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**CAPITALIZING ON  
EMERGING TECHNOLOGY  
IN THE AUTOMOTIVE  
AND MOBILITY SPACE:  
A 100-DAY REPORT ON BIDEN  
ADMINISTRATION OPPORTUNITIES**

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# Morgan Lewis Automotive Hour Webinar Series

Series of automotive industry focused webinars led by members of the Morgan Lewis global automotive team. The 10-part 2021 program is designed to provide a comprehensive overview on a variety of topics related to clients in the automotive industry. Upcoming sessions:

**JUNE 2** | Trademark and Copyright Considerations in the Automotive and Mobility Space

**JULY 14** | White Collar and Regulatory Developments Affecting the Automotive and Mobility Industry

**AUGUST 11** | Power and Opportunity: EVs, Hydrogen and Other Vehicle Power

**SEPTEMBER 15** | SPACs and Other Vehicles for Investment in the Automotive and Mobility Sectors

**NOVEMBER 10** | New Market Entry and the Anachronistic US Distribution System: What the Future Portends

**DECEMBER 8** | The IP Anatomy of the Automotive Nervous System

# Table of Contents

- Section 01 – Introductions
- Section 02 – Developments in Tailpipe Emissions Regulations and Standards
- Section 03 – Growth in Electric Vehicles
- Section 04 – Autonomous Vehicles: DOT and NHTSA Initiatives
- Section 05 – Questions

# Presenters



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# Developments in Tailpipe Emissions Regulations and Standards



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## A Regulatory Flashpoint

- Tailpipe emissions are at the intersection of climate change, job policy, and manufacturing
- Significant regulatory action at the federal and state level during the past decade
- Biden administration expected to be active in this sector



# Legal and Regulatory Background

- Title II of the Clean Air Act
  - Motor Vehicle Emission and Fuel Standards
- Corporate Average Fuel Economy (CAFE)
  - First enacted by Congress in 1975, after the 1973-74 Arab Oil Embargo
- The California Waiver – allowing the state to set its own emission standards for new motor vehicles
  - Originally allowed by EPA because:
    - California's standards are **at least as protective as federal standards**, and that **the state's determination of that fact was not arbitrary and capricious**
    - California's standards are needed to meet **compelling and extraordinary conditions**
    - California's standards are not inconsistent with certain Clean Air Act provisions related to **technical feasibility and lead time to manufacturers**



## The Trump Administration – CAFE Standards



- CAFE standards decreased during the Trump administration:
  - For model years 2021 through 2026, fuel economy must increase by 1.5% a year
  - Under the previous rule, fuel economy needed to increase by 5% a year



## The Trump Administration – California Waiver

- The Trump administration also revoked the California Waiver in September 2019 when the EPA released its “One National Program” rule
  - Asserting that the USDOT had the right to set national fuel economy standards
  - Also citing preemption issues
- Prompted significant blowback from California and environmental groups
  - Litigation in the DC Circuit



# Biden Administration – California Waiver



- Biden's first day order: directed federal agencies to review the rollback
  - Looking forward:
    - Different California regulations vs. federal standards?
- Some prognosticators believe the Biden administration will reinstate the California Waiver

# California Waiver

- Subject to litigation in the DC Circuit since the waiver was revoked – *Union of Concerned Scientists v. National Highway Traffic Safety Administration*
- Case was fully briefed in October 2020
- Once the Biden administration directed agencies to review the rollback, the Biden administration requested an abeyance
  - On the grounds that “the positions taken by the [Administration] in this litigation to date may not reflect their ultimate conclusions.”
- The Court, in a short Order, approved the motion to freeze the litigation pending the Biden administration’s review



## Looking Forward

- Candidate Biden stated that he would “negotiate fuel economy standards with workers and their unions, environmentalists, industries and states” with the goal of accelerating “the adoption of zero-emissions light- and medium duty vehicles”
  - As discussed, the Biden administration is negotiating with US automakers to see whether they can reach a deal, which would impose stricter tailpipe emissions on cars and light trucks through the model year 2026
- Pressure from Democratic senators to further regulate:
  - California Senators Feinstein and Padilla sent a letter to Biden in March calling on the administration “to follow California’s lead and set a date by which all new cars and passenger trucks sold be zero-emission vehicles”

