make sure they're in compliance. [00:21:00] It's important that they stay updated in regards to the regulation. There have been, as Matt mentioned, litigation efforts. As I noted earlier, there's a settlement effort not just with dysregulation, but the interconnection of all of the decarbonizing of the transportation sector, in this case trucks. But it's a broader effort in California to decarbonize [00:21:30] the transportation sector with private vehicles, locomotives, and others. And there's some interconnection. I would note when I say stay tuned to the changes last month or late August, I can't remember, HR1435 was passed out of the house with eight Democrats supporting it. And that federal law is called the Preserving Choice and Vehicle Purchase Act.

And it was designed [00:22:00] to leave the consumer or the company, the fleet owner, to have options. Not to be forced into a mandated zero emission. That's not likely to succeed or get to the Senate or through the Senate. And if it did, it isn't likely to get off President Biden's desk. But these kinds of efforts, we may see more of them. So when you're staying tuned, you want to look broadly and make sure you're [00:22:30] aware of what the changes are because you might want to reset your path forward. There may be alternatives that you'll find are more favorable to you. I think the things I mentioned earlier about the infrastructure, the availability of vehicles as Matt noted, particularly during the interim period or the near term, these are all things that require regulated entities attention. So I think those are the important things.

Kevin Wilson: [00:23:00] Okay, thank you John. I think we're getting close to concluding today's podcast, but no doubt some of our listeners who have responsibilities within their respective organizations for compliance with this regulation are going to need some help and support to get there. What can Procopio's Environmental and Energy Practice Group do in terms of support, John or Matt, for folks listening who have that responsibility and [00:23:30] as I say, perhaps need a little assistance getting there?

John Lormon: If I may, Matt, I'll go first. I think Procopio is involved with clients in regards to these issues, and therefore we are very current in our awareness and will stay current in terms of any changes that are going on inside the agency or outside in courts or in legislative efforts. [00:24:00] I think we could be of help to people where they may not have the resources or, in running their regular business, have the time to do that. Also, we're familiar with staff members at the agencies and that can sometimes be helpful. We can help with getting record requests. We help with preparing a client, should they be going to a meeting or going to a public meeting to give testimony. [00:24:30] We can do dress rehearsals, if you will, and have done that. And we've also presented ourselves at the request of the client on the client's behalf, we were the presenter.

We also, being lawyers, we're fairly good at written submittals. We can help draft and either submit on behalf of or provide that draft to the client for them to put it on their letterhead over their signature. And [00:25:00] sometimes that's important to stay in the game on particular public meetings because should litigation arise later, you may want to say, "Hey, we raised our voice before. We have a right to be heard". If you want to preserve that option, that's something that we can help. Should there be litigation, obviously we can help on that. I know some of our clients have raised antitrust questions. There's the Clean Act waiver question.

[00:25:30] And I would finally note, California isn't the only state that is looking at this kind of regulatory program. We understand other states are looking at it. As the listeners may know, California has a waiver under the Clean Air Act if it's approved by EPA as to any particular action, such as mandated no internal combustion sales after certain dates, or conversely [00:26:00] zero emission sales only. So in that case, what's happening here may and will likely be happening in other states that want to follow the waiver once it's obtained by California. I think Connecticut is currently looking at putting its own rule in, and I expect others. We work nationally, so California being kind of the birthplace of these things, that background can be helpful to our clients should they be subjected [00:26:30] to these requirements in other states.

Kevin Wilson: Excellent, excellent. And of course, our listeners know that if they want to connect with you, John, or you, Matt, your contact information is available via our website, which is [www.procopio.com](http://www.procopio.com). I'd say that concludes today's podcasts, and I'd like to thank all of our listeners for tuning in. And thank you John and Matt for providing such valuable and insightful [00:27:00] information today. We'll be back and we hope to see you back here for part



three of this series where we'll discuss Clean Fleet regulations on drayage fleets. And as you've heard, in the meantime, if you have any questions on any of this regulation, please reach out to John or Matt directly. Again, you can find them on [procopio.com](http://procopio.com). Thanks for listening and don't forget to join us for part three. Bye for now.

Outro:

[00:27:30] We hope you enjoyed this Procopio Perspectives podcast. Please subscribe, if you haven't already, and visit [procopio.com](http://procopio.com) to learn more about Procopio. Thank you for listening.