

**Morgan Lewis**

# **ENVIRONMENTAL DEVELOPMENTS AND CHALLENGES IN THE AUTOMOTIVE SPACE**

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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 2020 program is designed to provide a comprehensive overview on a variety of topics related to clients in the automotive industry. Upcoming session:

**DECEMBER 9** | Capitalizing on Emerging Technology in the Automotive and Mobility Space

# Agenda

**Section 01** – Introductions

**Section 02** – Phase out of internal combustion engines?

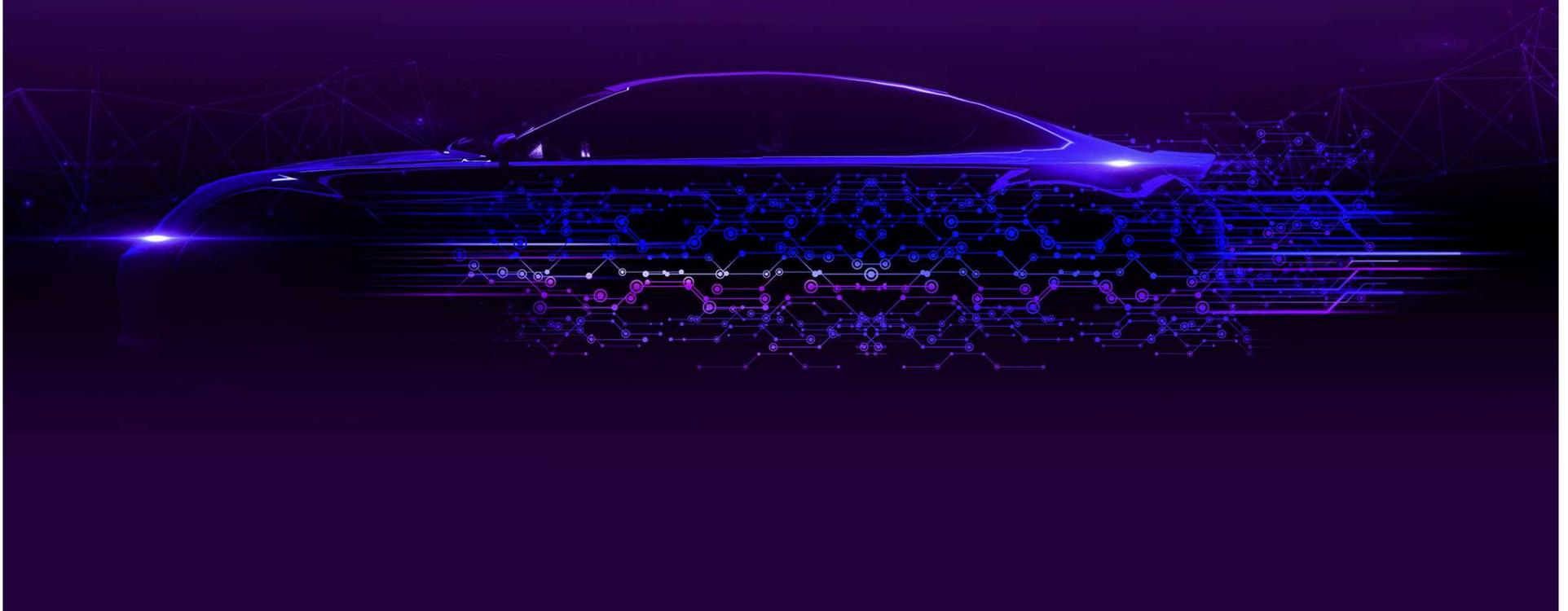
**Section 03** – Defeat devices: National Compliance Initiative

