

SUMMARY OF BOARD ITEM

ITEM # 01-10-1: PUBLIC HEARING TO CONSIDER REGULATIONS FOR THE AVAILABILITY OF CALIFORNIA MOTOR VEHICLE SERVICE INFORMATION

STAFF RECOMMENDATION: The staff recommends that the Board adopt California Code of Regulations (CCR), title 13, chapter 1, Motor Vehicle Pollution Control Devices, article 2 – Approval of Motor Vehicle Control Devices (New Vehicles); section 1969, Motor Vehicle Service Information – 1994 and Subsequent Model Passenger Cars, Light-Duty and Medium-Duty Vehicles; and CCR, title 17, 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.

DISCUSSION: On-board diagnostic II (OBD II) systems have been required since the 1994 model year for passenger cars, light-duty trucks, and medium-duty vehicles. In order for such advanced monitoring systems to be effective in-use, however, it is imperative that the necessary service information is available to diagnose and repair an indicated emission-related malfunction as soon as possible. This type of information is typically available to franchised dealerships, but not always to independent service facilities, or to part manufacturers that design components that are compatible with OBD II systems. A lack of competition created by this situation can result in increased consumer repair costs and loss of business in the aftermarket industry. If repair work is overly expensive or time-consuming, air quality can be impacted as consumers put off necessary emission-related repair work.

In recognition of this, the United States Environmental Protection Agency (U.S. EPA) adopted regulations in 1995 that require motor vehicle manufacturers to provide service information to any requesting party. Amendments to the U.S.

EPA's regulations are currently being considered. Similarly, the California Legislature in September 2000 passed Senate Bill 1146 (SB1146) requiring the Air Resources Board (ARB) to develop its own service information rulemaking. SB1146 specifically requires that independent service providers have access to dealership-quality service information and tools and that text-based service information be available over the Internet.

In order to meet the provisions of SB1146, staff recommends that the Board adopt the regulations proposed in this item. The proposal has been significantly harmonized with federal amendments currently under consideration.

SUMMARY AND IMPACTS:

Compliance with the provisions of this regulation is the direct responsibility of motor vehicle manufacturers that sell passenger cars, light-duty trucks, and medium-duty vehicles in California. Only one vehicle manufacturer is centrally based in the state.

Of significant concern to some motor vehicle manufacturers is the SB1146 requirement to provide initialization procedures for vehicles that use integrated anti-theft systems called immobilizers. Immobilizers work in conjunction with the on-board computers of many newer model vehicles, providing passive security by not allowing the engine to start unless the proper key, code, or other similar information is provided. These manufacturers believe that the release of such information may result in its misuse, leading to increased vehicle theft. Since the staff believes that this concern is generally dependent on a motor vehicle manufacturer's procedural approach and/or immobilizer design, it is proposed that motor vehicle manufacturers be provided with lead time through the 2004 model year where necessary to implement needed changes.

The aftermarket industry contends that initialization procedures must be made available pursuant to SB1146 to on-board computer rebuilders as well as service providers. However, the staff believes the

language of SB1146 specifically exempts motor vehicle manufacturers from having to disclose on-board computer initialization procedures beyond what is needed for service technicians to install replacement computers, or to make other emission-related repairs.

The requirement to make service information available on the Internet will impose costs on motor vehicle manufacturers for the development and maintenance of websites. These costs may be recovered in the prices that motor vehicle manufacturers charge to parties requesting information. However, prices must be fair, reasonable, and nondiscriminatory, as defined in the proposal. Franchised dealerships may experience some loss of business as independent facilities conduct more repairs resulting from increased access to service information. Still, the stimulation of competition in the service and repair industry was the goal of SB1146 and thus, such an effect was clearly recognized by the California Legislature when the bill was drafted.

Manufacturer costs may ultimately be passed on to consumers, but it is unlikely they will be impacted negatively by the regulation. The increase in the availability of information that the regulation would provide to independent service facilities and part manufacturers will allow consumers greater choice in finding competitive repair shops.

Based on an August 9, 2000, California Assembly Committee analysis of the fiscal effect of the regulation, the proposal is expected to impose moderate one-time costs of about \$200,000 for the ARB to develop and adopt the regulations for service information. Two additional staff and other resources will also be needed by the Air Resources Board to conduct audits of motor vehicle manufacturer websites and to participate in enforcement actions. The cost of the additional staff and resources will be about \$200,000 annually. It is also estimated that the Department of Consumer Affairs may incur costs of up to \$75,000 annually in

helping the ARB to report to the Legislature on the effectiveness of the regulation.

The proposal does not create new emission reductions, but rather realizes the emission benefits attributed to California's Low Emission Vehicle (LEV) and OBD II programs. This is based on the expectation that emission-related malfunctions are promptly repaired due to the availability of service information, thereby allowing vehicles to remain close to their certified emission levels. As a reference, statewide emission reductions for the LEV and OBD II programs by 2010 are 9, 337, and 146 tons per day for reactive organic gases, carbon monoxide, and oxides of nitrogen, respectively.

TITLE 13. CALIFORNIA AIR RESOURCES BOARD

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

The Air Resources Board (the Board or ARB) will conduct a public hearing at the time and place noted below to consider the adoption of regulations regarding the availability of motor vehicle service information in California.

DATE: December 13, 2001

TIME: 9:00 am

PLACE: California Air Resources Board
Auditorium
9530 Telstar Avenue
El Monte, CA 91731

This item will be considered at a two-day meeting of the Board, which will commence at 9:00 a.m., December 13, 2001, and may continue at 8:30 a.m., December 14, 2001. This item might not be considered until December 14, 2001. Please consult the agenda for the meeting, which will be available at least 10 days before December 13, 2001, to determine the day on which this item will be considered.

The facility is accessible to persons with disabilities. If accommodation is needed, please contact the Clerk of the Board at (916) 322-5594 or Telecommunications Device for the Deaf (TDD) (916) 324-9531 or (800) 700-8326 for TDD calls from outside the Sacramento area, by November 29, 2001.

INFORMATIVE DIGEST OF PROPOSED ACTION AND POLICY STATEMENT OVERVIEW

Sections Affected:

Adoption of the following sections of title 13, California Code of Regulations, and the documents incorporated by reference therein: division 3, 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, and the incorporated “Society of Automotive Engineers (SAE) Recommended Practice J1930, May 1998” and draft “SAE J2534, Revision 5.2, September 2001.”

Adoption of sections 60060.1 through 60060.34, title 17, California Code of Regulations (CCR): 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.

