

State of California
AIR RESOURCES BOARD

Notice of Public Availability of Modified Text

**PUBLIC HEARING TO CONSIDER ADOPTION OF REGULATIONS FOR THE
AVAILABILITY OF CALIFORNIA MOTOR VEHICLE SERVICE INFORMATION**

Public Hearing Date: December 13, 2001
Internet Posting Date: March 22, 2002
Public Availability Date: March 29, 2002
Deadline for Public Comment: April 15, 2002

At its December 13, 2001, public hearing, the Air Resources Board (the "Board" or "ARB") approved the adoption of section 1969, Title 13, California Code of Regulations (CCR), and sections 60060.1 through 60060.34, Title 17, CCR, which respectively provide the requirements and administrative hearing procedures for the availability of emission-related service information in California. The proposed regulations implement the legislative directives of Senate Bill No. 1146, Chapter 1077, which was approved by the Governor on September 30, 2000.

At the hearing, the Board adopted Resolution 01-55 (A copy of the adopted resolution is attached hereto as Attachment 1) approving the proposed regulations with modifications. Within the resolution, the Board directed the Executive Officer to adopt the proposed regulations after making available for public comment all changes specifically directed by the Board and any other necessary changes to the regulatory language as originally proposed in the Staff Report released on October 26, 2001. The Board further directed that the Executive Officer make available for comment any additional supporting documents and information relied upon by the ARB in adopting these regulations. The modifications specifically directed by the Board prior to adopting the Resolution are summarized below. All proposed modifications are set forth in detail in Attachments 2 and 3.

- Title 13, California Code of Regulations

§1969(c)(3): The definition of "covered person" has been modified. The scope of the definition has been modified to include only persons falling in one of four designated categories: (1) persons licensed with the Bureau of Automotive Repair, (2) persons engaged in the service and repair of vehicles belonging to a business fleet, (3) tool and equipment companies, and (4) persons engaged in the manufacturer or remanufacturer of emission-related parts. The definition is in accord with the purpose and intent of the Legislature in enacting SB1146. All parties to the regulatory proceedings acknowledge that commercial businesses and government entities that repair and service their own vehicle fleets have as much need for

service information as service and repair facilities that are licensed or registered with the Bureau of Automotive Repair. Also, the Legislature specifically provided equipment and tool companies with access to information under the regulations as prescribed by Health and Safety Code Section 43105.5(a)(2). As parties entitled to information, they should be included within the definition of covered persons and afforded the rights and responsibilities provided to covered persons under the statute and regulations.

§1969(f): This section has been subdivided into three distinct headings: Diagnostic and Reprogramming Tools; Data Stream and Bi-Directional Control Information; and Reprogramming Information. Language has been added to the paragraph for data stream and bi-directional information to give motor vehicle manufacturers the right to petition the Executive Officer for approval to refuse to provide such information to specific tool and equipment companies based on a reasonable belief that the requesting company will not produce safe and functionally accurate diagnostic tools. Under the proposed modification, the Executive Officer could approve such a petition, after consultation with the affected parties, upon a determination that the belief is indeed reasonable. If not, the motor vehicle manufacturer would have to make the information available within 2 days of the refusal of the petition.

Further, for the above three headings, motor vehicle manufacturers would have to make the required tools or information available through reasonable business means within a reasonable time (as specified in the modified text).

§1969(j)(9): As initially proposed, this paragraph would permit the Executive Officer to reject a compliance plan if that plan would not bring the motor vehicle manufacturer into compliance within 45 days once it is approved. The language has been modified to make paragraph (j)(9) consistent with paragraph (j)(8), which provides that, if necessary, the Executive Officer may provide manufacturers with additional time beyond 45 days to come into compliance.

In addition to the above changes, the staff is proposing additional minor amendments to the initially proposed regulations:

§1969(a): The applicability of the service information regulations is to passenger cars, light-duty trucks, and medium-duty vehicles that are certified to the requirements for second-generation on-board diagnostic (OBD II) systems. Language has been added to also include passenger cars, light-duty trucks, and medium-duty vehicles that comply with any future OBD requirements adopted by the ARB.

§1969(c)(5): The definition of “days” has been clarified. Except as provided below, the modifications would make clear that if the last permitted day to exercise a right or to perform an act falls on a Saturday, Sunday, or California-recognized holiday observed by the motor vehicle manufacturer, the deadline would be the next day. However, for purposes of section 1969(e), deadlines that fall on a Saturday would

not be extended to the next day, unless the Saturday was a California-recognized holiday observed by the manufacturer. This exception is consistent with the language proposed at the December 2001 Board hearing. The requirement that responses to e-mail inquiries should be made within two days, including Saturdays, recognizes the fact that many independent service and repair facilities are open for business on Saturdays and that information to effectively service and repair vehicles should be provided as expeditiously as possible. Further, for purposes of consistency, all references to “48 hours” have been changed to “2 days.”