**Section 04** – California regulatory developments for automotive manufacturers

**Section 05** – Key Takeaways

**SECTION 01**

# **INTRODUCTIONS**



## Today's Presenters



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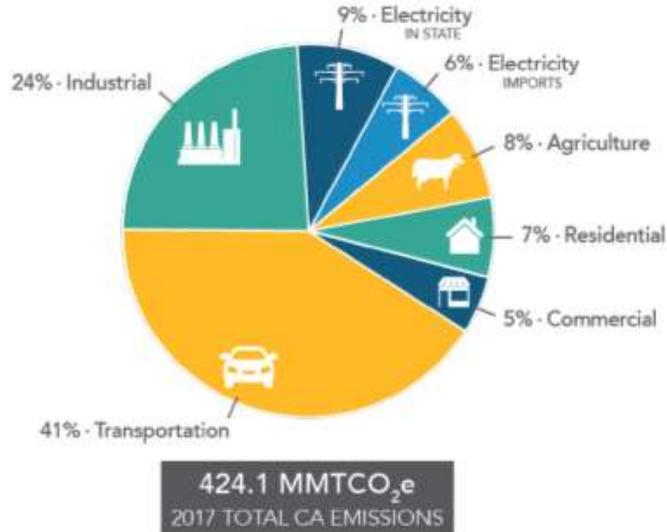
**SECTION 02**

# **PHASE OUT OF INTERNAL COMBUSTION ENGINES?**



# Greenhouse Gas Emissions by Sector

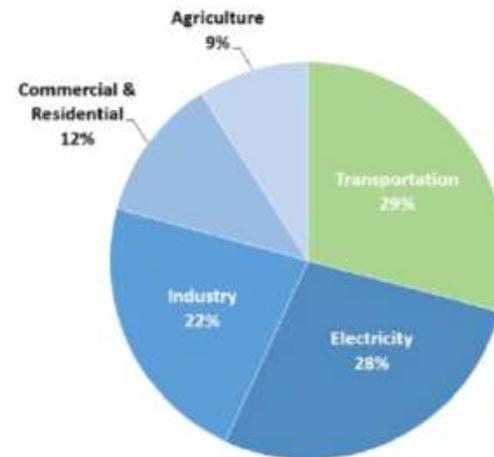
## California



Source: CARB

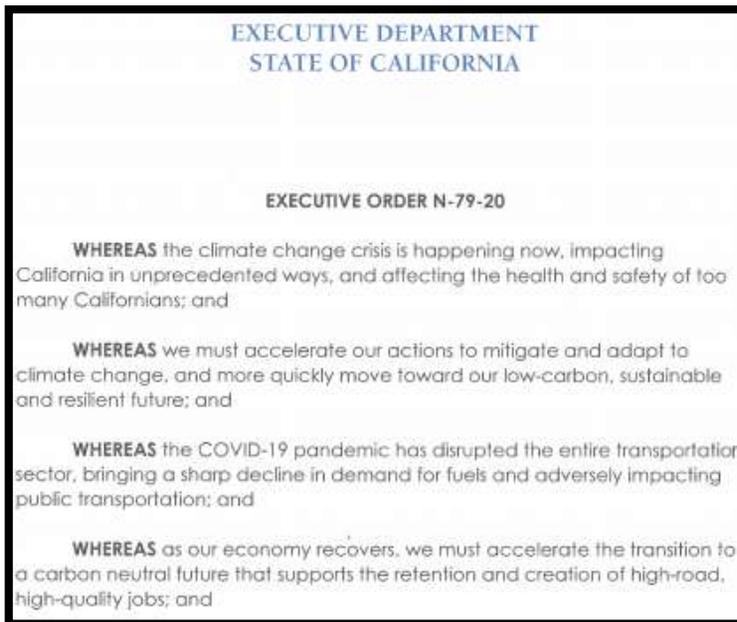
## United States

Total U.S. Greenhouse Gas Emissions by Economic Sector in 2017



Source: U.S. EPA

# California Executive Order – Overview



- With a Sept. 23, 2020 executive order, California is the first state in the nation to commit to ending the sale of fossil fuel-powered vehicles
  - Part of Governor Gavin Newsom’s effort to address climate change
- Directs state agencies to phase out gas and diesel-powered passenger cars and trucks, medium- and heavy-duty vehicles, and off-road vehicles

## California Executive Order – Upcoming Actions

- Governor Newsom’s executive order provides:
  - **“It shall be a goal of the State that 100 percent of in-state sales of new passenger cars and trucks will be zero-emission by 2035.** It shall be a further goal of the State that 100 percent of medium- and heavy-duty vehicles in the State be zero-emission by 2045 for all operations where feasible and by 2035 for drayage trucks. It shall be further a goal of the State to transition to 100 percent zero-emission off-road vehicles and equipment by 2035 where feasible.”
  - California Air Resources Board (CARB) “shall develop and propose ... regulations requiring increasing the volumes of zero-emission vehicles sold in the State towards the target of 100 percent of in-state sales” by these targets