# Looking Forward – Recent DC Circuit Opinion



- Stationary source decision – a harbinger for mobile emissions?
  - On April 5, 2021, the D.C. Circuit Court granted the Biden administration's request to vacate an 11<sup>th</sup> Hour Trump administration rule that would have prevented EPA from setting standards to reduce GHG pollution from stationary sources
  - The Trump rule exempted stationary sources from regulation unless they emitted 3% or more of the total amount of US GHG emissions
- This decision allows the Biden administration to bypass the otherwise lengthy process to repeal the old rule and begin new rulemaking

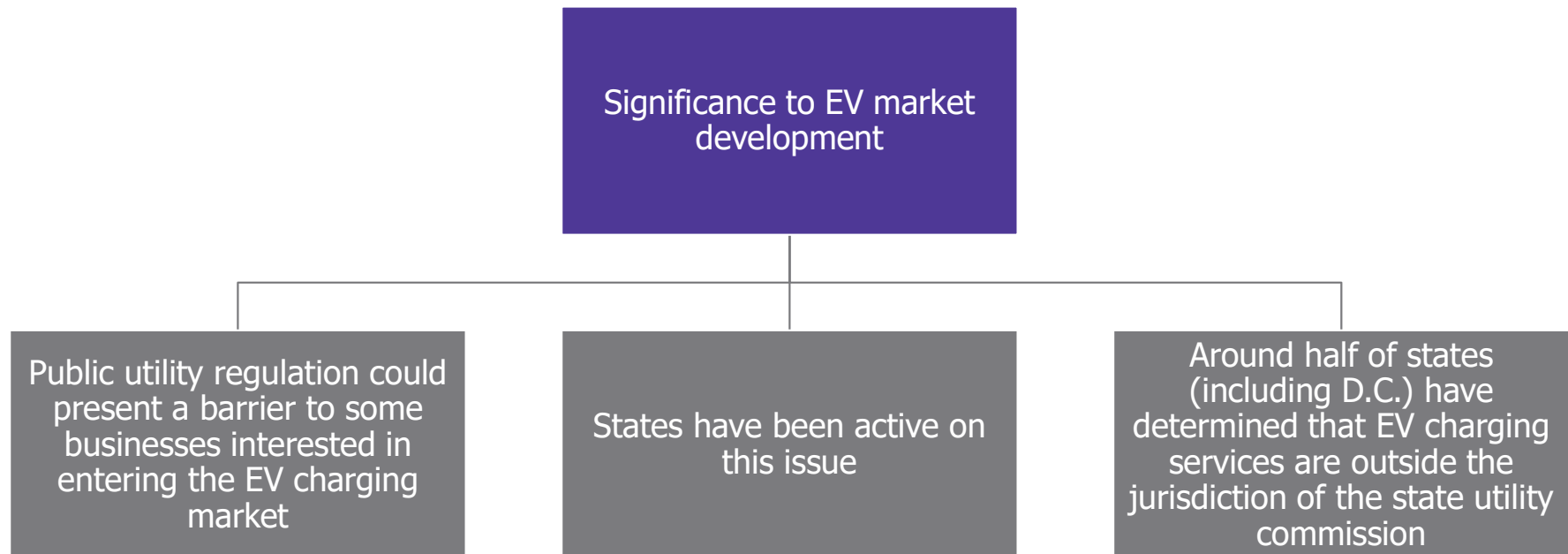
# **Growth in Electric Vehicles**

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## States Remain Active in Driving Transportation Electrification

- States are continuing to advance decarbonization and transportation electrification goals, of which EVs are an integral part
  - New Jersey
  - New York
- According to Atlas EV Hub, engagement from electric utilities in transportation electrification is on the rise and approved investment now totals almost [\\$1.4 billion](#), 80 percent of which has occurred in the last two years.

# Threshold Issue For States: Who Can Sell EV Charging Services?





# New Jersey

**January 2020** – New Jersey enacted S. 2252, intended to advance EV growth in the state by offering incentives for EV purchases and setting goals for the development of EV chargers.