§1969(c)(10): The definition of “fair, reasonable, and nondiscriminatory price” is based on eight factors that must be considered when determining the appropriateness of costs charged by a motor vehicle manufacturer for emission-related service information. In contrast, the U.S. EPA’s proposed amendments to its own service information regulations place specific caps on the monetary amounts a manufacturer can charge a covered person using its service information website. Although the proposed ARB regulations do not set specific cap limits, the staff believes that the pricing structure eventually adopted by the U.S. EPA is relevant and should be included as another factor in considering what is a “fair, reasonable, and nondiscriminatory price.” This proposal would provide additional consistency with federal requirements.

§1969(d)(3): As proposed, this section would provide manufacturers with lead time through the 2004 model year to provide computer or anti-theft system initialization information and/or tools to covered persons. The added lead time is subject to Executive Officer approval, and conditioned upon the manufacturer providing reasonable alternative means to achieve the objectives of the requirement. Based on manufacturers’ continued lead time concerns, and the staff’s belief that lead time through the 2004 model year does not provide sufficient time for manufacturers to address their initialization concerns in a practical manner, the section has been modified to extend the lead time provision through the 2007 model year.

In conjunction with the above modification, the staff is also proposing to modify the conditional requirement that manufacturers requesting lead time provide the independent service and repair industry with alternative means to initialize vehicles. The requirement has been modified to additionally require manufacturers to demonstrate that the proposed alternative would not put the independent service and repair industry, as a class, at a competitive disadvantage (as compared to franchised dealerships) in its ability to carry out repairs involving the initialization of vehicle anti-theft systems. The Executive Officer would have authority to audit previously issued approvals in accordance with paragraph (j) and have them rescinded if evidence produced at a hearing held before the Executive Officer demonstrated that the service and repair industry, as a class, has been placed at a competitive disadvantage. In such cases, the Executive Officer would require the manufacturer to provide the independent service and repair industry with all initialization information and/or related tools required under section 1969(d)(3).

§1969(e)(1): The responsibilities of vehicle manufacturers that transition out of the regulatory provision for small volume manufacturers have been clarified. The proposed modification makes clear that manufacturers are not required to retroactively post service information on the internet for vehicle models produced before manufacturer sales exceeded an average of 300 vehicles for three consecutive model years. Further, the manufacturer would not have to provide direct Internet access to service information for vehicle models in carry-over test groups that were initially certified while the small volume provision was in effect. This modification is being made to prevent an affected manufacturer from having to re-format existing service information for direct Internet access when such information has already been made available through alternate reasonable business means.

§1969(f)(2): The reference to Society of Automotive Engineers (SAE) Recommended Practice J2534 has been updated to incorporate the finalized document into the regulations. The official publication date is February 2002.

§1969(h): For clarity, the term “emission-related part” has been replaced with “emissions-related motor vehicle part.” With the modification, the term is identical to that defined by the Health and Safety Code, and Title 13, CCR, section 1969(c)(7).

§1969(i): The trade secret portion of the regulations has been modified for clarity and also to require the disclosure of requested information in the event a motor vehicle manufacturer makes a determination that the information is not a trade secret during the 14-day period provided in the regulations for notifying the covered person.

§1969(l)(1): Language has been added to clarify that a noncomplying motor vehicle manufacturer may be assessed penalties for each calendar day of noncompliance, including Saturdays, Sundays, and holidays, after the 30 day grace period to correct the violation has passed.

- Title 17, California Code of Regulations

§60060.8(d): This section has been modified to correct an inadvertent omission regarding the hearing officer’s ability to impose conditions on intervenors who are granted the right to participate under paragraph (c) as well as paragraph (b).

Staff has made other minor modifications throughout the Title 13 and Title 17 regulations to improve clarity, and to correct citations and references.

The ARB is also adding the following documents to the rulemaking record. The ARB staff relied upon these documents in adopting the service information regulations.

Letter sent from the Honorable John L. Burton, President Pro Tempore of the California State Senate, to Tom Cackette, ARB Deputy Executive Officer, dated August 21, 2001.

SAE Recommended Practice J2534, "Recommended Practice for Pass-Thru Vehicle Programming", February 2002.

The text of the modified language to section 1969, Title 13, CCR, and sections 60060.1 through 60060.34, Title 17, CCR, are attached as Attachments 2 and 3, respectively. Additions to the originally proposed language are shown in underline and deletions are shown in ~~strikeout~~. The other materials referenced in the regulatory language are available for public inspection from the Clerk of the Board at 1001 "I" Street, 23rd floor, Sacramento, California 95814.

All of the aforementioned attachments may be obtained from the Internet at the address below:

<http://www.arb.ca.gov/regact/cmvsip/cmvsip.htm>.

The other materials referenced in the regulatory language are available for public inspection from the Clerk of the Board at 1001 "I" Street, 23rd floor, Sacramento, California 95814.