## California Executive Order – Upcoming Actions

- Executive order directs state and local agencies to formulate other regulations and strategies to transition away from reliance on fossil fuels
  - “Zero-Emissions Vehicle Market Strategy” by Jan. 31, 2021, to be updated every three years
  - Accelerated deployment of affordable fueling and charging options for zero-emission vehicles
  - Updated assessment of zero-emission vehicle infrastructure
  - Near-term actions to improve clean transportation, sustainable freight, and transit options by July 15, 2021
  - “Just Transition Roadmap” by July 15, 2021
  - Expedited regulation of oil extraction, production facilities

# California Executive Order – Potential Implications

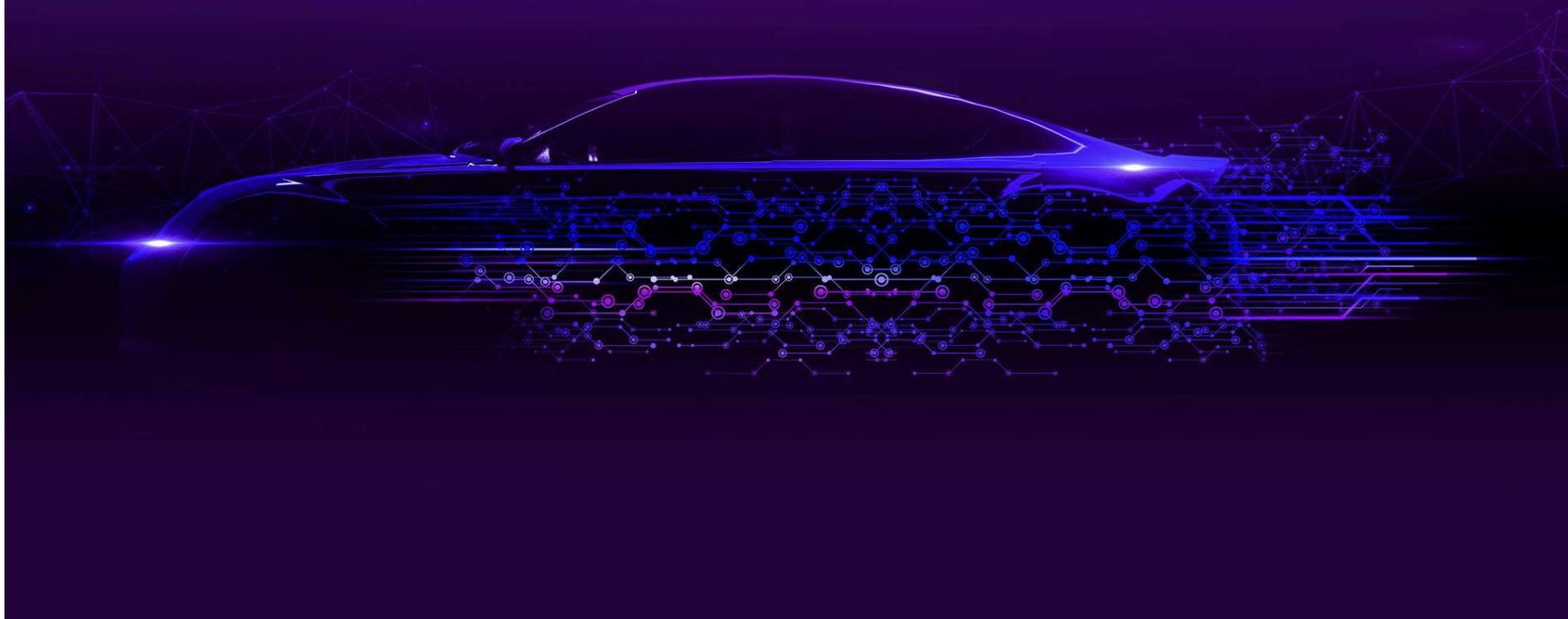
- California's move may signal a new phase in the implementation of climate change-related regulations and zero-emissions goals
  - But may not be the last word
  - Likely to face similar challenges as prior electric vehicles mandate
- Zero-Emission Vehicles Act of 2020 introduced in both U.S. House and Senate
- President-elect Biden's administration anticipated to pursue efforts to reduce motor vehicle emissions at the federal level
- Executive action will also likely tee up additional issues regarding California's Clean Air Act waiver
  - Trump administration preemption regulation likely to be revised/revoked
- Automakers and stakeholders will need to actively engage in the forthcoming regulatory process