Background

The California Clean Air Act as codified in Health and Safety Code section 43105.5¹ directs the ARB to develop regulations that require manufacturers of 1994 and later model year passenger cars, light-duty trucks and medium-duty vehicles to make available emission-related service information to the automotive repair industry. The ARB staff is proposing regulations to implement these service information requirements, and the process for administrative review of Executive Officer determinations of non-compliance

In drafting the proposal, the ARB staff met with the United States Environmental Protection Agency (U.S. EPA), motor vehicle manufacturers, aftermarket parts manufacturers, trade associations and other interested parties in various meetings and via phone calls. Staff issued two mail-outs (reference: #MSO 2001-04 and #MSO 2001-09) that respectively presented staff's initial and revised draft proposals. Numerous written comments from the aforementioned parties were submitted to the ARB in response to the two mail-outs and were considered in the development of the final proposal. The staff also held a public workshop on April 18, 2001, to discuss the first draft proposal.

Comparable Federal Regulations

The United States Environmental Protection Agency (U.S. EPA) promulgated regulations regarding the availability of service information in 1995.² The regulations require that beginning with the 1994 model year, motor vehicle manufacturers were to make available to the aftermarket service and repair industry emission-related service information. To this end, the regulation required the manufacturers to list all such information on an online database called FedWorld. Recently, on June 8, 2001, the U.S. EPA proposed in a Notice of Proposed Rulemaking (NPRM) amendments to the regulations to further improve availability of service information. The amendments would require motor vehicle manufacturers to directly provide service information for 1996 and later vehicles on individual Internet websites rather than listing the information on FedWorld. As of the date of publication of this Notice (October 26, 2001), the proposed federal amendments have not become final. To promote consistency between federal and state provisions, it is staff's intent to harmonize its regulations with the proposed amendments of the U.S. EPA to the extent possible. Minor differences

¹ Health and Safety Code section 43105.5 was created by Senate Bill 1146 (SB1146), enacted September 30, 2000.

² 40 Code of Federal Regulations, part 86, section 86.094-38.

exist in regards to pricing determinations, Internet performance reporting, and training materials, but none of these differences will cause conflict in the implementation of either proposal.

Staff Proposal

As required by Health and Safety Code section 43105.5, staff proposes that the regulations apply generally to 1994 and later passenger cars, light-duty, and medium-duty vehicles certified to California's On-Board Diagnostic II (OBD II) requirements (title 13, California Code of Regulations, section 1968.1). Currently, section 1968.1(k)(2.1) of the OBD II regulation requires motor vehicle manufacturers to comply with limited service information provisions. It is staff's intent that these regulations, to the extent that they are effective and operative, will supersede those provisions. In accordance with the requirements of Senate Bill 1146 (SB1146), the proposal includes the following:

- *Availability of emission-related service information*

The proposed regulation requires the availability of all emission-related service information provided to franchised dealerships, including service manuals, technical service bulletins, and training materials. In addition, motor vehicle manufacturers must also provide on-board diagnostic system description information for vehicles manufactured from the 1996 model year. The required information would be available to anyone engaged in the business of motor vehicle service and repair, or in the manufacture or remanufacture of emission-related motor vehicle parts.

- *Immobilizer information*

The staff's proposal would require manufacturers to provide initialization procedures used by dealerships for vehicles equipped with integrated anti-theft systems (known as immobilizers) when such procedures are necessary for installation of on-board computers or in making other emission-related repairs. A provision to permit additional time for full compliance with this requirement, through the 2004 model year, is proposed in cases where the manufacturer would need to make design changes to the immobilizer system in order to ensure that disclosure of the procedures will not compromise vehicle security.

- *Internet availability*

Consistent with the dictates of Health and Safety Code, section 43105.5, the proposal would require motor vehicle manufacturers to make emission-related service information available on the Internet in full text. The information must be maintained online for a minimum of 15 years. Manufacturers that produce less than 300 vehicles annually in California could choose to use another viable business mean(s) for information access.

- *Availability of diagnostic tools and reprogramming equipment*

Motor vehicle manufacturers would be required to make available the same diagnostic tools they provide to their dealerships, and to provide specific information that will allow makers of generic diagnostic tools to incorporate the same diagnostic capabilities. Further, manufacturers would be required to make the on-board computer reprogramming equipment that they provide to dealerships available to independent service providers as well. For 2004 and later model year vehicles, the regulation would require manufacturers to standardize the mechanism by which on-board computers are reprogrammed according to Society of Automotive Engineers' Recommended Practice J2534. This would eliminate the need for manufacturer specific reprogramming tools.

- *Requirements for fair, reasonable, and nondiscriminatory pricing*

Motor vehicle manufacturers would be required to make the specified information and tools available at a "fair, reasonable, and nondiscriminatory price." In enforcing compliance with this requirement, the ARB would consider the criteria set forth in the definition of the term. These criteria allow the vehicle manufacturer to recover the costs of making the information available, but also consider the requesting person's ability to afford the information.

- *Implementation Dates*

Compliance with the requirements would begin 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 the effective date of the regulation. For vehicle models introduced into commerce after the effective date of the regulation, compliance would be required 180 days from the date of introduction of the vehicles, or concurrently with availability of the information covered by these regulations to franchised dealerships, whichever occurs first.

- *Trade secret disclosure*

Staff's proposal would not direct motor vehicle manufacturers to divulge service information that can be classified as trade secret material pursuant to the Uniform Trade Secret Act contained in Title 5 of Part 1 of Division 4 of the California Civil Code. The proposal would set forth procedures for manufacturers and covered persons to attempt to informally resolve the release of disputed material. If such dealings are unsuccessful, the motor vehicle manufacturer would need to petition the California superior court for declaratory relief.

- *Compliance Review Procedures*

Motor vehicle manufacturers would be required annually to provide the Executive Officer with reports that adequately demonstrate that the performance of their individual Internet websites meets the requirements of subsection (e)(2). The Executive Officer could require manufacturers to submit additional reports upon request. The reports would include any information reports required by the United States Environmental Protection Agency under the Federal Service Information Rule.

The proposal would give the Executive Officer authority to conduct periodic audits of manufacturer websites to determine compliance with the provisions of the regulation. In addition, the proposal would allow covered persons the right to request the Executive Officer to conduct an audit of a specific manufacturer that it believes to be in noncompliance with the regulations. If, after conducting an audit, the Executive Officer determines that a manufacturer is not in compliance, the Executive Officer would be required to issue a notice to comply against the manufacturer.

- *Administrative Hearing Procedures*

Upon being served with a notice to comply, a manufacturer would be required to either submit a compliance plan to the Executive Officer or request an administrative review hearing to contest the noncompliance. To properly enforce the regulations, the proposed procedures would further require that the Executive Officer seek administrative review of certain determinations that have found a manufacturer to be in noncompliance. Specifically, the Executive Officer would be required to seek compliance orders against a manufacturer who has (1) been issued a notice to comply and has failed either to request administrative review of the notice or, in the alternative, to submit a compliance plan; (2) filed a compliance plan that the Executive Officer has found to be unacceptable; or (3) failed to comply with the terms of a compliance plan that had been accepted by the Executive Officer.