In accordance with section 11346.8 of the Government Code, the Board directed the Executive Officer to adopt section 1969, Title 13, CCR, and sections 60060.1 through 60060.34, Title 17, CCR, after making them available to the public for comment for a period of at least 15 days. The Board further provided that the Executive Officer shall consider such written comments as may be submitted during this period, shall make such modifications as may be appropriate in light of the comments received, and shall present the regulations to the Board for further consideration if warranted.

Written comments on the modifications must be submitted by postal mail, electronic mail, or facsimile as follows:

Postal mail must be sent to:

Clerk of the Board
Air Resources Board
P.O. Box 2815
Sacramento, California 95812

Electronic mail is to be sent to: cmvsip@listserv.arb.ca.gov

Facsimile submissions are to be transmitted to the Clerk of the Board at: (916) 322-3928.

All comments shall be received no later than April 15, 2002, for consideration by the Executive Officer prior to final action. Only comments relating to the above described modifications to the regulations shall be considered by the Executive Officer.

Sincerely,

/s/

Allen Lyons, Chief
New Vehicle / Engine Programs Branch
Mobile Source Operations Division

Attachments

Attachment 1

Resolution 01-55

State of California
AIR RESOURCES BOARD

Resolution 01-55

December 13, 2001

Agenda Item No.: 01-10-1

WHEREAS, sections 39600 and 39601 of the Health and Safety Code authorize the Air Resources Board (the "Board") to adopt standards, rules and regulations and to do such acts as may be necessary for the proper execution of the powers and duties granted to and imposed upon the Board by law;

WHEREAS, sections 39515 and 39516 of the Health and Safety Code provide that the Board may delegate any duty to the Executive Officer which the Board deems appropriate and that any power, duty, purpose, function, or jurisdiction which the Board may lawfully delegate shall be conclusively presumed to have been delegated to the Executive Officer unless the Board has expressly reserved such authority onto itself;

WHEREAS, section 43018 of the Health and Safety Code directs the Board to endeavor to achieve the maximum degree of emissions reduction possible from vehicular and other mobile sources to accomplish the attainment of state ambient air quality standards by the earliest practicable date;

WHEREAS, section 43105.5 of the Health and Safety Code requires the Board, to the extent not limited or prohibited by federal law, to adopt regulations no later than January 1, 2002, that make available emission-related service information for 1994 model year and later passenger cars, light-duty trucks, and medium-duty vehicles to persons engaged in the service and repair of motor vehicles and the manufacture of motor vehicle parts;

WHEREAS, in enacting section 43105.5 of the Health and Safety Code, the State Legislature found that:

There are over 26 million registered motor vehicles in California, and that California residents rely heavily upon those vehicles to conduct their everyday activities;

The use of those motor vehicles results in hundreds of tons of pollutants being emitted into California's air every day, significantly affecting air quality and public health and safety;

It is in the best interests of the state to ensure that California motorists have the ability to obtain service, repair, or replacement of faulty emissions-related components of their motor vehicles and that such ability not be limited by the arbitrary withholding of service, repair, or parts information by motor vehicle manufacturers; and

Such a withholding of information from independent automotive repair technicians by vehicle manufacturers may result in improper and needlessly costly repairs that could endanger the public and result in anticompetitive effects harmful to the best interests of the state;

WHEREAS, the occurrence of emission-related malfunctions in those vehicles causes them to emit significantly more pollutants into the air than properly maintained vehicles;

WHEREAS, it was the intent of the State Legislature in enacting section 43105.5 of the Health and Safety Code to assure and stimulate competition in the service and repair of motor vehicles and in having parts available for those repairs;

WHEREAS, Article 3, Section 3.5 of the California Constitution provides that no administrative agency may declare any statute to be unenforceable or to refuse to enforce a statute on the basis of being prohibited or limited by federal law or regulations unless an appellate court has made a determination to that effect.

WHEREAS, in August 1995, the United States Environmental Protection Agency (U.S. EPA) adopted a service information rule that made service and repair information available to aftermarket service providers for 1994 model year and later motor vehicles;

WHEREAS, the U.S. EPA is considering but has not as yet adopted amendments to the existing federal service information rule that would, among other things, make full-text information available on the Internet;

WHEREAS, the Legislature, in 1995 and 1996, amended the Administrative Procedure Act (Stats. 1995, Ch.938 (SB 523) and Stats. 1996, Ch. 390 (SB 794)), to promote greater uniformity in state agency hearing procedures; make state agency hearing procedures more accessible to the public; improve fairness of state agency hearing procedures; and modernize and add greater flexibility to state agency hearing procedures;

WHEREAS, the Board has considered the effects of its proposed rulemaking on the economy of the State;

WHEREAS, the California Environmental Quality Act and Board regulations require that no project which may have significant adverse environmental impacts be adopted as originally proposed if feasible alternatives or mitigation measures are available to reduce or eliminate such impacts;

WHEREAS, a public hearing and other administrative proceedings have been held in accordance with the provisions of Chapter 3.5 (commencing with section 11340), Part 1, Division 3, Title 2 of the Government Code;

WHEREAS, the Board finds that:

1. The prompt and effective repair of emission-related malfunctions from motor vehicles will minimize the amount of excess emissions caused by such malfunctions.
2. Access to complete emission-related service information by independent service and repair facilities and parts manufacturers is necessary for such facilities to properly identify and repair emission-related malfunctions.
3. Use of the Internet will provide the independent service and repair industry and aftermarket parts manufacturers with convenient and timely access to manufacturers' emission-related service information.
4. The availability of motor vehicle manufacturer diagnostic tools and information, which have typically only been made available to franchised dealerships, to aftermarket tool companies will allow the aftermarket companies to develop tools that will help ensure that the independent service and repair industry has access to all equipment necessary to effectively repair emission-related malfunctions.
5. To address motor vehicle manufacturers' concerns regarding the quality of diagnostic tools available to the aftermarket, motor vehicle manufacturers should be afforded the right to petition the Executive Officer to refuse to provide data stream and bi-directional control information to aftermarket tool manufacturers for which legitimate concerns regarding quality exist.
6. The availability of motor vehicle reprogramming equipment and information will ensure that the independent service and repair industry is able to install on-board computer software updates issued by motor vehicle manufacturers.
7. In addressing the need for making initialization procedures related to immobilizer circuits available to the aftermarket so that it may properly service and repair vehicles, it is appropriate to balance the need of motor vehicle manufacturers that vehicle security systems not be compromised.
8. The regulation properly balances these conflicting needs by requiring manufacturers to provide the aftermarket with information on initialization procedures related to immobilizer circuits that are necessary for the proper installation of on-board computers, and the repair and replacement of other emission-related parts, while providing manufacturers the opportunity to

receive sufficient lead time to address vehicle security concerns prior to being required to fully disclose such information.

9. In approving paragraph (d)(3) of the regulation requiring manufacturers to provide initialization procedures, it is cognizant that remanufacturers of on-board computers may be adversely impacted by the Board's determination on balance that motor vehicle manufacturers are not required to provide special initialization information to remanufacturers for the bench testing of on-board computers.
10. The requirement for motor vehicle manufacturers to make available basic OBD II design information for 1996 model year and later vehicles to the independent service and repair industry and aftermarket parts manufacturers will help ensure that vehicles with detected malfunctions are properly serviced and repaired and that aftermarket parts are compatible with original equipment OBD II systems.
11. The regulations establish enforcement procedures, including provisions for assessment of monetary penalties that will help ensure effective compliance with the service information availability requirements.
12. The regulations establish hearing procedures that meet the requirements of the Administrative Adjudication Bill of Rights, Chapter 4.5, Article 6 of the Administrative Procedures Act, and such procedures afford due process to all parties.
13. The costs of all emission-related service information and tools must be fair, reasonable, and nondiscriminatory.
14. The proposed service information regulations are significantly similar to the proposed amendments to the federal service information rule and, if adopted, would not require manufacturers to duplicate compliance efforts.
15. No appellate court has, to date, made a determination that the directives of section 43105.5(a) of the Health and Safety Code that motor vehicle manufacturers make available specific service related information by reasonable business means, including, but not limited to the use of the Internet, is unenforceable because of being prohibited by federal law or regulations.
16. The economic and fiscal impacts of the service information regulations have been analyzed as required by California law, and the conclusions and supporting documentation for this analysis are set forth in the Notice and Initial Statement of Reasons for this rulemaking.
17. The service information regulations will not have any significant adverse impact on the environment.

WHEREAS, the Board further finds that:

1. While the service information regulations will not create new emission reductions, they will ensure that the emission benefits attributed to California's Low Emission Vehicle (LEV) and OBD II programs are achieved.
2. Adoption of the service information regulations will help independent service facilities and aftermarket part manufacturers to compete effectively with franchised dealerships for consumers' business.
3. Adoption of the service information regulations will provide consumers with a greater choice in who services their vehicles, thereby making it more likely that they will have their vehicles repaired when an emission-related problem occurs.
4. There is no feasible alternative considered by the Board that would be more effective in carrying out the purposes of Health and Safety Code section 43105.5 or would be as effective and less burdensome to affected private persons.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby approves for adoption section 1969, title 13, California Code of Regulations and article 2.5, title 17, California Code of Regulations, as set forth in Attachments A and B hereto, with modifications, including but not necessarily limited to, a provision that would provide motor vehicle manufacturers the right to petition the Executive Officer to refuse to provide data stream and bi-directional control information to specific tool and equipment manufacturers.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to adopt section 1969, title 13, California Code of Regulations, and article 2.5, title 17, California Code of Regulations, after making the modified regulatory language and additional supporting documents and information available for public comment for a period of 15 days, provided that the Executive Officer shall consider such written comments regarding the modification and additional supporting documents and information as may be submitted during this period, shall make modifications as may be appropriate in light of the comments received, and shall present the regulations to the Board for further consideration if he determines that this is warranted.

