Comments of the

Motorcycle Industry Council, Inc.

Re: CARB Proposed Warranty Information Reporting
and Recall Regulatory Amendments
Public Hearing: December 7, 2006
Continued to March 22, 2007

Summary:

The Motorcycle Industry Council (MIC) submits these comments on behalf of its more than 300 members, who are manufacturers and distributors of motorcycles, scooters, parts and accessories, as well as allied trades such as publishing, insurance and consultants.

MIC submitted extensive comments on this regulatory proposal at the December 7 public hearing, at workshops before and after that hearing, and in several meetings with staff.[1] MIC has consistently requested substantive revisions with respect to four main issues:

- The infeasible requirement for manufacturers to submit a compliance statement at the time of certification that an excess defect failure rate will not occur over the full useful life of the vehicle or engine.
- The failure of the proposal to provide for emission testing and an opportunity for manufacturers to show that a defect does not cause vehicles or engines to exceed applicable emission standards.
- The failure to recognize the special circumstances affecting motorcycles in applying recall or corrective action requirements.
- Unfair and legally unsupportable public hearing provisions.

While the regulatory proposal released on March 9, 2007 has revised wording, the proposal remains substantively the same and does not adequately address MIC's four main issues.

The fundamental problem with the revised staff proposal is that it is still based on a "strict liability" approach to defective parts that attempts to eliminate consideration of whether the defect causes a vehicle or engine to exceed standards. In taking this approach, and in trying to protect staff-ordered corrective actions not based on violations of applicable emission standards, the proposal goes beyond the Board's jurisdiction and violates due process requirements. The regulatory proposal is still flawed, and is not ready for implementation.

[1] All of MIC's prior comments and other material submitted to the Board and staff are attached and incorporated by reference into these comments.

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The revised proposal also needs to be re-proposed as a 45-day noticed item with an updated staff report, and contains a number of serious drafting problems that need to be corrected.

MIC therefore requests that the Board not adopt the March 9 regulatory proposal, and pull this item off its agenda so that further substantive revisions can be developed through cooperative work between staff and all industry stakeholders.

Detailed Comments on March 9 Revised Regulatory Proposal:

1. Need for Full 45-Day Comment Period – The March 9 revised staff proposal has been so extensively revised and re-written (although it still does not address MIC's primary concerns) that it no longer bears a substantive resemblance to the proposal noticed for and considered at the December 7 hearing. It is no longer covered by the original Initial Statement of Reasons (ISOR). To comply with the rulemaking requirements in the California Administrative Procedure Act, a new 45-day notice needs to be issued, with a properly revised staff report, so that MIC and all other interested parties will have adequate time to comment. This procedural defect cannot be corrected by having the Executive Officer conduct a post-hearing 15-day comment period, since no person will ever have a proper, full 45-day comment period, and there will never be a relevant ISOR.

2. Poorly Drafted, Infeasible Requirement for Manufacturer's Statement of Compliance – In the prior versions of the staff regulatory revisions, section 1958(c)(5), which sets forth the certification requirements for motorcycles, was amended to create a certification "test procedure" requirement for motorcycle manufacturers to state that their vehicles and engines will not exceed a defect rate of 4%/50 vehicles over their useful life, and to make it a "violation" of the test procedure if they later experience a defect rate above those limits while in use. Verbiage was also added to make it a test procedure "violation" on the ground that vehicles and engines with an in-use defect rate above the limit are no longer substantially the same as the certification test vehicles and engines.

In its earlier comments, MIC stated that the new requirements were not a valid test procedure (because they did not determine compliance with applicable emission standards, as required under H&S Code 43104), and that they were not feasible because there is no known methodology for making such a statement.

In the March 9 re-write of section 1958(c)(5), all-new wording appears requiring manufacturers to state that their vehicles and engines will be in compliance with "all applicable requirements" for their full useful life. This wording is unclear to the point of being unworkable and unenforceable. There is no evident antecedent for the term "all applicable requirements". Does it refer to all other subsections in section 1958? Or just some of them? Or does it refer to some other section? Is it a reference to the emission standards in section 1958? Or the test procedures? Or both, or neither? At this point, MIC has no assurance what this wording means.

The same problem exists later in the revised wording, where it states that it is a "violation" of the "foregoing test procedures" for a device to exceed a 4%/50 vehicles defect rate. Again, there is no evident antecedent for the term "foregoing test procedures", and no actual, identifiable test procedure containing a 4%/50 vehicles defect rate limitation, which makes this new wording unworkable.

While the wording is confused, the underlying intent appears to be the same, i.e. that motorcycle manufacturers must at the time of certification state that they meet a "requirement" that vehicles and engines will never exceed a defect rate of 4%/50 over their useful life, and that 'test procedures' are violated if an excessive defect rate is experienced by in-use vehicles. For that reason, this proposed revision remains infeasible, because there is no known technical method (i.e. no basis for making the required "good engineering judgment" and no "available information") for a manufacturer to make the required statement. Similarly, as MIC has pointed out in its earlier comments, after-acquired defect rate information cannot fairly be used to establish a retroactive violation of a certification test procedure, and defect rate information cannot rationally be used to support the contention that in-use vehicles are not substantially the same as the certification vehicles or engines.