**May 2020** The New Jersey Board of Public Utilities (BPU) released a straw proposal for EV infrastructure build-out to advance the statutory targets set by S. 2252.

**September 2020** – BPU adopts Staff recommendations. Utilities must file EV proposals by **February 28, 2021**.

# New Jersey

Who will own and operate the “backbone” infrastructure?

Who will own and operate the charging equipment?

How can the state ensure equitable access to EV charging?

How can utility rate reform encourage EV adoption in the state?

# New York

April 2018

New York Public Service Commission (PSC) commenced a proceeding to identify cost-effective approaches for electric utilities to support the build-out of EV infrastructure in the state.

January 2020

PSC Staff issued a Whitepaper estimating that, to accommodate desired growth in EVs, New York State will need up to 50,000 Level 2 chargers, up to 80,000 workplace-sited Level 2 chargers, and up to 4,000 fast chargers, and recommended the adoption of a "Make-Ready Program."

July 2020

The New York PSC issued an Order adopting Staff's proposed "Make-Ready Program" (with modifications) to support the build-out of EV infrastructure.

# New York

- Under the PSC’s program, NY’s utilities are authorized to collect up to \$701 million from customers to incentivize EV infrastructure development.
- Under the Make-Ready Program, incentives will be available to cover up to 50% (for proprietary plug types) or 90% (for standardized plug types) of the cost to make a site “ready” to accommodate EV infrastructure (or up to 100% in disadvantaged communities) in utilities’ respective service territories as follows:

	Make-Ready Program	Consolidated Edison	Central Hudson	New York State Electric & Gas	Niagara Mohawk	Orange & Rockland	Rochester Gas and Electric
Workplace Level 2	35,217	12,776	2,091	5,821	10,105	1,765	2,659
Public Level 2	18,556	5,763	1,113	3,458	5,623	1,080	1,519
Total Level 2	53,773	18,539	3,204	9,279	15,728	2,845	4,178
DC Fast Chargers	1,500	457	69	250	504	71	149

# Biden Administration Initiatives

- Prior to January 20<sup>th</sup>:
  - Biden’s campaign publicly supported a transition to clean transportation, including widespread use of electric vehicles.
  - Stated intention to use the power of federal procurement to increase demand for American-made, American-sourced clean vehicles.
  - Publicly supported an effort for the installation of a nationwide charging network of 500,000 chargers
  - Signaled support for EVs through its nomination of Secretary Granholm as Secretary of Energy.

## Biden Administration Initiatives (continued)

- Post-Inauguration
  - On January 27, President Biden issued Executive Order 14008, which addresses (among other things) procurement of EV federal fleet.
  - Under Section 205, Biden mandated the development of a comprehensive plan that would stimulate clean energy industries by revitalizing the Federal Government's sustainability efforts.
  - The plan shall aim to use, as appropriate and consistent with applicable law, all available procurement authorities to achieve or facilitate clean and zero-emission vehicles for Federal, State, local, and Tribal government fleets, including vehicles of the United States Postal Service.
  - Combined with his Buy American mandate, this E.O. would conceivably lead to direct support for the deployment of over 600,000 American-made EVs that would replace the existing federal government combustion engine fleet (currently about 650,000 vehicles in service).

## Biden Administration Initiatives (continued)

- Infrastructure Plan
  - Substantial monetary investment (\$174 billion)
    - Used to develop a network of 500,000 charging stations.
    - The Plan proposes that 50,000 diesel transit vehicles and 20% of existing school buses nationwide would be replaced with EVs or electrified.
  - Proposes to electrify the federal fleet of vehicles, including US Postal Service Vehicles.
    - The Plan specifically proposes a \$46 billion investment in federal procurement authority, which would be used for that purpose as well as others.
  - Proposes the continuation of certain tax incentives and also new point of sale rebates for purchasers of EVs made in America.

# **Autonomous Vehicles: DOT and NHTSA Initiatives**

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# SAE Definitions for Driving Automation Systems

## Level 0

All major systems are controlled by humans.