BE IT FURTHER RESOLVED that the Board directs the ARB staff to work with the motor vehicle manufacturers and the remanufacturers of on-board computers to attempt to see if a way exists that would allow remanufacturers to effectively bench test rebuilt computers with immobilizer circuitry without compromising motor vehicle security.

BE IT FURTHER RESOLVED that the Board directs the ARB staff to monitor the progress of motor vehicle manufacturers in meeting the provisions set forth in the regulation requiring motor vehicle manufacturers to provide the aftermarket service and repair industry with information to reinitialize motor vehicles after installation of on-board computers or the repair or replacement of other emission-related parts.

BE IT FURTHER RESOLVED that the Board directs the ARB staff to report back to the Board within one year on the status of the issues set forth in the preceding two paragraphs, with recommendations for amending the regulation if necessary.

BE IT FURTHER RESOLVED that the Board directs ARB staff to monitor the implementation and effectiveness of the regulations adopted herein and to make such recommendations to the Board for amending the regulations, if necessary, by on or around December 2003.

BE IT FURTHER RESOLVED that the Board hereby determines that the regulations adopted herein will not cause California motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.

BE IT FURTHER RESOLVED that the Board finds that the provisions adopted herein will not cause the California requirements to be inconsistent with section 202(a) of the Clean Air Act and raise no new issues affecting previous waiver determinations of the Administrator of the U.S. EPA pursuant to section 209(b) of the Clean Air Act.

I hereby certify that the above is a true and correct copy of Resolution 01-55, as adopted by the Air Resources Board

/s/

Marie Kavan, Clerk of the Board

Attachment 2

Modifications to Proposed 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

Note: This document is printed in a style to indicate changes from the language approved by the Board on December 13, 2001, in Resolution 01-55. All approved language is indicated by plain text. All additions and deletions to language therein are indicated by underline and ~~strikeout~~, respectively.

Proposed Regulation Order

Adopt sSection 1969, title 13, California Code of Regulations, chapter 1, Motor Vehicle Pollution Control Devices:

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~~ trucks 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. These regulations shall also apply to any passenger cars, light-duty trucks and medium-duty vehicles certified to future on-board diagnostic requirements adopted by the Air Resources Board.
- (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: (1) any person or entity engaged in the business of service or repair of motor vehicles who is licensed or registered with the Bureau of Automotive Repair, pursuant to Section 9884.6 of the Business and Professions Code, to conduct that business in California; (2) any commercial business or government entity that repairs or services its own California motor vehicle fleet(s); ~~or who~~ (3) tool and equipment companies; or (4) any person or entity is engaged in the manufacture or remanufacture of emission-related motor vehicle parts for these 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-; in computing the time within which a right may be exercised or an act is to be performed, the day of the event from which the designated period runs shall not be included and the last day shall be included, unless:
- (A) for purposes of section 1969(e), the last day falls on a Sunday, or a California-recognized holiday observed by the subject motor vehicle manufacturer, in which case the last day shall be the following day;
- (B) for all other purposes, the last day falls on a Saturday, Sunday, or a California-recognized holiday observed by the subject motor vehicle manufacturer, in which case the last day shall be the following day.
- (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 a an original equipment motor vehicle manufacturer’s brand of tools and equipment.
- (9) “Enhanced diagnostic tool” means a diagnostic tool that is specific to the original equipment motor vehicle manufacturer’s vehicles.
- (10) “Fair, reasonable, and nondiscriminatory price”, for the purposes of section 1969, means a price that allows motor vehicle 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; and
 - (I) Any additional criteria or factors considered by the United States Environmental Protection Agency for the determination of service information costs under federal regulations.
- (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 for information or tools that provides franchised dealerships with an unfair economic advantage over covered persons ~~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~~ each 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.
- (A) 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 i) The proper installation of on-board computers on motor vehicles that employ integral vehicle security systems; or
 - (~~B~~ ii) The repair or replacement of ~~an~~ any other emission-related part.
 - (B) A motor vehicle manufacturer may request Executive Officer approval to be excused from the requirements above for some or

all model year vehicles through the ~~2004~~ 2007 model year. The Executive Officer shall approve the request upon him or her finding that the motor vehicle manufacturer has demonstrated that:

- (i) The availability of such information to covered persons would significantly increase the risk of vehicle theft, and
- (ii) ~~that the manufacturer~~ It will provide make available to 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 and that such alternative means do not place covered persons, as a class, at a competitive disadvantage to franchised dealerships in their ability to service and repair vehicles.

(C) The approval is conditional and subject to audit under paragraph (j) below and possible rescission if the conditions set forth in paragraph (d)(3)(B) fail to be satisfied.

- (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 motor vehicle 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. If a manufacturer later exceeds the three-year vehicle sales average, it would be required to begin complying with all Internet availability requirements the next model year. In such cases, the requirements would apply only to those

vehicle models certified in that and subsequent model years and would not apply to any models that were within carry-over test groups that were initially certified before the sales average was exceeded.