MIC is concerned that the staff has re-written this section to hide or obfuscate what manufacturers must do, in order to make it appear feasible. By not stating what the "applicable requirements" are, and by declaring a "violation" of unspecified "test procedures", this new wording makes compliance impossible and puts MIC's members unacceptably at risk. The new convoluted wording proves that is it not possible to write a feasible, enforceable requirement for a defect rate limitation to be enforced against in-use vehicles as a test procedure requirement for initial certification.[2]

MIC therefore recommends that this entire new section be eliminated.

3. Need for Consideration of Compliance with Emission Standards – In this new proposal, the requirements for the SEWIR in section 2168(f) allow the Executive Officer (EO) not to impose corrective action where a defect will "not have an emissions impact under any conceivable circumstance", and states that the EO "need not base this determination on emissions testing". The latter phrase appears to mean that the EO may forego corrective action based on a proper engineering demonstration or technical data other than emissions testing, which MIC regards as a step in the right direction.

However, the term "emissions impact" remains of great concern to MIC. This term is not defined, but appears to be alternative wording for "increase in emissions" as used in earlier versions of the proposal. MIC interprets the new wording to mean that the EO is not authorized to forego corrective action if a defect causes any measurable increase in emissions, even where emission levels remain below the applicable emission standards.

MIC does not believe that CARB has the authority to impose a recall, or other corrective action, where a defect does not cause emission levels to exceed applicable emission standards, and that manufacturers have a legal right to demonstrate that their vehicles or engines comply with applicable standards. In effect, this treats a manufacturer's certified emissions level for a vehicle or engine as if it were an actual regulatory standard, without the Board ever having properly adopted such a limit as a standard. The requirement for a demonstration that there will be no emissions impact under "no conceivable circumstance" is unduly strict, as well. MIC has explained why this approach is unfair and unenforceable in its earlier comments, and we will not repeat those points here. MIC requests that the staff proposal be revised to allow manufacturers an opportunity to present evidence that a defect has minor impacts that do not cause a violation

[2] The problem with the new wording in section 1958(c)(5) is pervasive throughout the new regulatory proposal, since it is used in boiler-plate fashion in many other sections.

of applicable standards, subject to a reasonable burden of proof (e.g. preponderance of evidence or clear-and-convincing evidence). In addition, the SEWIR provisions should be revised to allow manufacturers additional time to conduct emission testing.

4. Need to Recognize Special Circumstances and Correct Discriminatory Treatment of Motorcycles in Sections Describing Recall/Corrective Action Orders – In the ISOR for this rulemaking, staff acknowledged that defective parts are not a problem for motorcycles, and that motorcycles already are subject to an "extended" warranty period equal to their full useful life. Motorcycles are also unique in that that they are not subject to OBD requirements. In its earlier comments, MIC provided alternative wording for a separate section dealing with motorcycles that was developed with staff during the first workshop process; unfortunately, MIC's wording has been ignored and motorcycles are now being treated more harshly than other vehicle categories.

The unfair treatment arises from the wording in section 2171 making recall mandatory for all types of component failures in non-OBD vehicles, whereas under section 2170 OBD-equipped vehicles are subject to corrective action other than recall for non-exhaust aftertreatment device defects. This treatment does not give proper recognition to the fact that motorcycles all come with "extended" emissions warranties. While section 2171(c) allows the EO "sole discretion" to waive corrective action for vehicles warranted for their full useful life, there are no standards to guide the EO's discretion for granting such waivers. MIC is concerned that the discretionary waiver is illusory and may never be granted, or will be granted in an unpredictable manner. MIC therefore requests that its earlier proposal for a separate section dealing with defective components on motorcycles be included; the MIC proposal contains specific grounds for waiving corrective action, including the opportunity to conduct emissions testing that demonstrates a defect does not cause certification standards to be exceeded.

5. Unfair Hearing Process – Section 2174, dealing with public hearings, remains unfair and in violation of federal and state due process requirements in spite of all the changes that have been made. The hearing process adopted in this section is an undisguised attempt to put staff decisions above the law and beyond independent review. In describing what the record of the hearing is to be, it begins with the phrase "Notwithstanding any other provision of law…". This appears to mean that CARB staff views its recall hearings as not subject to constitutional and legislative constraints, and that staff, rather than an impartial administrative law judge, will determine what evidence is allowable. Obviously, CARB has no such authority. No agency has the authority to adopt a regulation or conduct a hearing that operates "notwithstanding any other provision of law".

The Board should note that this section actually says that the hearing process is to operate unconstrained by its own regulations in titles 13 and 17; while not stated or otherwise apparent, what this means is that staff is here repudiating its own hearing regulations in title 17, which were recently adopted and follow the authoritative provisions of the state's Administrative Procedure Act (APA) for adjudicatory hearings. The Board should not allow this obviously illegal section to be adopted. A simple cross-reference to the Board's existing hearing procedures in title 17, or to the APA, is all that is needed.