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## US Auto Cos. Look To Clear Obstacles To Fully Electric Future

By **Linda Chiem**

*Law360 (March 2, 2023, 1:51 PM EST)* -- The U.S. electric-vehicle industry is riding a wave of momentum as the Biden administration finalizes new standards for a first-ever national charging network, with the Big Three automakers and others pledging to drop billions into domestic battery-manufacturing facilities.

In recent months, the federal government has floated new rules and guidance governing how charging stations are designed, built and deployed, as well as what types of EVs qualify for expanded consumer tax incentives.

At the same time, Detroit auto giants and other carmakers have unveiled a host of investments in domestic battery-manufacturing facilities, including in Michigan and Ohio, to advance the goal of the U.S. becoming a global leader in electric vehicles.

These and other milestones are generating plenty of buzz for EVs, but experts tell Law360 there are myriad questions and compliance hurdles to overcome before the transportation sector steers away from fossil-fuel dependency to fully embrace an electrification renaissance.

"This is a starting point — in some ways, it's an agenda, a pathway and a wish list," Clark Hill PLC of counsel Don Shindler told Law360. "You've got things ranging from supply-chain concerns to ramping up to get to a reasonable nationwide electric-vehicle charging station network ... [but] at the very least, all the federal initiatives will help create a framework to allow some degree of uniformity."

### Minimum Charging Standards

The U.S. Department of Transportation's Federal Highway Administration on Feb. 15 finalized minimum standards for installing, operating and maintaining charging stations that receive funding from a \$5 billion program created by the Infrastructure Investment and Jobs Act, more widely known as the Bipartisan Infrastructure Law.

The baseline standards, first floated in June 2022, would help state and local entities chart out their infrastructure building efforts in line with President Joe Biden's goal of establishing a first-ever national network of 500,000 charging stations along America's highways — roughly five times the number of stations that are publicly available nationwide right now.

"Without a comprehensive and widespread network of EV fast-charging stations, a large portion of the

American public will be hesitant to go EV. So this is certainly a big and necessary step," said Richard A. Walawender, a Detroit-based senior principal with Miller Canfield Paddock & Stone PLC who leads the firm's autonomous and connected vehicles practice team.

Importantly, the rule establishes universal fast-charging capabilities at such stations. Currently, EVs across North America can use the same standard plug for normal-speed charging, known as Level 1 and Level 2 charging, which can typically take hours. But when it comes to faster Level 3 charging — through direct-current fast chargers — the plugs can vary depending on the manufacturer.

Tesla, for example, uses a proprietary plug for its Supercharger stations. But for the first time, Tesla will make at least 7,500 of its chargers available for all EVs by the end of 2024, Biden announced Feb. 15.

"[When looking at] where the United States is as far as public charging infrastructure and where we need to be, no matter how you slice it, there is a shortage of infrastructure," said Morgan Lewis & Bockius LLP partner Levi McAllister, head of the firm's electric vehicles working group and energy commodity trading and compliance working group. "This development of making existing charging infrastructure available to all, obviously that advances the ball in a positive way for the industry."

Increasing the number of public chargers nationwide and securing commitments from major EV manufacturers to expand their networks over the next two years — using private funds to complement the planned spending of federal dollars — mark a significant step forward, according to Blank Rome LLP attorney Robert C. Levicoff.

Notably, the FHWA said it will soon be distributing funds from its new Charging and Fueling Infrastructure discretionary grant program, which will provide \$2.5 billion over five years to set up chargers in publicly accessible locations, such as downtown areas, local neighborhoods, and underserved and disadvantaged communities.

"Providing funds to deploy publicly accessible charging infrastructure within communities, including at schools, grocery stores, parks, libraries and apartment complexes, will make one of the largest and far-reaching impacts to spread this technology to more of the general public and assist in meeting what are arguably still very ambitious EV adoption goals," Levicoff said.

### **'Buy America' Rules**

Also on Feb. 15, the FHWA made clear that charging stations funded through the \$5 billion National Electric Vehicle Infrastructure, or NEVI, program are subject to Build America, Buy America Act requirements that were included in the Bipartisan Infrastructure Law. That means federally funded infrastructure projects must use U.S.-made iron, steel, construction materials and manufactured products.

But agencies can issue special waivers as needed. To that end, the FHWA has issued a temporary waiver, which takes effect March 23, for federally funded EV chargers, phasing in compliance targets in order to give project developers additional time to navigate tricky domestic sourcing and manufacturing challenges, experts say.

Arthur F. Foerster, an environmental law partner with Latham & Watkins LLP, said the new charging standards are a significant step in achieving the Biden administration's vehicle electrification goals because "the development, deployment and operation of EV chargers were always threshold issues."