- (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~~ 2 days 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 motor vehicle 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 motor vehicle 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 Tools and Information.
- (1) Diagnostic and Reprogramming Tools. Motor vehicle manufacturers shall make available for purchase through reasonable business means, including ordering over the Internet, 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. The motor vehicle manufacturer shall ship purchased tools to a requesting covered person as expeditiously as possible after a request has been made.
- (~~B~~ 2) Data Stream and Bi-Directional Control Information. Motor vehicle manufacturers shall make available for purchase through reasonable business means, ~~To~~ 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 that is used in when using diagnostic tools supplied available to franchised dealerships, and all information that is needed to activate all emission-related bi-directional controls that can be activated by franchised dealership tools. The motor vehicle manufacturer shall make such information available through the Internet or other reasonable business means to the requesting equipment and tool company within 14 days after the request to purchase has been made, unless the motor vehicle manufacturer petitions the Executive Officer for approval to refuse to disclose such information to the requesting company. After receipt of a petition and consultation with the affected parties, the Executive Officer shall either grant or refuse the petition based on the evidence submitted during the consultation process:
- (A) If the evidence demonstrates that the motor vehicle manufacturer has a reasonably-based belief that the requesting equipment and tool company could not produce safe and functionally accurate tools, the petition will be granted.
- (B) If the evidence does not demonstrate that the motor vehicle manufacturer has a reasonably-based belief that the requesting equipment and tool company could not produce safe and functionally accurate tools, the petition will be denied and the motor vehicle manufacturer shall make the requested information available to the requesting equipment and tool company within 2 days of the denial.
- (~~2~~ 3) Reprogramming Information.
- (A) 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 Pass-Thru Vehicle Programming,

~~Interface for Pass-Through Vehicle Reprogramming”, Revision 5.2, September 2004 February 2002~~, which is incorporated by reference herein, for all vehicle models that can be reprogrammed by franchised dealerships.

- (3 ~~B~~) Motor vehicle manufacturers shall make available for purchase through reasonable business means 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. The motor vehicle manufacturer shall, within 2 days of receipt of a covered person’s request, provide purchased reprogramming information via an Internet download or, if available in a different electronic format, via postal mail or package delivery service.
- (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 motor vehicle 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: Motor vehicle Mmanufacturers 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 motor vehicle 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 motor vehicle manufacturer shall do the following:
- (A) ~~If the information it had has not been previously made the information available for purchase because of an oversight on the part of the motor vehicle manufacturer, it shall make the information available~~ motor vehicle manufacturer shall within 48 hours 2 days from receipt of the request make the information available for purchase directly to the requesting covered person at a fair, reasonable, and nondiscriminatory ~~cost~~ price and by reasonable business means. Additionally, the motor vehicle manufacturer shall, within 7 days, make such information available for purchase to other covered persons consistent with the requirements of these regulations ~~on the Internet pursuant to subsections (d) through (f).~~
 - (B) ~~If the motor vehicle manufacturer it~~ has not made the requested information available for purchase because it believes the information it to be a trade secret, ~~the motor vehicle manufacturer it~~ 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 during this 14 day period set forth in paragraph (B), the motor vehicle manufacturer determines that the information is, in fact, not a trade secret, it shall immediately notify the requesting covered person of its determination and make the information available within the timeframes and means set forth in paragraph (A)
 - (~~C~~ D) If the parties can informally resolve the matter, the motor vehicle manufacturer shall within ~~48 hours~~ 2 days 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 consistent with the requirements of these regulations ~~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~~ E) 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~~ that the

information ~~being a trade secret~~ that is exempt from disclosure because it is a trade secret. 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~~ the motor vehicle manufacturer 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 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 motor vehicle 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 motor vehicle 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 motor vehicle 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.
- (7) 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 8) 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 motor vehicle manufacturer.
- (8 9) 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 10) 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, or such longer period that the Executive Officer deemed appropriate to allow the motor vehicle manufacturer to properly remedy the noncompliance. The Executive Officer shall notify the motor vehicle manufacturer in writing of his or her determination, and that the Executive Officer will be seeking administrative review pursuant to subsection (k) below.
- (10 11) 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 motor vehicle 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 motor vehicle 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 motor vehicle manufacturer who has failed to either request administrative review of the Executive Officer determination, or, in the alternative, to submit a compliance plan.
 - (C) An Executive Officer determination that a motor vehicle 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 (including Saturdays, Sundays, and observed holidays) per violation until the violation is corrected. The hearing officer may immediately impose a civil penalty in cases where a motor vehicle 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.

Attachment 3

Modifications to Proposed Title 17, California Code of Regulations, Chapter 1,
Subchapter 1.25, Article 2.5 Administrative Procedures for Review of Executive Officer
Determinations Regarding Service Information for 1994 and Subsequent Model Year
Vehicles

Note: This document is printed in a style to indicate changes from the language approved by the Board on December 13, 2001, in Resolution 01-55. All approved language is indicated by plain text. All additions and deletions to language therein are indicated by underline and ~~strikeout~~, respectively.

§ 60060.8. Motion to Intervene.