## Other Proposals/Plans to Phase Out Fossil Fuels

- Washington (Feb. 2020) – Introduced, but did not pass, legislation that would have required all new vehicles to be zero emission or electric beginning in 2030
- Colorado (Apr. 2020) – Energy Office presented an Electric Vehicle Plan with a 100% electric vehicle mandate, no precise timeline for implementation
- New Jersey (Oct. 2020) – Department of Environmental Protection recommended 100% electric vehicles by 2035 as part of statewide global warming response roadmap
- President-elect Biden's platform calls for accelerating the deployment of electric vehicles without an accompanying timeline

**SECTION 03**

# **DEFEAT DEVICES: NATIONAL COMPLIANCE INITIATIVE**

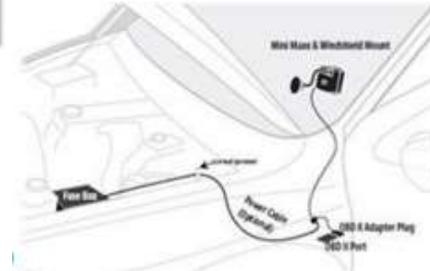


## Defeat Devices – Federal Enforcement Overview

- U.S. EPA is implementing for FY 2020-2023 a new National Compliance Initiative entitled *Stopping Aftermarket Defeat Devices for Vehicles and Engines*
  - **Authority:** Clean Air Act prohibits tampering with emissions controls, as well as manufacturing, selling, and installing aftermarket devices intended to defeat those controls
  - **Goal:** Stopping the manufacture, sale, and installation of defeat devices on onroad and offroad vehicles and engines
  - **Targets:** EPA has initiated enforcement actions against numerous companies and individuals that have manufactured and sold both hardware and software alleged to have been designed to defeat required emissions controls on vehicles and engines

# Defeat Devices – Examples of Enforcement Priorities

- Exhausts and exhaust systems
- Electronic control modules (ECMs, “programmers” or “tuners”)
- Fuel injection components
- Delete kits
  - Diesel particulate filter (DPF)
  - Exhaust gas recirculation (EGR)
  - Selective catalytic reduction (SCR)



## Defeat Devices – Federal Certification

- U.S. EPA administers a certification program to ensure that new motor vehicles and engines introduced into United States commerce satisfies applicable emission standards
  - Under this program, EPA issues certificates of conformity (COCs) for vehicles and engines for each manufacturer
- Each COC application must include a list of all auxiliary emission control devices (AECDs)
  - Undisclosed or unjustified AECDs that can reasonably be expected to affect emission controls do not conform in all material respects with the COC application and, therefore, are not covered by the COC
  - AECDs that reduce the effectiveness of the emission control system under normal operating conditions are commonly referred to as “defeat devices”

## Defeat Devices – Federal Prohibitions

- Clean Air Act (42 U.S.C. § 7401 *et seq.*) generally prohibits manufacturers from:
  - Selling, offering for sale, introducing into commerce, or delivering for introduction into commerce, or importing into the United States, any new motor vehicle or engine not covered by a certificate of conformity (COC) issued by EPA
  - Selling, offering for sale, or installing, any part or component where a principal effect of the part or component is to bypass, defeat, or render inoperative a pollution control device or system
  - Removing or rendering inoperative any a pollution control device or system prior to its sale and delivery to the ultimate purchaser

## Defeat Devices – Federal Enforcement Implications

- EPA has already resolved more than 50 cases addressing alleged violation of defeat device and tampering prohibitions since 2015
- For example, Volkswagen enforcement involved:
  - Three partial settlements
  - \$1.45 billion civil penalty
  - Investment in mitigation fund and zero emission vehicle infrastructure and promotion
  - Corporate compliance improvements and new testing, audit, and reporting requirements designed to prevent future violations
- EPA appears committed to pursuing enforcement actions against manufacturers who it believes violate Clean Air Act defeat device and tampering prohibitions
  - Increased enforcement at U.S. DOJ more likely during Biden administration