Consistent with Health and Safety Code section 43105.5(e) and (f), the staff is proposing that Executive Officer determinations regarding manufacturer noncompliance be subject to administrative hearing procedures that would be codified at Title 17, CCR section 60060 et seq. The procedures would closely parallel other administrative hearing procedures that have been adopted by the ARB. (See Title 17, CCR section 60055 through 60075.45.) The proposed procedures would include, among other things, general procedural requirements regarding a party's right to representation and reasonable accommodation, and the filing of motions. Provisions would also cover the authority of hearing officers to conduct hearings and procedures for the filing of requests for review. Other provisions would set forth prehearing procedures, including the right to discovery and procedures for the conduct of hearings, including, introduction of evidence.

Finally, the proposed procedures would set forth requirements for the issuance of decisions and orders by the hearing officer, including penalty assessments, and the right of parties to seek judicial review of a hearing officer's final decision.

- *Penalties*

As provided by Health and Safety Code section 43105.5(f), the proposed regulations would allow the administrative hearing officer to assess penalties, not to exceed \$25,000 per day per violation, for failure to take corrective action after a compliance order has been issued by the hearing officer. Such penalties could be assessed if corrective action is not undertaken with 30 days (or such longer time that the hearing officer deems appropriate) from the date of the compliance order. For purposes of this section, all issues of noncompliance that are covered by the compliance order would be considered a single violation.

AVAILABILITY OF DOCUMENTS AND AGENCY CONTACT PERSONS

The ARB staff has prepared a Staff Report: Initial Statement of Reasons (ISOR) for the proposed regulatory action, which includes a summary of the potential environmental and economic impacts of the proposal, and supporting technical documentation. The staff report is entitled: "Initial Statement of Reasons for Proposed Rulemaking, Public Hearing to Consider Adoption of Regulations for the Availability of California Motor Vehicle Service Information."

Copies of the ISOR and full text of the proposed regulatory language, in underline and strike-out format to allow for comparison with the existing regulations, may be obtained from the ARB's Public Information Office, Environmental Services Center, 1001 "I" Street, First Floor, Sacramento, California 95814, (916) 322-2990, at least 45 days prior to the scheduled hearing (December 13, 2001).

Upon its completion, the Final Statement of Reason (FSOR) will be available and copies may be requested from the agency contact persons in this notice, or may be accessed on the web site listed below.

Inquiries concerning the substance of the proposed regulations may be directed to the designated agency contact persons: Dean Hermano, Air Resources Engineer, at (626) 459-4487, or Allen Lyons, Chief, New Vehicle/Engine Programs Branch, Mobile Source Operations Division at (626) 575-6918.

Further, the agency representative and designated back-up contact persons to whom non-substantive inquiries concerning the proposed administrative action may be directed are Artavia Edwards, Manager, Board Administration & Regulatory Coordination Unit, (916) 322-6070, or Marie Kavan, Regulations Coordinator, (916) 322-6533. The Board has compiled a record for this rulemaking action, which includes all the information upon which the proposal is based. This material is available for inspection upon request to the agency contact persons.

If you are a person with a disability and desire to obtain this document in an alternative format, please contact the Air Resources Board ADA Coordinator at (916) 323-4916, or TDD (916) 324-9531, or (800) 700-8326 for TDD calls from outside the Sacramento area.

This notice, the ISOR, and all subsequent regulatory documents, including the FSOR, when completed, are available on the ARB Internet site for this rulemaking at: <http://www.arb.ca.gov/regact/cmvsip/cmvsip.htm>.

COSTS TO PUBLIC AGENCIES AND TO BUSINESS AND PERSONS AFFECTED

The determinations of the Executive Officer concerning the costs or savings necessarily incurred in reasonable compliance with the proposed regulations are presented below.

The Executive Officer has determined that the proposed regulatory action will create administrative costs, as defined in Government Code section 11346.5(a)(6), to the ARB and to the Department of Consumer Affairs. The ARB is expected to incur ongoing costs of approximately \$200,000 per year to implement the regulation and enforce compliance. The Department of Consumer Affairs is expected to incur costs of less than \$75,000 per year as the Bureau of Automotive Repair is required through 2009 to assist the ARB in reporting to the Legislature on the effectiveness of these regulations. Costs would not be created to any other state agency, or in federal funding to the state. The regulation will not create costs or mandates to any local agency or school district whether or not reimbursable by the state pursuant to Part 7 (commencing with section 17500), Division 4, Title 2 of the Government Code, or other nondiscretionary savings to local agencies.

The Executive Officer has also made an initial determination that the proposed action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The Executive Officer has further determined that there should be insignificant, potential direct cost impacts, as defined in Government Code section 11346.5(a)(9), on representative private persons or businesses acting in reasonable compliance with the proposed action. The proposed service information regulation should directly affect approximately 34 motor vehicle manufacturers. Although manufacturers would incur costs to comply with the regulation, most, if not all of these costs should be recoverable through the sale of service information and tools. The regulation would likely have no or a small positive cost impact on the thousands of independent service repair facilities and aftermarket part manufacturers that do business in California because of the greater availability of service information and tools. The proposed regulation may indirectly have adverse cost impacts on franchised dealerships in California that may lose some repair business to independent service facilities.

In accordance with Government Code section 11346.3, the Executive Officer has determined that the proposed regulatory action will not affect the elimination of jobs or elimination of existing businesses within the State of California.

The Executive Officer has determined that the proposed action may possibly create some jobs, create new businesses, or promote the expansion of businesses currently doing business within California. An assessment of the economic impacts of the proposed regulatory action can be found in the staff report. The Executive Officer has further determined, pursuant to Government Code sections 11346.3(c) and 11346.5(a)(11), that the regulatory requirements for motor vehicle manufacturers to file reports are necessary for the health, safety, or welfare of the people of the state.

The Executive Officer has also determined, pursuant to title 1, CCR, section 4, that the proposed regulatory action will affect small business.

Before taking final action on the proposed regulatory action, the Board must determine that no reasonable alternative considered by the agency or that has been otherwise identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected persons than the proposed action.

SUBMITTAL OF COMMENTS

The public may present comments relating to this matter orally or in writing at the hearing, and in writing or by e-mail before the hearing. To be considered by the Board, written submissions not physically submitted at the hearing must be received no later than **12:00 noon, December 12, 2001**, and addressed to the following:

Postal Mail is to be sent to:

Clerk of the Board
Air Resources Board
1001 "I" Street, 23rd Floor
Sacramento, California 95814

Electronic mail is to be sent to: cmvsip@listserv.arb.gov and received at the ARB by no later than **12:00 noon, December 12, 2001**.