(a) Any person may file a motion to intervene.

(b) The hearing officer shall grant, as a matter of right, a timely written motion to intervene filed by an interested party to the determination for which review has been requested.

(c) As to other persons, the hearing officer may grant such a motion to intervene if all of the following conditions are satisfied:

(1) The motion is in writing, with copies served on all parties named in the request for review.

(2) The motion is made as early as practicable.

(3) The motion states facts demonstrating that the proceeding will substantially affect the requesting person's legal rights, duties, privileges, or immunities.

(4) The hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention.

(d) Upon a ~~If the~~ motion filed under paragraph (b) or (c) being is granted, the hearing officer may impose conditions on the intervenor's participation in the proceeding, either at the time that intervention is granted or at a later time. Conditions may include:

(1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the motion.

(2) Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceeding.

(3) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceeding.

(4) Limiting or excluding the intervenor's participation in settlement negotiations.

NOTE: Authority cited: Sections 39600 and 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections 43105.5(e) and (f), Health and Safety Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.10. Interpreters and Other Forms of Accommodation.

(a) In proceedings where a party, a party's representative, or a party's expected witness requires an interpreter for any language, including sign language, that party shall be responsible for notifying the hearing office as soon as the requirement is known, but no later than ten days prior to the first day of hearing. The hearing officer may allow later notification for good cause. The hearing office shall be responsible for securing the interpreter, and for providing reasonable accommodation.

(b) The state board shall pay the cost of interpreter services if the hearing officer so directs. In determining who should pay the cost of the interpreter, the hearing officer shall base the decision on equitable considerations, including the ability of the party in need of the interpreter to pay the cost.

Note: Authority cited: Sections 39600, 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections 43105.5(e) and (f), Health and Safety Code; Sections 11425.10 11435.25, 11435.30 and 11435.55, Government Code; Section 751, Evidence Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.12. Disqualification.

(a) The hearing officer shall disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing.

(b) A hearing officer may not hear any case in which he or she has previously served as an investigator, prosecutor, or advocate.

(c) Any party may request the disqualification of a hearing officer by filing an affidavit or declaration under penalty of perjury. A request against the hearing officer must be made no later than five days prior to the commencement of a prehearing conference or first day of hearing on the merits, whichever is earlier. The affidavit or declaration must state with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. The issue shall be determined, in the first instance, by the hearing officer against whom the request for disqualification has been filed.

NOTE: Authority cited: Sections 39600, 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections 43105.5(e) and (f), Health and Safety Code; Sections 11425.10, 11425.30, 11425.40 and 11512, Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.13. Prohibited Communications.

(a) Except as otherwise provided in this section, while the proceeding is pending, the hearing officer shall not participate in any communications with any party, representative of a party, or any person who has a direct or indirect interest in the outcome of the proceeding about the subject matter or merits of the case at issue, without notice and opportunity of all parties, to participate in communication.

(b) No pleading, letter, document, or other writing shall be filed in a proceeding under these rules by a party unless service of a copy thereof together with any exhibit or attachment is made on all other parties to a proceeding. Service shall be in a manner as prescribed in section 60060.5.

(c) For the purpose of this section, a proceeding is pending from the time that a request for review is first filed with the hearing office.

(d) Communications prohibited under paragraph (a) do not include communications concerning matters of procedure or practice, including requests for continuances that are not in controversy.

(e) A communication between a hearing officer and an employee of the state board that would otherwise be prohibited by this section is permissible if the employee is another employee of the hearing office whose job duties include aiding the hearing officer in carrying out the hearing officer's adjudicative responsibilities. Upon request, the hearing office will provide a list of employees of the hearing office to the parties.

The prohibitions of paragraph (a) that apply to the hearing officer shall also apply to such other employees employed in the hearing office. Communications permitted under this paragraph shall not furnish, augment, diminish, or modify the evidence in the record.

NOTE: Authority cited: Sections 39600, 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections 43105.5(e) and (f), Health and Safety Code; Sections 11425.10, 11430.70 - 11430.80, Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.14. Disclosure of Communication.

(a) If, while the proceeding is pending, but before serving as hearing officer, the hearing officer receives a communication of a type that would be in violation of this subarticle if received while serving as hearing officer, he or she shall, promptly after starting to serve, disclose the content of the communication on the record and give all parties an opportunity to address it as provided below.

(b) If a hearing officer receives a communication in violation of this article, the hearing officer shall make all of the following a part of the record in the proceeding:

(1) If the communication is written, the writing and any written response of the hearing officer to the communication; and

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the hearing officer, and the identity of each person from whom the hearing officer received the communication.

(c) The hearing officer shall notify all parties that a communication described in this section has been made a part of the record.

(d) If a party requests an opportunity to address the communication within ten days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

(2) The hearing officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.

(e) Receipt of ex parte communications may be cause for disqualification of the hearing officer.