"These new standards provide much-needed clarity on these thresholds by creating requirements that foster predictable and reliable operation for users and, separately, by alleviating many of the burdens — at least temporarily — of the Buy America requirements on EV charging projects using federal-aid highway funds," Foerster said. "In doing so, the new requirements help to propel the momentum for broad penetration of electric vehicles in the U.S. market."

Effective immediately, final assembly and all manufacturing processes for any iron or steel charger enclosures or housing for EV chargers must occur in the United States. But by July 1, 2024, at least 55% of the cost of all components for chargers will need to be manufactured domestically as well. Any equipment that does not meet the 55% standard must be installed no later than Oct. 1, 2024.

"On the one hand, the FHWA was receptive to comments and made rule revisions simplifying the waiver and clarifying when EV chargers must be manufactured in order to qualify," Foerster said. "But the FHWA declined to provide much more clarity regarding the meaning of certain terms that will govern how the rules get implemented — what are the 'components' of a charger? What does it mean to 'manufacture' in the United States?"

Miller Canfield's Walawender noted that while some have complained during the public comment period that the 55% domestic content requirement, by cost, is problematic, "from a political standpoint, the U.S. government can't realistically be expected to pour \$7.5 billion into a program which subsidizes the purchase of foreign-made EV chargers."

"This isn't so new," he said. "After all, the [United States-Mexico-Canada Agreement] imposes a 75% North American content requirement on vehicles overall, and a requirement that at least 70% of the steel and aluminum originate in North America in order to be considered duty-free under the USMCA. More problematic from a business standpoint is that the EV chargers be assembled in the U.S. Given the labor shortage, this may challenge producers of EV chargers."

And while the final rule makes a lot of sense, there's one part that might trigger unintended consequences.

"Curiously, while the rule requires that the charging price at an EV charging station be publicly listed without taking into account any membership or subscription discount, there is no restriction on the ability of a company to offer cheaper pricing — through rebates or discounts — to its network members or subscribers," Walawender pointed out.

"This also applies to auto manufacturers, which can, and will, build their own EV charging networks using the public funding and may offer a lower charging price at their EV stations for purchasers of their own EVs," he added.

### **Expanded Consumer Incentives**

The U.S. Department of the Treasury and the Internal Revenue Service in late December issued highly anticipated guidance defining the eligibility criteria for retooled tax credits that were part of the sweeping climate and health care law, the Inflation Reduction Act.

That provided some regulatory clarity on which electric sedans and SUVs qualify for the tax breaks and how the different consumer and commercial EV tax credits would be applied.

But experts say the industry is anxiously awaiting details on how the Treasury Department will impose stringent, and complicated, requirements on where critical minerals for batteries can be sourced from and where an EV can ultimately be assembled. The Treasury said those additional rules are tentatively set to be issued in March.

"It's nice that the IRS and Treasury provided a little bit of what they view as a preliminary roadmap for where they're heading ... but that's a very big issue for everyone in the EV sector. I can't overstate that," Morgan Lewis' McAllister said of the still-to-come rules.

Dykema Gossett PLLC government policy adviser Mary Beth McGowan said it's been a "point of contention" that the IRS moved forward with implementing the new clean vehicle tax credits without guidance for the battery material and critical mineral sourcing requirements, thereby allowing vehicles that may not eventually meet the requirements to still qualify.

"A key detail from the forthcoming guidance will be how 'free trade agreement' is defined and which countries will make the cut," according to McGowan, who noted there has been much attention in recent weeks about funding from the Bipartisan Infrastructure Law benefiting China.

### **Battery Manufacturing Ramps Up**

Michigan's Big Three automakers — General Motors LLC, Ford Motor Co. and Stellantis NV, the auto giant created by the merger of Fiat Chrysler Automobiles and Peugeot parent company Groupe PSA — have all rallied behind the Biden administration's EV push, pouring billions into new facilities and retooling existing production lines for EVs.

More recently, Dearborn-based Ford announced Feb. 13 that it's investing \$3.5 billion to build a lithium iron phosphate, or LFP, battery plant in Marshall, Michigan. Ford said it inked a new agreement with Chinese supplier Contemporary Amperex Technology Co. — the world's leading battery manufacturer — under which a Ford wholly owned subsidiary would manufacture the battery cells using LFP battery cell knowledge and services provided by CATL.

But neighboring Ohio has also lined up several notable battery-making endeavors. For example, Honda Motor Co. Ltd. and LG Energy Solution announced in October they are building a \$3.5 billion lithium-ion battery plant in Fayette County, located about 40 miles southwest of Columbus. And General Motors said in September it would spend \$760 million to repurpose an existing Toledo facility to make EV drive units.

"Ohio is arguably at or near the center of the universe in the exponential growth in the electric vehicle, battery and component industries," Thompson Hine LLP partner Joel Eagle said.

--Editing by Philip Shea.