Facsimile submissions are to be transmitted to the Clerk of the Board at (916) 322-3928 and received at the ARB no later than **12:00 noon, December 12, 2001**.

The Board requests, but does not require, 30 copies of any written statement be submitted and that all written statements be filed at least 10 days prior to the hearing so that ARB staff and Board Members have time to fully consider each comment. The

ARB encourages members of the public to bring any suggestions for modification of the proposed regulatory action to the attention of staff in advance of the hearing.

STATUTORY AUTHORITY

This regulatory action is proposed under the authority granted to the ARB in California Health and Safety Code sections 39600, 39601, 43018, and 43105.5. This action is proposed to implement, interpret or make specific sections 39027.3, 43104, 43105.5, and 44011.6, Health and Safety Code; sections 11181, 11182, 11184, 11189, 11425.30, 11425.40, 11430.70-11430.80, 11435.25, 11435.30, 11435.55, 11440.30, 11455, 11455.30, 11500, 11507.6, 11509, 11512 and 11525, Government Code; sections 451, 452, 751, 915(b), Evidence Code; sections 395, 1013, 1013a, 1094.5, California Code of Civil Procedure; 13, CCR, section 1969; Mathews v. Eldridge, 424 U.S. 319 (1976).

HEARING PROCEDURES

The public hearing will be conducted in accordance with the California Administrative Procedure Act, title 2, division 3, part 1, chapter 3.5 (commencing with section 11340) of the Government Code.

Following the public hearing, the Board may adopt the regulatory language as originally proposed, or with non-substantial or grammatical modifications. The Board may also adopt the proposed regulatory language with other modifications if the text as modified is sufficiently related to the originally proposed text that the public adequately has been placed on notice that the regulatory language as modified could result from the proposed regulatory action; in such event the full regulatory text, with the modifications clearly indicated, will be made available to the public, for written comment, for at least 15 days before it is adopted. The public may request a copy of the modified regulatory text from the Board's Public Information Office, 1001 "I" Street, Sacramento, CA 95814, (916) 322-2990.

CALIFORNIA AIR RESOURCES BOARD



Michael P. Kenny
Executive Officer

Date: October 16, 2001

State of California
AIR RESOURCES BOARD

STAFF REPORT: INITIAL STATEMENT OF REASONS
FOR PROPOSED RULEMAKING

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

Date of Release: October 26, 2001
Scheduled for Consideration: December 13, 2001

This report has been reviewed by the staff of the California Air Resources Board and approved for publication. Approval does not signify that the contents necessarily reflect the views and policies of the Air Resources Board, nor does mention of trade names or commercial products constitute endorsement or recommendation for use.

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Attachment A – Proposed California Regulations to Title 13, California Code of Regulations, Chapter 1 Motor Vehicle Pollution Control Devices, Article 2 Approval

of Motor Vehicle Pollution Control Devices (New Vehicles); Section 1969, Motor Vehicle Service Information – 1994 and Subsequent Model Passenger Cars, Light-duty and Medium-Duty Vehicles.....A

Attachment B – Proposed California Regulations to 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.....B

EXECUTIVE SUMMARY

The Air Resources Board (ARB) staff is proposing regulations to require the availability of emission-related service information for 1994 and later passenger cars, light-duty trucks, and medium-duty vehicles. This proposal is being developed pursuant to the requirements of Senate Bill 1146 (SB1146), which created Health and Safety Code Section 43105.5. Enacted on September 30, 2000, the statute requires the ARB to adopt such regulations by January 1, 2002.

Both the ARB and the United States Environmental Protection Agency (U.S. EPA) have recognized the importance of such service information since the inception of on-board diagnostic (OBD) systems in motor vehicles. OBD systems alert vehicle operators when emission-related malfunctions occur, and provide service technicians with information regarding the nature of the problem. Complete service information is then needed to enable technicians to repair the identified problems. Historically, independent service providers have not always been able to obtain the same level of information that is available to the service centers of franchised dealerships.

Requirements for access to service information are currently in place under federal regulations. Independent service providers may order information available to dealers directly from manufacturers' clearinghouses. The information available is listed in an online database within FedWorld. The U.S. EPA is currently considering amendments to these requirements that would, among other things, also call for direct access to required service information over the Internet in order to facilitate faster and more convenient access to emission-related service information. Throughout the development of these proposals, the ARB staff has been in contact with U.S. EPA staff in order to harmonize the respective regulations.

In order to meet the requirements of the bill, staff proposes that motor vehicle manufacturers provide all emission-related service information, including service manuals, technical service bulletins, and training materials, over the Internet. In general, the proposal requires motor vehicle manufacturers to provide the same level of information that is available to franchised dealerships. If it is not already available, the regulation would require manufacturers to develop and make available descriptions of the basic design and operation of vehicle On-Board Diagnostic II (OBD II) systems.

The proposed regulation would also require vehicle manufacturers to offer for sale the emission-related diagnostic tools that are used by dealership technicians, along with information necessary for the same diagnostic capabilities to be designed into aftermarket tools that are not manufacturer specific. Similarly, equipment necessary to install updated on-board computer software must be made available to aftermarket service providers. Included in the regulation is a requirement for manufacturers to provide information relative to initializing on-board computers with integrated vehicle theft deterrents, if such information is necessary for installation of the computer or the repair and replacement of other emission-related parts. The

staff's proposal contains provisions for the protection of trade secret information that would otherwise have to be disclosed under the regulation. The proposed regulation would also set forth procedures for determining whether manufacturers are in compliance once the requirements take effect.

Under the proposal, initial non-compliance determinations would be made by the Executive Officer and would be communicated to the affected vehicle manufacturer. The manufacturer would then have the option of submitting a compliance plan to remedy the non-compliance, or to request an administrative review of the Executive Officer's determinations. The Executive Officer would also be able to request an administrative hearing for appropriate action and/or civil penalties to be imposed in cases where a manufacturer does not act in response to a notice to comply, files an unacceptable compliance plan, or fails to follow through on a compliance plan approved by the Executive Officer. A civil penalty of up to \$25,000 per day could be imposed on manufacturers that do not correct issues of noncompliance.

The staff estimates that the primary costs of compliance with this regulatory action will be the transfer of data to manufacturer websites and the maintenance of such websites. Based on information from motor vehicle manufacturers, it is expected that start-up costs for the development of a compliant website would range from \$600,000 to \$5 million, while annual maintenance costs would be in the vicinity of \$150,000 to \$450,000. Manufacturers are permitted by the regulation to set fair, reasonable, and non-discriminatory prices for the tools and information that must be made available under the regulation, thereby offsetting some or all of the compliance costs.

