

## Attachment A

Proposed Adoption to Title 13, California Code of Regulations, Chapter 1 Motor Vehicle Pollution Control Devices, Article 2, Approval of Motor Vehicle Pollution Control Devices (New Vehicles); Section 1969, Motor Vehicle Service Information – 1994 and Subsequent Model Passenger Cars, Light-duty and Medium-Duty Vehicles

## Proposed Regulation Order

Adopt section 1969, title 13, California Code of Regulations, chapter 1, Motor Vehicle Pollution Control Devices, to read as follows:

Article 2. Approval of Motor Vehicle Pollution Control Devices (New Vehicles)

### **§1969 Motor Vehicle Service Information – 1994 and Subsequent Model Passenger Cars, Light-Duty and Medium-Duty Vehicles**

- (a) **Applicability.** Unless otherwise noted, this section shall apply to all California-certified 1994 and subsequent model-year passenger cars, light-duty vehicles and medium-duty vehicles equipped with on-board diagnostic systems pursuant to title 13, California Code of Regulations, sections 1968.1 and 1968.2. This section shall supersede the provisions of section 1968.1(k)(2.1) at all times that this section is effective and operative.
- (b) **Severability of Provisions.** If any provision of this section or its application is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected.
- (c) **Definitions.** The definitions in section 1900(b), Division 3, Chapter 9, Title 13 of the California Code of Regulations, apply with the following additions:
  - (1) “Access codes, recognition codes and encryption” mean any type, strategy, or means of encoding software, information, devices, or equipment that would prevent the access to, use of, or proper function of any emission-related part.
  - (2) “Bi-directional control” means the capability of a diagnostic tool to send messages on the data bus (if applicable) that temporarily override a module’s control over a sensor or actuator and give control to the diagnostic tool operator. Bi-directional controls do not create permanent changes to engine or component calibrations.
  - (3) “Covered person” means any person or entity engaged in the business of service or repair of motor vehicles in California, or who is engaged in the manufacture or remanufacture of emission-related motor vehicle parts for those California motor vehicles.
  - (4) “Data stream information” means information that originates within the vehicle by a module or intelligent sensor (including, but not limited to, a sensor that contains and is controlled by its own module) and is transmitted between a network of modules and intelligent sensors connected in parallel with either one or two communications wires. The information is broadcast over communication wires for use by other modules such as chassis or transmission modules to conduct normal vehicle operation or for use by diagnostic tools. Data stream information does not include engine calibration-related information.

- (5) "Days" means calendar days.
- (6) "Emission-related motor vehicle information" means information regarding any of the following:
  - (A) Any original equipment system, component, or part that controls emissions.
  - (B) Any original equipment system, component, or part associated with the powertrain system including, but not limited to, the fuel system and ignition system.
  - (C) Any original equipment system or component that is likely to impact emissions, including, but not limited to, the transmission system.
- (7) "Emission-related motor vehicle part" means any direct replacement automotive part or any automotive part certified by Executive Order that may affect emissions from a motor vehicle, including replacement parts, consolidated parts, rebuilt parts, remanufactured parts, add-on parts, modified parts and specialty parts.
- (8) "Enhanced data stream information" means data stream information that is specific for an original equipment manufacturer's brand of tools and equipment.
- (9) "Enhanced diagnostic tool" means a diagnostic tool that is specific to the original equipment manufacturer's vehicles.
- (10) "Fair, reasonable, and nondiscriminatory price", for the purposes of section 1969, means a price that allows manufacturers to be compensated for the cost of providing required information and diagnostic tools considering the following:
  - (A) The net cost to the motor vehicle manufacturers' franchised dealerships for similar information obtained from motor vehicle manufacturers, less any discounts, rebates or other incentive programs;
  - (B) The cost to the motor vehicle manufacturer for preparing and distributing the information, excluding any research and development costs incurred in designing and implementing, upgrading or altering the onboard computer and its software or any other vehicle part or component. Amortized capital costs for the preparation and distribution of the information may be included;
  - (C) The price charged by other motor vehicle manufacturers for similar information;
  - (D) The price charged by the motor vehicle manufacturer for similar information immediately prior to January 1, 2000;
  - (E) The ability of an average covered person to afford the information.
  - (F) The means by which the information is distributed;
  - (G) The extent to which the information is used, which includes the number of users, and frequency, duration, and volume of use; and
  - (H) Inflation.