**SECTION 04**

# **CALIFORNIA REGULATORY DEVELOPMENTS FOR AUTOMOTIVE MANUFACTURERS**



# CARB Letter – Urges Industry to Self-Report



Gavin Newsom, Governor  
Jared Blumenfeld, CalEPA Secretary  
Mary D. Nichols, Chair

To: ALL MANUFACTURERS OF Mail-Out #ECC 2020-06  
- PASSENGER CARS  
- LIGHT-DUTY TRUCKS  
- MEDIUM-DUTY VEHICLES AND ENGINES USED IN SUCH VEHICLES  
- HEAVY-DUTY VEHICLES AND ENGINES USED IN SUCH VEHICLES  
- ON-ROAD MOTORCYCLES  
- OFF-HIGHWAY RECREATIONAL VEHICLES  
- OFF-ROAD SMALL SPARK-IGNITION ENGINES  
- OFF-ROAD SMALL SPARK-IGNITION EQUIPMENT  
- OFF-ROAD LARGE SPARK-IGNITION ENGINES  
- OFF-ROAD LARGE SPARK-IGNITION EQUIPMENT  
- OFF-ROAD SPARK-IGNITION MARINE ENGINES  
- OFF-ROAD SPARK-IGNITION MARINE WATERCRAFT  
- OFF-ROAD COMPRESSION-IGNITION ENGINES  
- AFTERMARKET PARTS  
- DIESEL EMISSION CONTROL STRATEGIES  
ALL OTHER INTERESTED PARTIES

Date: October 14, 2020

Subject: ALERT: SELF-DISCLOSURE OF NON-COMPLIANT SOFTWARE AND  
OTHER VIOLATIONS BY DECEMBER 31, 2020

Dear Manufacturer:

- “Dear Manufacturer” letter urges manufacturers to self-report emissions-related violations by December 31, 2020
  - Builds upon Sept. 25, 2015 letter calling for disclosure of AECs and defeat devices
  - Notes that only “a handful” of manufacturers have self-reported since Sept. 2015
  - Encourages manufacturers to voluntarily disclose any potential regulatory violations
  - References multiple CARB enforcement actions and settlements since 2015
  - Notes that the agency will be expanding its testing programs in 2021
  - States the agency has already identified targets for future investigation

## CARB Letter – Identified Violation Categories

- According to CARB, the identified violations generally relate to manufacturers failing to submit accurate information during the certification process:
  - Undisclosed AECDs
  - Defeat Devices
  - Unapproved Running Changes and Field Fixes
  - Failure to Report or Address Warranty Claims
  - Failure to Timely Complete Manufacturer In-Use Compliance Testing and Self-Testing
  - Failure to Report Corrective Actions that Should be Under a CARB-Approved Recall
  - Submission of False Data or Noncompliance with Regulatory Test Requirements
  - Failure to Meet Onboard Diagnostic Requirements
  - Failure to Disclose Adjustable Parameters that May Affect Emissions

## CARB Letter – Potential Penalty Reductions

- CARB's letter cautions that recent violations are subject to a maximum penalty of \$37,500 per mobile source or engine, per identified violation
- CARB urges manufacturers to avail themselves of the potential for reduced penalties under CARB's enforcement policy by self-reporting violations
- CARB's enforcement policy provides for penalty reduction from 25% to 75%, assuming specified voluntary disclosure criteria are met

## CARB Letter – Implications for Industry

- Notice of likely uptick in investigations and enforcement actions focused on unapproved AECs and defeat devices
  - Self-reporting would reduce the burden on CARB's enforcement division by having manufacturers self-report
- Opportunity for manufacturers to assess compliance with California regulatory requirements
- Short window of time to determine whether voluntary disclosure may be warranted or appropriate