State of California
AIR RESOURCES BOARD

**Staff Report: Initial Statement of Reasons
for Proposed Rulemaking**

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

Date of Release: October 26, 2001
Scheduled for Consideration: December 13, 2001

I. Introduction

Existing state and federal laws require motor vehicle manufacturers to provide emission-related service information to facilities and technicians that are not affiliated with franchised dealerships. The purpose of these rules is to better ensure that all segments of the automotive repair industry have the information and tools necessary to repair emission-related malfunctions, thereby reducing emissions from these vehicles over their lifetimes. Senate Bill 1146 was enacted in September 2000 to expand the scope of information that must be made available to independent service facilities, and to improve the ease with which the information can be accessed. Furthermore, the bill provides for information to be made available to aftermarket parts manufacturers in order to ensure that their products are compatible with current technology vehicles. It added Health and Safety Code Section 43105.5, which directs the ARB to adopt these regulations no later than January 1, 2002. The regulatory action proposed by the ARB staff would fully implement the requirements of the statute, while creating consistency with similar regulations currently under consideration by the U.S. EPA.

II. Background

Motor vehicles of today are more complex than ever. The adoption of increasingly stringent emission standards has resulted in advanced emission control systems such as three-way catalytic converters, precise closed-loop fueling strategies, exhaust gas recirculation, and enhanced evaporative emission controls. With these components and systems, new cars and trucks sold today are up to 96 percent cleaner than those sold 10 years ago.¹ However, continued performance at these low emission levels depends on the proper operation of the emission control systems built into the vehicles. Emission-related malfunctions can cause vehicle emission levels to greatly exceed certification standards. Since the 1994 model

¹ Based on a comparison of Tier 1 and Super Ultra-Low Vehicle (SULEV) emission standards.

year, the ARB has relied on second generation on-board diagnostic systems, known as OBD II systems, to provide for quick detection and repair of emission-related problems.

OBD II systems are incorporated into vehicle on-board computers to monitor the performance of virtually every component and system that can affect emissions. The OBD II system alerts the vehicle operator of the occurrence of a malfunction, and stores diagnostic information in the on-board computer for later retrieval and use by a service technician. Through the rapid identification and repair of emission-related problems, the lifetime emissions from motor vehicles can be minimized. However, because emission levels are not reduced until the vehicle is successfully repaired, it is critical that service technicians have access to the information and diagnostic tools necessary to effectively utilize OBD II system information, and to carry out necessary repair work for identified problems. This is especially true for independent service providers who have been estimated to perform up to 80 percent of all automotive repairs.² The availability of compatible aftermarket replacement parts is also important to the repair process. If there is not an adequate supply of needed replacement parts at reasonable prices, the repair of emission-related malfunctions may be postponed or done improperly.

In response to concerns from the aftermarket service providers and parts makers regarding the availability of emission-related service information and diagnostic tools, Governor Gray Davis signed Senate Bill (SB) 1146 into law on September 30, 2000. The intent of the bill is to aid independent service providers in the repair of emission-related malfunctions by ensuring that adequate information and diagnostic tools are available for use. The bill addresses service information availability in three specific areas:

1. Motor vehicle manufacturers would be required to make available all emission-related diagnostic and service literature (e.g., service manuals, technical service bulletins, and training materials) in an easily accessible format at fair, reasonable, and nondiscriminatory costs. Access to this information on the Internet is specifically required.
2. Motor vehicle manufacturers must make available to the aftermarket the same diagnostic tools that are available to franchised dealerships. Further, specific information that can be used to design and market more affordable service and reprogramming equipment must be provided. If special tools or information are necessary for the installation of on-board computers into vehicles that employ integral vehicle theft deterrent systems, such materials must be made available to the aftermarket.
3. Motor vehicle manufacturers must make available basic OBD II system design information to help service technicians understand OBD II system operation, and better ensure that aftermarket parts manufacturers will be able to produce

² Federal Register: August 9, 1995 (Volume 60, Number 135), pg. 40475.

emission-related parts that are OBD II compatible and effective in controlling emissions.

Requirements for access to service information are currently in place under federal regulations. Independent service providers may order information directly from manufacturers' clearinghouses³. The information available is listed in an online database within FedWorld. The U.S. EPA has recently initiated a proposed rulemaking to make adjustments to these requirements based on experience gained since the regulation was first promulgated in 1995. These amendments would, among other things, also require manufacturers to make service information directly accessible over the Internet in order to improve the speed and convenience of obtaining the information. To promote consistency, the ARB staff and the U.S. EPA have worked to harmonize the respective regulations wherever possible. The staff believes this effort will eliminate any need for the manufacturers to take separate actions to meet each set of requirements.

III. Summary of Proposal

A. Applicability of the Regulation

In accordance with SB1146, the staff is proposing that the service information requirements of section 1969 of Title 13, California Code of Regulations (Title 13 CCR section 1969), apply to all 1994 and later model year passenger cars, light-duty trucks, and medium-duty vehicles certified to California's OBD II requirements.⁴ OBD II system descriptions would need to be provided only for 1996 and later model year vehicles, consistent with SB1146, in order to reduce the manufacturers' burden of creating OBD II description information in cases where it does not currently exist. The regulation will replace the existing service information requirements in section 1968.1(k)(2.1) of the OBD II regulation when Title 13 CCR section 1969 is effective and operative.

B. Service Information

The bulk of emission-related service information needed by independent service facilities and aftermarket part manufacturers consists of text-based data that are routinely used to complete service and repairs on consumer vehicles. Such information includes, but is not limited to, service manuals, technical service bulletins, troubleshooting manuals, and training materials. The staff's proposal would require manufacturers to make available all emission-related service information that is available to franchised dealerships.

C. Access to Service Information

Under the staff's proposal the required information would be offered for sale to "covered persons". A covered person is defined as any person or entity engaged

³ Code of Federal Regulations, Part 86, Section 86.094-38.

⁴ Title 13, California Code of Regulations, Section 1968.1.

in the business of service or repair of motor vehicles in California, or who is engaged in the manufacture or remanufacture of emission-related motor vehicle parts for those California motor vehicles. The original definition of covered person provided in SB1146 only extended to licensed or registered service facilities, a condition that would effectively exclude companies that service and repair their own vehicle fleets (e.g., utility and mail companies). Staff does not believe the intent of the bill was to do so and thus, removed this qualifying language. Motor vehicle manufacturers would need to ensure that the information is standardized to conform with the terms and acronyms specified in Society of Automobile Engineers (SAE) Recommended Practice J1930. The use of standardized terms and acronyms will allow technicians to effectively make use of manufacturers' service information without having to become familiar with multiple, and possibly conflicting, terms and acronyms for emission-related parts.