- (11) "Initialization" or "reinitialization" means the process of resetting a vehicle security system by means of an ignition key or access code(s).
  - (12) "Nondiscriminatory" as used in the phrase "fair, reasonable, and nondiscriminatory price" means that motor vehicle manufacturers shall not set a price that provides franchised dealerships with greater access to information or tools than is provided to covered persons under this regulation.
  - (13) A "Reasonable business mean" is a method or mode of distribution or delivery of information that is commonly used by businesses or government to distribute or deliver and receive information at a fair, reasonable, and nondiscriminatory price. A reasonable business mean includes, but is not limited to, the Internet, first-class mail, courier services, and fax services.
- (d) (1) Service Information: Except as expressly provided below, motor vehicle manufacturers shall make available for purchase to all covered persons all emission-related motor vehicle information that is provided to the motor vehicle manufacturer's franchised dealerships for subject vehicle models. The information shall include, but is not limited to, diagnosis, service, and repair information and procedures, technical service bulletins, troubleshooting guides, wiring diagrams, and training materials.
- (2) On-Board Diagnostic System (OBD II) Information. Motor vehicle manufacturers shall make available for purchase to all covered persons, a general description of each OBD II system used in 1996 and subsequent model-year vehicles, which shall include the following:
- (A) A general description of the operation of the monitor, including a description of the parameter that is being monitored.
  - (B) A listing of all typical OBD II diagnostic trouble codes associated with each monitor.
  - (C) A description of the typical enabling conditions for each monitor to execute during vehicle operation, including, but not limited to, minimum and maximum intake air and engine coolant temperature, vehicle speed range, and time after engine startup.
  - (D) A listing of each monitor sequence, execution frequency and typical duration.
  - (E) A listing of typical malfunction thresholds for each monitor.
  - (F) For OBD II parameters for specific vehicles that deviate from the typical parameters, the OBD II description shall indicate the deviation and provide a separate listing of the typical values for those vehicles.
  - (G) Identification and scaling information necessary to interpret and understand data available to a generic scan tool through "mode 6," pursuant to Society of Automotive Engineers (SAE) J1979, which is incorporated by reference in title 13, CCR section

1968.1.

- (H) The information required by this subsection shall not include specific algorithms, specific software code or specific calibration data beyond that required to be made available through the generic scan tool pursuant to section 1968.1, except where such algorithms, codes, or data are made available to franchised dealerships. To the extent possible, motor vehicle manufacturers shall organize and format the information so that it will not be necessary to divulge specific algorithms, codes, or calibration data considered to be a trade secret by the motor vehicle manufacturer.
- (3) On-Board Computer Initialization Procedures. Consistent with the requirements of subsection (h) below, motor vehicle manufacturers shall provide to all covered persons computer or anti-theft system initialization information and/or related tools necessary for:
  - (A) The proper installation of on-board computers on motor vehicles that employ integral vehicle security systems; or
  - (B) The repair or replacement of an emission-related part.A manufacturer may request Executive Officer approval to be excused from the requirements above for some or all model year vehicles through the 2004 model year. The Executive Officer shall approve the request upon finding that the availability of such information to covered persons would significantly increase the risk of vehicle theft, and that the manufacturer will provide covered persons with reasonable alternative means to install computers, or to otherwise repair or replace an emission-related part, at a fair, reasonable, and nondiscriminatory price.
- (4) The information in this subsection shall be made available for purchase no later than 180 days after the effective date of these regulations or January 1, 2003, whichever is later, for vehicle models introduced into commerce on or before these dates. For all new vehicle models for which production commences after the effective date of these regulations, motor vehicle manufacturers shall make available for purchase the required information no later than 180 days after the start of vehicle introduction into commerce or concurrently with its availability of the information to franchised dealerships, whichever occurs first.
- (e) (1) Information required to be made available for purchase under subsection (d), excluding paragraph (d)(3), shall be directly accessible via the Internet. As an exception, motor vehicle manufacturers with annual California sales of less than 300 vehicles (based on the average number of California-certified vehicles sold by the motor vehicle manufacturer in the three previous consecutive model years) have the option not to provide required materials directly over the

Internet. Such manufacturers may instead propose an alternative reasonable business mean for providing the information required by this section to the Executive Officer for review and approval. The alternate method shall include an Internet website that adequately specifies that the required service information is readily available through other reasonable business means at fair, reasonable, and nondiscriminatory prices.