NOTE: Authority cited: Sections 39600 and 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections 43105.5(e) and (f), Health and Safety Code; Sections 11425.10 and 11430.10 et. seq., Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.18. Notice of Receipt of Request for Review.

(a) Upon receipt of a timely request for review, the hearing office shall review the request for completeness.

(b) If the request does not include the information required under section 60060.17, the hearing office shall immediately acknowledge receipt of the request and notify the requesting party of the deficiencies that must be corrected before the request for hearing may be deemed filed and docketed. The requesting party shall have 10 days from the date of mailing the notice of deficiencies to submit a complete request for hearing. If the deficiencies are not corrected within the 10 days or the time provided for initially filing the request in sections 60060.15 through 60060.16, whichever is later, the underlying Executive Officer determination will become final.

(c) If the hearing office finds the request for hearing to be complete, it shall deem the request filed on the date that the request was received and notify the requesting party, the Executive Officer, and any identified interested party that a request for hearing has been filed.

(d) Except as provided in paragraph (f) below, the notice shall inform the parties that:

(1) Copies of these hearing procedures are available from the hearing office and that the procedures set forth at Government Code section 11500 et seq. are not applicable.

(2) Interested parties may file a motion to intervene pursuant to these rules if they wish to participate in the hearing.

(3) The parties shall submit to the hearing office responsive and reply arguments by the dates specified in these procedures.

(4) The parties have the right to be represented by counsel or other representative of their choosing and the right to an interpreter or other necessary accommodation.

(e) Upon being informed that the request for review is complete, the Executive Officer shall forward to the hearing officer, within 15 days from the date of service, a certified copy of the Executive Officer determination that is the subject of the request for review and the investigative record that was compiled during the Executive Officer's investigation.

(f) In those matters in which the Executive Officer has requested review of his or her determination to issue a notice to comply because the manufacturer has failed to contest the notice or, in the alternative, submit a compliance plan, the notice shall inform the parties that no hearing on the merits of the underlying Executive Officer determination will be held. Instead the notice shall inform the parties that the hearing

officer will issue a compliance order against the motor vehicle manufacturer within 30 days of receipt from the Executive Officer of a certified copy of the Executive Officer determination and investigative record.

Note: Authority cited: Sections 39600, 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections 43105.5(e) and (f), Part 5, Health and Safety Code; Section 11425.10, Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.32. Decisions and Orders of the Hearing Officer.

(a) Except for compliance orders issued pursuant to or after a request for hearing filed under section 60060.16(a)(1) or otherwise ordered, all proceedings shall be submitted at the time identified by the hearing officer in the schedule for review that has been served upon the parties. Within 30 days of the matter being submitted, the hearing officer shall make findings upon all facts relevant to the issues under review, and file a written decision and order setting forth the reasons or grounds therefore.

(b) If the decision finds that the motor vehicle manufacturer has failed to comply with any of the requirements of Health and Safety Code section 43105.5 or title 13, CCR, section 1969, including the obligation to submit an acceptable compliance plan, the decision shall order the motor vehicle manufacturer to come into compliance within 30 days of the effective date of the decision.

(1) The order shall further provide that if the motor vehicle manufacturer fails to comply within the 30-day time period set forth above, the hearing officer may order that the motor vehicle manufacturer be assessed penalties in an amount not to exceed \$25,000 per day per violation, commencing on the 31st day of noncompliance and continuing until the violation is corrected.

(2) For purposes of this section, a finding by the 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.

(c) A compliance order issued pursuant to a request for review filed under section 60060.16(a)(1) shall be in writing and issued within 30 days from the date the hearing officer notified the parties that it is in receipt of the documents forwarded by the Executive Officer. The order shall require that the motor vehicle manufacturer, within 30 days from the date of the order, correct the noncompliance identified by the Executive Officer in its notice to comply. The hearing officer may order the assessment of penalties for continuing noncompliance after the 30-day grace period consistent with the provisions of paragraphs (b)(1) and (2) above.

(d) The decision or order of the hearing officer is the final decision of the ARB and is effective on the date of issuance.

(e) A copy of the decision or order shall be served on each party or representative.

(f) Within five days of the filing of any decision or order, a party may file a written request that the hearing officer correct a mistake or clerical error.

(1) Pursuant to the party's request or on the hearing officer's own motion, the hearing officer may issue a revised decision or order correcting a mistake or clerical error with respect to any matter respectively covered therein. If the hearing officer

makes such a determination, he shall provide written notice to the parties.

(2) A motion filed by a party under this subparagraph shall be deemed denied if the hearing officer has taken no action to address the request within 15 days of filing of the request. In such a case, the decision shall become effective 15 days after the motion was filed.

(3) Within 15 days notifying the parties of his or her intent to modify the decision or order, the hearing officer shall serve a copy of any modified decision or order on each party that had previously been served with the original. The modified decision or order shall supersede the previously served document. The date of service of the modified decision or order shall become the effective date of the document.

NOTE: Authority cited: Sections 39600, 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections 43105.5(e) and (f), Health and Safety Code; Section 11425.50, Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.