The Legislature specifically directed in Health and Safety Code section 43105.5(a)(1) that service information, at a minimum, be made available via the Internet. To ensure proper access and availability of requested information on the Internet, the regulation would require manufacturer websites to meet minimum performance requirements. The proposed requirements would help to prevent situations where information cannot be obtained because of unreasonably long webpage download times caused by a lack of Internet bandwidth, inadequately designed search engines, complicated subpage structures, etc. Additionally, to this end, the staff is proposing that all documents be accessible using commonly available software for website browsing and document viewing, and updates to the websites should occur at the same time that such new information is made available to franchised dealerships. To assess the performance of manufacturer websites in effectively providing the information required by the regulation, manufacturers would be required to submit annual reports to the Executive Officer regarding compliance with the aforementioned requirements. The Executive Officer would also have free, unrestricted access to all manufacturer websites to monitor manufacturer compliance with the regulation.⁵

Various levels of access (e.g., one-time versus long-term use) must be considered by motor vehicle manufacturers so that users are not limited by inflexible pricing and registration structures. Motor vehicle manufacturers would also need to respond to any electronic mail inquires within 48 hours, Monday through Saturday (excluding California holidays). The staff has proposed this requirement to provide service information users with an avenue to resolve issues related to the availability of specific information, or questions related to the content of posted information. It is expected that manufacturers will take necessary action to fully resolve e-mail inquiries within that time period. However, the staff realizes that the 48 hour response time could on occasion be exceeded due to the nature of the request or other complicating circumstances. In such cases, the staff would expect the

⁵ ARB staff is responsible under SB1146 for auditing manufacturers' compliance with the regulation for the purposes of identifying and correcting issues of non-compliance. Further, the ARB is responsible for reporting yearly to the legislature on the effectiveness of the regulation that is adopted towards fulfilling the goals of Health and Safety Code Section 43105.5.

manufacturer to clearly communicate to the requestor the status of its inquiry within 48 hours.

The staff proposes that all required service information remain available on the Internet for a minimum of fifteen years. After such time, a motor vehicle manufacturer could choose to leave the service information on its website or make it available for purchase in an off-line electronic format, such as CD-ROM. The option of archiving the information is proposed so that manufacturers will not have to continuously expand website capacity to include new models while retaining all existing information. The staff believes that after 15 years, the demand for service information for a particular model will be low due to vehicle attrition, and because most technicians would likely already own the information they need. Notwithstanding, the information would still be available for purchase in an off-line format for any covered person that needs it.

A small-volume exemption to the requirement to access information over the Internet is proposed for motor vehicle manufacturers that produce less than 300 motor vehicles annually in California (based on average sales of the three previous model years). For the purposes of determining a small-volume manufacturer in this case, the sales volume for a motor vehicle manufacturer would be based on sales of vehicle models for which the manufacturer is the manufacturer-of-record irrespective of whether that company is wholly or partially owned by another company. Under this small-volume provision, such manufacturers would have the option to instead provide the required information in another viable format, subject to Executive Officer approval. At a minimum though, a basic website would have to be established that describes how the desired information can be obtained by other reasonable business means. The inclusion of a small-volume allowance takes into consideration the magnification of the costs (discussed later in this report) involved in creating user-friendly Internet websites for very few vehicle models. Small-volume manufacturers have stated that they have insufficient technology resources and capital to convert service information to an on-line format.⁶ Since it is anticipated that demand for service information from such manufacturers will be quite low, staff does not believe that it would be cost-effective to require these manufacturers to develop and maintain comprehensive websites on a continual basis.

D. On-Board Diagnostic System Descriptions

SB1146 requires manufacturers to make available general descriptions of the design and operation of on-board diagnostic systems for 1996 and subsequent model year vehicles. These descriptions include the system's monitored parameters, diagnostic trouble codes, enabling conditions, monitoring sequence, and malfunction thresholds. This information will help service technicians to better understand the circumstances under which malfunctions are detected, and also will provide manufacturers of emission-related replacement parts with information that can be used to better ensure that replacement parts are compatible with OBD II systems. The regulation would not otherwise require motor vehicle manufacturers to

⁶ April 17, 2001, letter from Volkswagen of America on behalf of Rolls Royce & Bentley Motor Cars.

provide information specifically for use in the design and manufacture of replacement parts.

As part of the OBD II description, the regulations would require motor vehicle manufacturers to provide identification and scaling information necessary to understand and interpret data accessible to generic scan tools under mode 6 of SAE J1979, consistent with a similar provision in the OBD II regulation.⁷ As directed by SB1146, the regulations do not require motor vehicle manufacturers to include specific trade secret algorithms, software codes, and calibration data into the system descriptions. The staff expects that manufacturers should be able to organize and format OBD II descriptions in such a manner that the requirements of the regulations could be met without compromising trade secret information. If this cannot be accomplished, the vehicle manufacturer could seek judicial relief from providing the confidential information in question, as discussed in section III(I) below.

E. Diagnostic Tools and Reprogramming Equipment

Pursuant to SB1146, the proposed regulation would require manufacturers to offer for sale the emission-related diagnostic tools that are provided to franchised dealerships. The proposal would ensure the availability of dealership-quality tools to the aftermarket and provide for improved diagnoses and repair of emission-related malfunctions. If a manufacturer's tool includes both emission-related and non emission-related information and diagnostic capabilities, the manufacturer can elect to produce and make available to the aftermarket an emission-related only version of the diagnostic tool. In such a case, the tool provided to the aftermarket must be able to perform all emission-related diagnostic routines in a manner equivalent to the multitask tool supplied to the dealership.

In addition to offering for sale diagnostic tools that are provided to dealerships, the regulation would require motor vehicle manufacturers to make available emission-related enhanced data stream information⁸ and bidirectional commands⁹ to aftermarket tool manufacturers. This proposal is specifically required by Health and Safety Code, section 43105.5(a)(2) and would allow the aftermarket tool manufacturers to incorporate similar functionality into their own tools.

The staff believes that providing such information should enable automotive diagnostic tool manufacturers to build tools capable of working with multiple motor vehicle manufacturer lines. In such an event, independent service technicians would be provided with potentially less expensive alternatives to manufacturer specific enhanced diagnostic tools, which typically cost several thousand dollars each.

⁷ Title 13, California Code of Regulations, Section 1968.1(k)(2.0).