- (2) For purposes of making the information available for purchase via the Internet, motor vehicle manufacturers, or their designees, shall establish and maintain an Internet website(s) that:
  - (A) Is accessible at all times, except during times required for routine and emergency maintenance. Routine maintenance shall be scheduled after normal business hours.
  - (B) Houses all of the required information such that it is available for direct online access, except as provided in subsections (e)(2)(G) and (e)(2)(J). In addition to direct access, motor vehicle manufacturers may concurrently offer the information by means of electronic mail, fax transmission, or other reasonable business means.
  - (C) Is written in English with all text using readable font sizes.
  - (D) Has clearly labeled and descriptive headings or sections, has an online index connected to a search engine and/or hyperlinks that directly take the user to the information, and has a comprehensive search engine that permits users to obtain information by various query terms including, but not limited to, vehicle model, model year, bulletin number, diagnostic procedure, and trouble code.
  - (E) Provides, at a minimum, e-mail access for communication with a designated contact person(s). The contact person(s) shall respond to any inquiries within 48 hours of receipt, Monday through Saturday (excluding California holidays). The website shall also provide a business address for the purposes of receiving mail, including overnight or certified mail.
  - (F) Lists the most recent updates to the website. Updates must occur concurrently with the availability of new or revised information to franchised dealerships.
  - (G) Provides all training materials offered by the motor vehicle manufacturer. For obtaining any training materials that are not in a format that can be readily downloaded directly from the Internet (e.g., instructional tapes), the website must include information on the type of materials that are available, and how such materials can be purchased.
  - (H) Offers media files (if any) and other documents in formats that can be viewed with commonly available software programs (e.g., Adobe Acrobat, Microsoft Word, RealPlayer, etc.).
  - (I) Provides secure Internet connections (i.e., certificate-based) for

- transfer of payment and personal information.
- (J) Provides ordering information and instructions for the purchase of manufacturer emission-related enhanced diagnostic tools and reprogramming information pursuant to subsection (f).
  - (K) Complies with the SAE Recommended Practice J1930, "Electrical/Electronic Systems, Diagnostic Terms, Definitions, Abbreviations, and Acronyms," May 1998, incorporated by reference herein, for all emission-related motor vehicle information beginning with the 2003 model year.
  - (L) Complies with the following website performance criteria:
    - (i) Possesses sufficient server capacity to allow ready access by all users and has sufficient downloading capacity to assure that all users may obtain needed information without undue delay.
    - (ii) Broken weblinks shall be corrected or deleted weekly.
    - (iii) Website navigation does not require a user to return to the motor vehicle manufacturer's home page or a search engine in order to access a different portion of the site. The use of "one-up" links (i.e., links that connect to related webpages that preceded the one being viewed) is recommended at the bottom of subordinate webpages in order to allow a user to stay within the desired subject matter.
  - (M) Indicates the minimum hardware and software specifications required for satisfactory access to the website(s).
- (3) All information must be maintained by the motor vehicle manufacturer for a minimum of fifteen years. After such time, the information may be retained in an off-line electronic format (e.g., CD-ROM) and made available for purchase in that format upon request.
  - (4) Motor vehicle manufacturers must implement fair, reasonable, and nondiscriminatory pricing structures that provide for a range of time periods for online access (e.g., in cases where information can be viewed online) and/or the amount of information purchased (e.g., in cases where information becomes viewable after downloading). These pricing structures shall be submitted to the Executive Officer for review concurrently with being posted on the motor vehicle manufacturer's service information website(s).
  - (5) Motor vehicle manufacturers must provide the Executive Officer with free, unrestricted access to their Internet websites. Access shall include the ability to view and download posted service information.
  - (6) Reporting Requirements. Motor vehicle manufacturers shall provide the Executive Officer with reports that adequately demonstrate that the performance of their individual Internet websites meets the requirements of subsection (e)(2). Motor vehicle manufacturers shall submit such reports annually by December 31st. The Executive Officer may also require manufacturers to submit additional reports

upon request, including any information required by the United States Environmental Protection Agency under the Federal Service Information Rule. These reports shall be submitted in a format prescribed by the Executive Officer.