## Cal. Aftermarket Parts – New CARB Approval Process

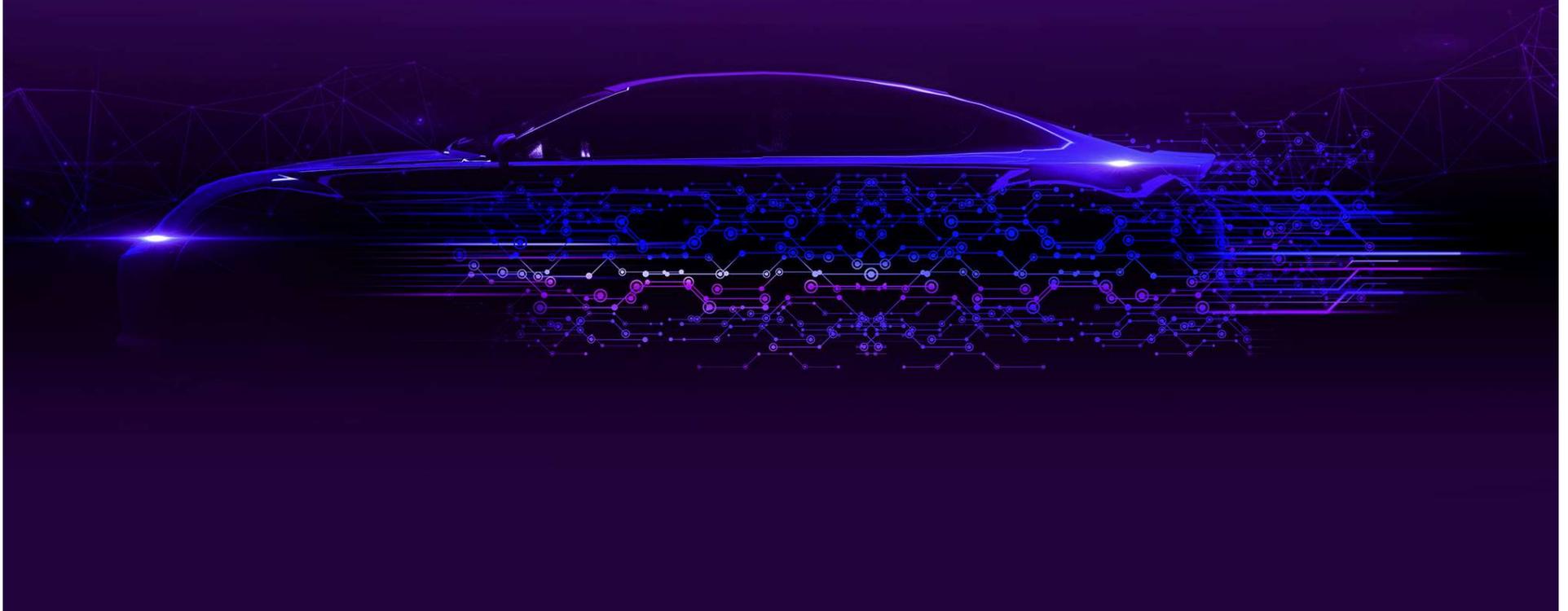
- Process for approval to sell aftermarket parts in California is changing in 2021
- New process intended to update, clarify, and streamline its aftermarket parts approvals and update existing regulations to addresses new technologies
- CARB's new process will generally include:
  - Letter of intent
  - Identification of a specified aftermarket part category
  - More narrow application of the vehicle or engine coverage
  - New laboratory reporting requirements
- Less burdensome process for simple administrative applications

## Cal. Aftermarket Parts – Implications for Industry

- CARB believes it will benefit from the new process
- Certain manufacturers may benefit from a streamlined process as well
- Process may increase the number of applications submitted and increase administrative and testing demands for some manufacturers
  - Manufacturers with diverse product lines and parts that fit on a range of vehicles
- Advanced planning could reduce overall burdens and minimize potential for adverse impacts

**SECTION 05**

# **KEY TAKEAWAYS**



## Key Takeaways

- Recent developments to phase out fossil fuel-powered vehicles
  - California’s efforts to transition away from transportation reliant upon fossil fuels will have wide-ranging impacts, but it is too early to conclude how the transition will be implemented
  - There are opportunities to engage with the California agencies that will be tasked to address and implement Governor Newsom’s executive order
  - Important to monitor any federal efforts or other states that may follow suit
- New enforcement/regulatory initiatives for automotive manufacturers
  - U.S. EPA is likely to increase its focus on and enforcement of certification requirements and defeat devices
  - Not just EPA will be enforcing; CARB is also looking for manufacturers to self-report
  - Self-auditing or third-party auditing may be cost-effective

# QUESTIONS?



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# THANK YOU

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