## Level 1

Certain systems, such as cruise control or automatic braking, may be controlled by the car.

## Level 2

The car offers at least two simultaneous automated functions like acceleration and steering, but requires humans for safe operations.

## Level 3

The car can manage all safety-critical functions under certain conditions, but the driver is expected to take over when alerted.

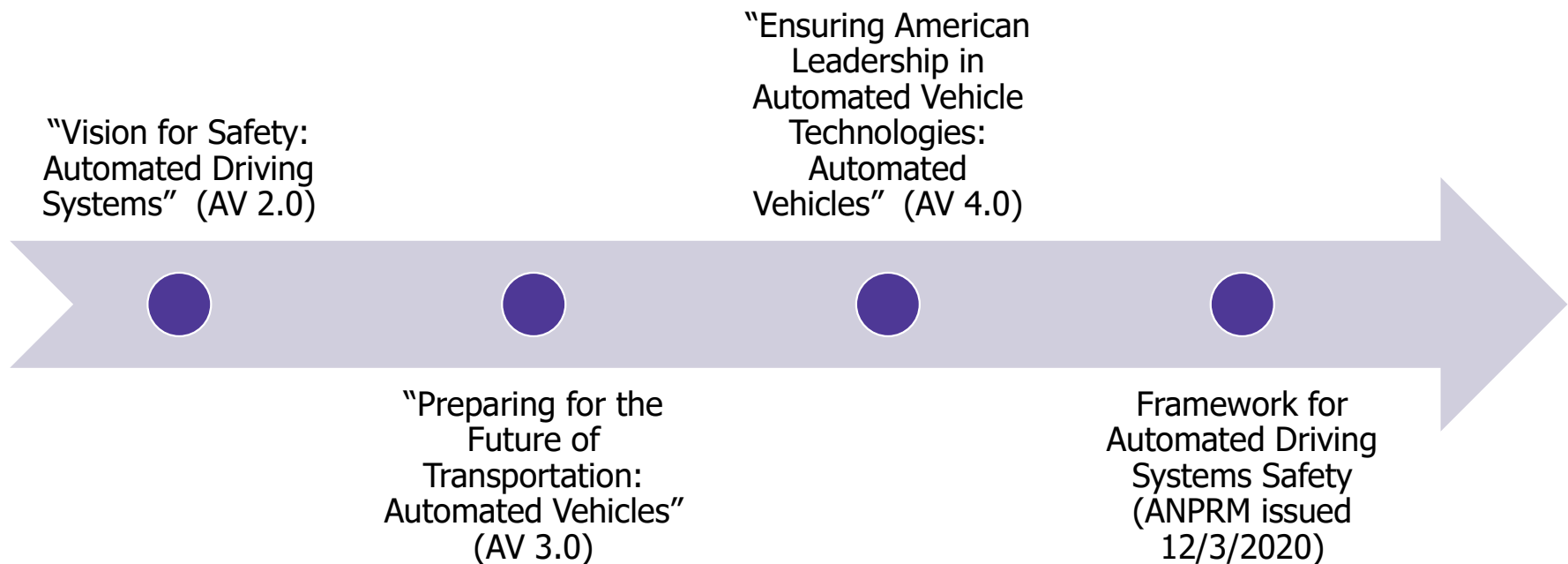
## Level 4

The car is fully-autonomous in some driving scenarios, though not all.

## Level 5

The car is completely capable of self-driving in every situation.

# Department of Transportation Initiatives



## **Framework for Automated Driving Systems Safety National Highway Traffic Safety Administration (NHTSA)**

- “NHTSA seeks comments on how to select and design the structure and key elements of a framework and the appropriate administrative mechanisms to achieve the goals of improving safety, mitigating risk and enabling the development and introduction of new safety innovations.”