- (f) Diagnostic and Reprogramming Equipment and Information.
  - (1) Motor vehicle manufacturers shall make available for purchase the following diagnostic tools and information:
    - (A) To all covered persons, all emissions-related enhanced diagnostic tools, and reprogramming tools available to franchised dealers, including software and data files used in such equipment.
    - (B) To all equipment and tool companies, all information necessary to read and format all emission-related data stream information, including enhanced data stream information, available when using diagnostic tools supplied to franchised dealerships, and to activate all emission-related bi-directional controls that can be activated by franchised dealership tools.
  - (2) Beginning with the 2004 model year, motor vehicle manufacturers' reprogramming methods shall be compatible with SAE J2534 Draft Paper, "Recommended Practice for Microsoft Windows 32-Bit Application Programming Interface for Pass-Through Vehicle Reprogramming", Revision 5.2, September 2001, which is incorporated by reference herein, for all vehicle models that can be reprogrammed by franchised dealerships.
  - (3) Motor vehicle manufacturers shall make available for purchase to covered persons for vehicle models meeting the requirements of subsection (f)(2) all vehicle reprogramming information and materials necessary to install motor vehicle manufacturers' software and calibration data to the extent that it is provided to franchised dealerships.
  - (4) The information and tools required by this subsection shall be made available for purchase no later than 180 days after the effective date of these regulations or January 1, 2003, whichever is later, for vehicle models introduced into commerce on or before these dates. For all new vehicle models for which production commences after the above dates, motor vehicle manufacturers shall make available for purchase the required information no later than 180 days after the start of vehicle introduction into commerce or concurrently with its availability to franchised dealerships, whichever occurs first.
- (g) Costs: All information and diagnostic tools required to be provided to covered persons by these regulations shall be made available for purchase at a fair, reasonable, and nondiscriminatory price.
- (h) Motor vehicle manufacturers shall not utilize any access code, recognition



code or encryption for the purpose of preventing a vehicle owner from using an emission-related part (with the exception of the powertrain control module, engine control modules and transmission control modules), that has not been manufactured by that motor vehicle manufacturer or any of its original equipment suppliers.

- (i) Trade Secrets: Manufacturers may withhold trade secret information (as defined in the Uniform Trade Secret Act contained in Title 5 of the California Civil Code) which otherwise must be made available for purchase, subject to the following:
  - (1) At the time of initial posting of all information required to be provided under sections (d) through (f) above, the motor vehicle manufacturer shall identify, by brief description, any information that it believes to be a trade secret and not subject to disclosure.
  - (2) A covered person, believing that a manufacturer has not fully provided all information that is required to be provided under subsections (d) through (f) above or that such information is needed to offset anticompetitive effects, shall submit a request in writing by certified mail to the motor vehicle manufacturer for release of the information.
  - (3) Upon receipt of the request for information:
    - (A) If the information has not been previously made available for purchase because of an oversight on the part of the motor vehicle manufacturer, the motor vehicle manufacturer shall within 48 hours make the information available for purchase directly to the requesting covered person at a fair, reasonable, and nondiscriminatory cost and by reasonable business means. Additionally, the motor vehicle manufacturer shall, within 7 days, make such information available for purchase to other covered persons on the Internet pursuant to subsections (d) through (f).
    - (B) If the motor vehicle manufacturer has not made the requested information available for purchase because it believes it to be a trade secret, the motor vehicle manufacturer shall within 14 days, notify the requesting covered person that it considers the information to be a trade secret, provide justification in support of its position, and make reasonable efforts to see if the matter can be resolved informally.
    - (C) If the parties can informally resolve the matter, the motor vehicle manufacturer shall within 48 hours provide the requesting covered person with all of the information that is subject to disclosure consistent with that agreement. The motor vehicle manufacturer shall also, within 7 days, make such information available for purchase to other covered persons on its Internet site(s) and by such other reasonable business means that the motor vehicle manufacturer has been using to distribute information pursuant to this section.