⁸ "Enhanced data stream information" is defined as data stream information that is specific for an original equipment manufacturer's brand of tools and equipment. Data stream information available to technicians through a diagnostic tool typically consists of real time data from sensors and the on-board computer regarding the operating conditions of the vehicle.

⁹ "Bidirectional controls" typically consist of commands issued by a technician using a scan tool to override normal vehicle operation in order to activate a device or computer routine for diagnostic purposes.

Many motor vehicle manufacturers already provide data stream information and bidirectional commands as a means of satisfying the service information requirements of the OBD II regulation (Title 13, California Code of Regulations (CCR), section 1968.1(k)(2.1)). Manufacturers could elect to provide the required information to clearinghouses such as the Equipment and Tool Institute, provided the requirements for ready access to the information at a fair, reasonable, and non-discriminatory price are met

To meet SB1146's directives that on-board computer reprogramming information be provided to covered persons, the staff is proposing that manufacturer's be required to use a standardized programming interface specified by SAE J2534, "Recommended Practice for Microsoft Windows 32-Bit Application Programming Interface for Pass-Through Vehicle Reprogramming." Use of this recommended practice by motor vehicle manufacturers would allow independent service providers to program vehicles to factory specifications using commonly available personal computer based tools. Since this standard is not yet finalized by SAE, the staff is proposing that vehicle reprogramming be compatible with SAE J2534 for 2004 and later model year vehicles. For OBD II equipped vehicles produced prior to the 2004 model year, the regulation would require manufacturers to offer for sale the reprogramming equipment available to dealership technicians for the installation of manufacturer issued on-board computer software updates.

F. Immobilizer Information

Pursuant to Health and Safety Code section 43105.5(a)(6), the staff is proposing that manufacturers under specified circumstances be required to provide to the aftermarket initialization procedures used by dealerships for vehicles equipped with integrated anti-theft systems. These systems are typically referred to as "immobilizers". A manufacturer would be required to provide such procedures when necessary for installation of on-board computers, or repair or replacement of other emission-related parts. A provision to permit lead time for full compliance with this requirement, through the 2004 model year, is proposed in cases where the manufacturer would need additional time to make design changes to the immobilizer system in order to ensure that disclosure of the procedures would not compromise vehicle security. A more detailed discussion of the staff's proposals and rationale relative to immobilizers is provided below in section IV(A)(3) of this report.

G. Cost of Service Information and Diagnostic Tools

The regulation would require that all covered information and diagnostic tools be offered for sale at a "fair, reasonable, and nondiscriminatory price." The intent of the SB1146 is to stimulate competition between franchised dealerships and the aftermarket by ensuring that the aftermarket has equal access to service information and tools necessary for the proper service and repair of vehicles and the manufacturing of replacement parts. To this end, the statute requires that manufacturers be compensated at a price that is fair and reasonable to all interested parties, and that the price should not advantage franchised dealers over the

aftermarket industry. The proposed regulation does not specify actual prices or price caps for service information and tools. Rather, ARB staff's proposed regulatory approach is to define a number of factors that will permit manufacturers to recover costs associated with providing required information and diagnostic tools, while considering the ability of the aftermarket industry to afford the materials. Specifically, the staff is proposing that the following factors be included in evaluating whether set prices are fair, reasonable, and non-discriminatory.

- The net cost to the motor vehicle manufacturers' franchised dealerships for similar information obtained from motor vehicle manufacturers after considering any discounts, rebates or other incentive programs;
- The cost to the motor vehicle manufacturer for preparing and distributing the information, excluding any research and development costs incurred in designing, implementing, upgrading or altering the onboard computer and its software or any other vehicle component. Amortized capital costs may be included;
- The price charged by other motor vehicle manufacturers for similar information;
- The price charged by the motor vehicle manufacturer for similar information immediately prior to January 1, 2000;
- The ability of an average covered person to afford the information;
- The means by which the information is distributed;
- The extent the information is used in general and by specific users, which includes the number of users, and the frequency, duration, and volume of use; and,
- Inflation.

The ARB will consider all relevant factors in making any determination that a manufacturer's set prices are not fair, reasonable, and non-discriminatory. The ARB will conduct periodic audits of manufacturer pricing policies. A finding that a manufacturer's pricing is not fair, reasonable, and nondiscriminatory would result in the Executive Officer issuing a notice to comply to the manufacturer.

H. Implementation Dates

The staff is proposing that motor vehicle manufacturers make all required information, including OBD II system general descriptions and diagnostic tools, available 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 that date. Thus the initial implementation date would be no earlier than January 1, 2003. The staff has proposed this date in order to avoid a situation where the manufacturers' compliance deadline is uncertain and based on the speed with which the post Board Hearing regulatory work is completed and approved. The fixed implementation date provides manufacturers with the ability to effectively plan the remaining work required to achieve regulatory compliance. Further, the staff believes that the January 1, 2003, implementation date provides sufficient lead time for manufacturers to carry out this work. The provision to extend the implementation

beyond January 1, 2003, to 180 days after the effective date of the regulation is proposed to provide a reasonable time period following completion of the regulatory activity during which manufacturers can reassess their compliance with the final rule and make necessary adjustments.

For vehicle models introduced into commerce after the effective date of the regulation, the information would need to be available within 180 days from the start of the vehicle model's introduction into commerce or concurrently with the availability of the information to franchised dealerships, whichever occurs first. The term "start of introduction into commerce" refers to the initial date a motor vehicle is available for sale at a manufacturer's dealership. The proposed 180 days would provide manufacturers with lead-time to publish the required information and to create a stock of materials and tools that will be offered for sale. By requiring concurrent availability of information with franchised dealerships within the 180-day period, the staff believes the proposal should not in any way disadvantage independent service providers. Further, the staff believes the need for service information outside of the dealerships within the first six months of model introduction is low. All vehicles in need of repair would be under warranty and in nearly all cases be taken to dealerships for free service.

I. Trade Secret Disclosure

SB1146 contains provisions for manufacturers to withhold trade secret information that would otherwise have to be disclosed. The staff is proposing regulatory text to guide the process of resolving trade secret disclosure issues.

The staff's proposal, consistent with the language of SB1146, will ultimately require the vehicle manufacturers to obtain trade secret protection from the California superior courts. However, in order to avoid unnecessary use of courts, the staff's proposes that manufacturers be required to seek declaratory relief only if trade secret determinations are in dispute (i.e., only if the aftermarket wants the information, and objects to a manufacturer's trade secret claims). Specifically, the staff's proposal would permit manufacturers to initially withhold information that it believes to be trade secret (as defined in the Uniform Trade Secret Act contained in Title 5 of the California Civil Code). At the time information for vehicle models is made available, the motor vehicle manufacturer would be required to identify on the website, by general description, the information it has withheld as trade secret. Covered persons that believe the information not to be a trade secret or believe availability of the information is necessary to "mitigate anticompetitive effects" may request the motor vehicle manufacturer in writing to make the information available. The motor vehicle manufacturer would then have 14 days in which to respond to the request, and the parties would have an additional 7 days in which to attempt to resolve the information request informally. If resolution cannot be reached within the 21-day period, the motor vehicle manufacturer would be required to petition the California superior court to obtain an exemption from disclosure.