# Framework for Automated Driving System Safety

## Four Functions



### Sensing

How the ADS receives information about its environment through sensors



### Perception

How the ADS detects and categorizes other road users (vehicles), infrastructure (traffic signs), and conditions (weather)



### Planning

How the ADS analyzes the situation, plans the route it will take on the way to its intended destination and makes decisions on how to respond appropriately to the road users, infrastructure, and conditions detected and categorized



### Control

How the ADS executes the driving functions necessary to carry out that plan through integration with other parts of the vehicle

# Framework for Automated Driving System Safety Processing and Engineering Measures to Manage Risk

Process measures would likely include robust safety assurance and functional safety programs (general practices for analyzing, classifying by severity level and frequency, and reducing potential sources of risks during the vehicle design process)

Engineering measures would seek to provide ways of demonstrating that ADS performs their sensing, perception, planning and control (execution) of intended functions with a high level of proficiency (performance metrics, thresholds, and test procedures)

# Questions?

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# Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at [www.morganlewis.com/topics/coronavirus-covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple "Stay Up to Date" button.



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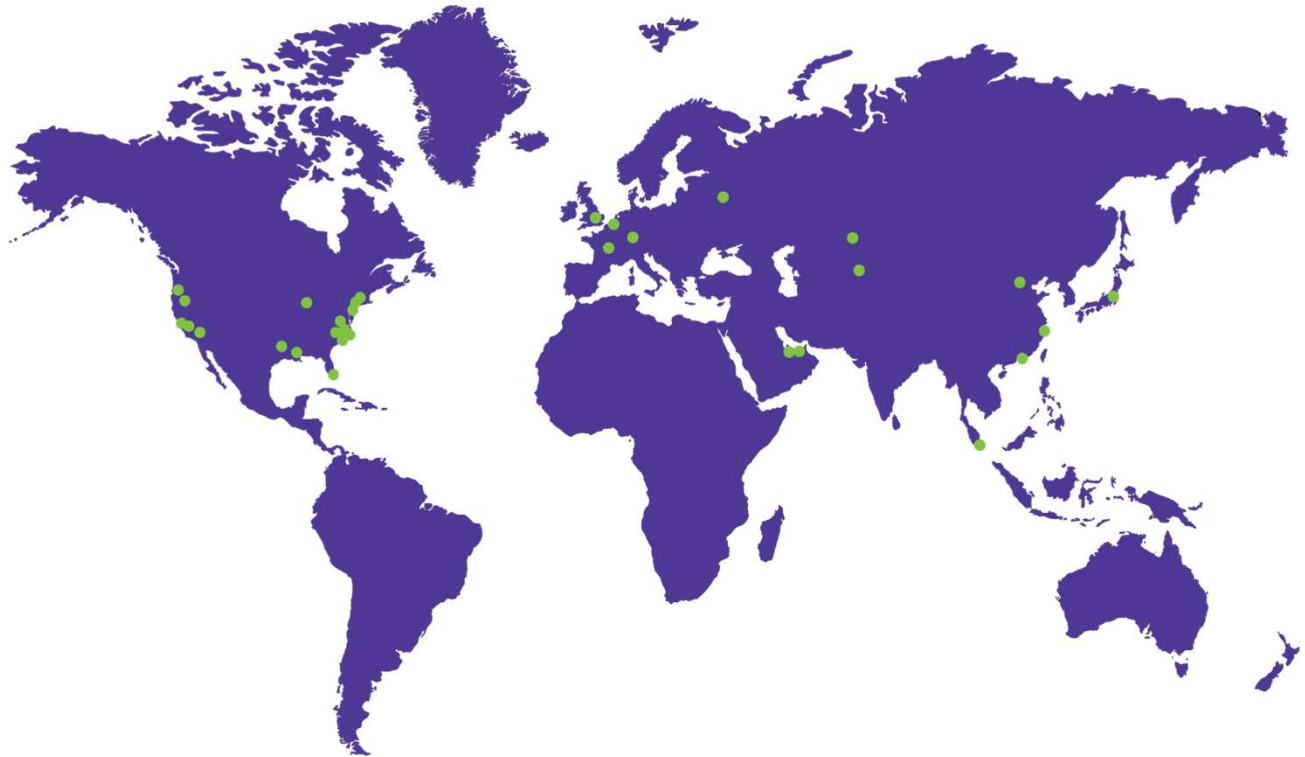
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