- (D) If the matter cannot be informally resolved, the motor vehicle manufacturer shall, within 21 days from the date that it initially received the request for information, petition the California superior court for declaratory relief to make a finding as to the information being a trade secret that is exempt from disclosure. The petition shall be filed in accordance with the California Code of Civil Procedure section 395 et seq. The petition shall be accompanied with a declaration stating facts that show that it has made a reasonable and good faith attempt to informally resolve the matter.
  
- (j) Executive Officer Review of Compliance.
  - (1) The Executive Officer shall monitor compliance with the requirements of Health and Safety Code section 43105.5 and this regulation.
  - (2) The Executive Officer, through the Chief of the Mobile Source Operations Division (Division Chief), shall periodically audit a motor vehicle manufacturer's Internet website(s) and other distribution sources to determine whether the information requirements of Health and Safety Code section 43105.5 and this regulation are being fulfilled. Motor vehicle manufacturers must provide the Executive Officer with free unrestricted access to the sites and other sources for the purposes of an audit.
  - (3) The Division Chief shall also commence an audit upon receipt of a request from a covered person that provides reasonable cause to believe that a motor vehicle manufacturer is not in compliance.
    - (A) Such a request shall be in the form of a written declaration setting forth specific details of the alleged noncompliance of the motor vehicle manufacturer. The declaration shall also set forth facts that demonstrate that the requesting covered person has undertaken efforts to resolve the matter informally with the named motor vehicle manufacturer.
    - (B) The covered person shall concurrently serve a copy of the audit request on the motor vehicle manufacturer against whom the request has been filed.
    - (C) The Division Chief shall determine if the request, on its face, sets forth facts establishing reasonable cause to believe that that motor vehicle manufacturer is in noncompliance with Health and Safety Code section 43105.5 or these regulations and that the covered person has undertaken reasonable efforts to informally resolve the alleged noncompliance with the manufacturer directly. If the Division Chief determines that the request satisfies these conditions, he or she shall conduct an audit of the designated motor vehicle manufacturer's site. Otherwise, the Division Chief shall dismiss the request and notify the requesting covered person and the affected motor vehicle manufacturer of his or her

determination.

- (4) In conducting any audit, the Division Chief may require the motor vehicle manufacturer to provide the ARB with all information and materials related to compliance with the requirements of Health and Safety Code section 43105.5 and this regulation, including but not limited to:
  - (A) Copies of all books, records, correspondence or documents in its possession or under its control that the manufacturer is required to provide to persons engaged in the service and repair industries and to equipment and tool companies under paragraphs (c) through (f) of this regulation, and
  - (B) Any and all reports or records developed or compiled either for or by the manufacturer to monitor performance of its Internet site(s).
- (5) In conducting the audit, the Division Chief may order or subpoena the motor vehicle manufacturer, the party filing the request for inspection, or any other person with possible knowledge of the issue of noncompliance to appear in person and testify under oath. The Division Chief may also request or subpoena such persons to provide any additional information that the Division Chief deems necessary to determine any issue of noncompliance.
- (6) Except for good cause, the audit shall be completed within 60 days from the date that the Division Chief notifies the motor vehicle manufacturer about the audit. At the conclusion of the audit, the Division Chief shall issue a written determination, with supporting findings, regarding compliance by the motor vehicle manufacturer. If the Division Chief finds sufficient credible evidence that the motor vehicle manufacturer is not in compliance with any requirements of Health and Safety Code section 43105.5 or this regulation, the determination shall be in the form of a notice to comply against the motor vehicle manufacturer.
- (7) The Division Chief's determination not to issue a notice to comply against a motor vehicle is subject to limited review by the Executive Officer.
  - (A) A covered person may only request that the Executive Officer review a determination that it specifically requested pursuant to paragraph (3) above.
  - (B) The covered person shall file the request for Executive Officer review within 10 days from the date of issuance of the Division Chief's determination.
    - (i) The request shall be filed to the attention of the Executive Officer c/o Clerk of the Board, Air Resources Board, P.O. Box 2815, Sacramento, CA 95812-2815. A copy of the request shall be concurrently served on the motor vehicle manufacturer that was the subject of the audit and determination.

- (ii) The request shall set forth specific facts and reasons why the determination should be reviewed and supporting legal authority for why a notice to comply should have been issued.
    - (C) The motor vehicle manufacturer may file an opposition to the request for review within 10 days from the date of service of the request for review.
    - (D) The Executive Officer shall issue a determination within 30 days from the last day that the motor vehicle manufacturer had to file an opposition. The Executive Officer may affirm the decision of the Division Chief; remand the matter back to the Division Chief for further consideration or evidence; or issue a notice to comply against the manufacturer.
  - (8) Within 30 days from the date of issuance of a notice to comply, the motor vehicle manufacturer shall either:
    - (A) Submit to the Executive Officer a compliance plan that adequately demonstrates that the motor vehicle manufacturer will come into compliance with this section within 45 days from the date of submission of the plan, or such longer period that the Executive Officer deems appropriate to allow the motor vehicle manufacturer to properly remedy the noncompliance; or
    - (B) Request an administrative hearing to consider the basis or scope of the notice to comply.
  - (9) If the motor vehicle manufacturer elects to submit a compliance plan, the Executive Officer shall review the plan and issue a written determination, within 30 days, either accepting or rejecting the plan. The Executive Officer shall reject the compliance plan if the Executive Officer finds that it will not bring the motor vehicle manufacturer into compliance within 45 days from the date that the plan would have been approved. The Executive Officer shall notify the manufacturer in writing of his or her determination, and that the Executive Officer will be seeking administrative review pursuant to subsection (k) below.
  - (10) After approving a proposed compliance plan, if the Executive Officer determines that the motor vehicle manufacturer has failed to comply with the terms of the plan, the Executive Officer shall notify the motor vehicle manufacturer of his or her determination and that he or she will be seeking administrative review pursuant to subsection (k) below.
- (k) Administrative Hearing Review.
- (1) A motor vehicle manufacturer may request that a hearing officer review the basis and scope of the notice to comply. Failure by the manufacturer to request such a review and failing, in the alternative, to submit a compliance plan as required by paragraph (j)(8)(A) shall result in the Executive Officer's determination becoming final and may subject the manufacturer to penalties pursuant to Health and Safety

Code section 43105.5(f) and paragraph (l).

- (2) The Executive Officer shall forward the following matters to a hearing officer for appropriate administrative review, including, if warranted, consideration of penalties:
  - (A) A compliance plan that it has rejected pursuant to paragraph (j)(9).
  - (B) A notice to comply that has been issued against a manufacturer who has failed to either request administrative review of the Executive Officer determination, or, in the alternative, submit a compliance plan.
  - (C) An Executive Officer determination that a manufacturer has failed to satisfy the terms of a compliance plan it has submitted in response to a notice to comply.
- (3) Administrative hearings under this regulation shall be conducted pursuant to the procedures set forth in title 17, California Code of Regulations, section 60060 et seq.

(l) Penalties.

- (1) If after an administrative hearing, the hearing officer finds that the motor vehicle manufacturer has failed to comply with any of the requirements of this section, and the motor vehicle manufacturer fails to correct the violation within 30 days from the date of his finding, the hearing officer may impose a civil penalty upon the motor vehicle manufacturer in an amount not to exceed \$25,000 per day per violation until the violation is corrected. The hearing officer may immediately impose a civil penalty in cases where a manufacturer has failed to act in accordance with a compliance plan it has previously submitted.
- (2) For purposes of this section, a finding by a hearing officer that a motor vehicle manufacturer has failed to comply with the requirements of Health and Safety Code section 43105.5 and title 13, CCR, section 1969 et seq., including the failure to submit a timely compliance plan, shall be considered a single violation.

NOTE: Authority cited: sections 39600, 39601, 43018 and 43105.5, Health and Safety Code. Reference: section 39027.3, 43104 and 43105.5, Health and Safety Code; section 335 et seq. California Code of Civil Procedure.