J. Compliance Review Procedures

Under the staff's proposal, the ARB, through the Chief of the Mobile Source Operations Division, would review a motor vehicle manufacturer's compliance with these regulations. In general, the ARB would conduct periodic audits of motor vehicle manufacturer websites and information made available via the Internet or other distribution sources. In addition, a covered person may request that the ARB conduct an audit of a specific motor vehicle manufacturer. In such cases, the Division Chief would initiate an audit upon making the following findings: (1) the request, on its face, establishes reasonable cause to believe that the manufacturer is in noncompliance with the Health and Safety Code section 43105.5 and these implementing regulations, and (2) the covered person has made reasonable efforts to resolve the matter informally with the manufacturer. In conducting audits, the Division Chief would review all pertinent information provided by the covered person and manufacturer and could subpoena any additional information and testimony that he or she believes would be pertinent to the inquiry. At the conclusion of the audit, the Division Chief would issue a written determination as to whether the motor vehicle manufacturer is in compliance with the statute and regulations.

If the Division Chief, after reviewing all of the evidence, finds that the motor vehicle manufacturer is not in compliance with the governing statute or regulation, he or she would issue a notice to comply to the motor vehicle manufacturer ordering it to remedy the non-compliance. If, on the other hand, the Division Chief determines that the motor vehicle manufacturer is in compliance, the ARB would pursue no further action. In such a case, the covered person, who filed the request for the audit, could request that the Division Chief's determination be reviewed by the Executive Officer. Upon review, the Executive Officer could affirm the decision of the Division Chief, remand the matter back to the Division Chief for further consideration or evidence, or issue a notice to comply against the manufacturer. If the Executive Officer affirms the determination of the Division Chief, the covered person could petition the superior court for a writ of mandamus pursuant to California Civil Procedure section 1085.

As directed by SB 1146, upon being issued a notice to comply, the motor vehicle manufacturer would be required to either submit within 30 days a compliance plan for Executive Officer approval, or request an administrative hearing to contest the basis or scope of the notice. See section K. below. The Executive Officer would review any compliance plan that is submitted and accept those plans that demonstrate compliance within 45 days from the date of submission of the plan, or such longer term that the Executive Officer finds is necessary. If the plan is rejected by the Executive Officer, the Executive Officer would be required, as directed by SB1146, to seek review of its determination by an administrative hearing officer as discussed in section III(K) below.

The staff has proposed the foregoing audit and review procedures believing that it will enable the ARB to better monitor compliance by ensuring that its limited enforcement resources are utilized efficiently while concurrently providing covered persons with fair and reasonable access to the Board's enforcement process. The

proposed procedures preserve the Executive Officer's discretion in enforcing the regulations and policies of the agency, a decision clearly within the Executive Officer's expertise. At the same time the review procedures assure covered persons who believe that a manufacturer may not be complying with the law the opportunity to present their case to the agency and to have an adverse determination reviewed.

K. Administrative Hearing Procedures

Health and Safety Code section 43105.5(f) provides that the ARB shall establish an administrative hearing procedure for the review of Executive Officer determinations of non-compliance against manufacturers regarding the provisions of SB1146 and the implementing regulations. To that end, the ARB is proposing in section 1969(k)(1) that a motor vehicle manufacturer may request administrative hearing review of an ARB determination to issue a notice to comply against the manufacturer. To assure proper enforcement of the statute and implementing regulations, section 1969(k)(2) would require the Executive Officer to forward specific matters regarding a motor vehicle manufacturer's noncompliance to a hearing officer for administrative review. SB1146 requires that an independent hearing officer review any Executive Officer determination rejecting a manufacturer compliance plan. The statute further provides that the hearing officer be entrusted to impose administrative penalties against a manufacturer for continued noncompliance. Accordingly, the proposed regulations would require the Executive Officer to have determinations regarding a manufacturer's noncompliance reviewed and enforced by the independent hearing officer through issuance of compliance orders and possible assessment of penalties.

Staff is proposing the adoption of detailed hearing procedures to accomplish this objective. The procedures would be codified at Title 17, California Code of Regulations section 60060.1 through 60060.34. The proposed procedures would provide the parties with notice and the opportunity to have Executive Officer determinations regarding a motor vehicle manufacturer's compliance with Health and Safety Code section 43105.5 and the implementing regulations, Title 13, CCR, section 1969, reviewed in a full, fair, and expeditious manner. A neutral administrative hearing officer would preside over such hearings. The proposed procedures substantially parallel other procedures for administrative hearings that have been adopted by the ARB (see Title 17, CCR, Division 3, Chapter 1, Subchapter 1.25) and are in accord with the California Administrative Procedures Act, Government Code section 11400 et seq.

Consistent with the provisions of SB1146 and proposed sections 1969(j) and (k), Title 13, CCR, covered persons would not have the right to request an administrative hearing to review an Executive Officers determination not to issue a notice to comply against a motor vehicle manufacturer. See discussion in section III(J) above. But, under the proposed hearing procedures, covered persons would be considered an interested party with the full right to intervene and participate in matters reviewed by the hearing officer.

To ensure that parties have an opportunity to properly prepare and evaluate cases for hearing, the procedures would afford all parties the right to limited discovery. The parties would be entitled to obtain the names and addresses of persons having personal knowledge of the issues under review, and to inspect and make copies of non-privileged documents that are relevant to the issues for hearing and in the possession, custody, or control of another party to the proceeding. The hearing officer would have authority to consider requests for broader discovery and motions to compel discovery.

Specific procedures are being proposed for conducting hearings. Hearings would be recorded electronically or by a court reporter. Except in the case in which a motor vehicle manufacturer has neither requested review of an issued notice to comply nor submitted a compliance plan in response to the notice, the Executive Officer would have the initial burden of presenting evidence.¹⁰ The motor vehicle manufacturer would then have the right to examine, respond to, or rebut any contentions raised by Executive Officer, and may offer any documents, testimony, or other evidence that bears on relevant issues. At the close of the motor vehicle manufacturer's presentation, the parties would be able to present any rebuttal evidence that is necessary to resolve disputed issues. The parties would be provided a full opportunity to introduce all relevant evidence by calling and examining witnesses, cross-examination, introduction of exhibits, etc.

Under the proposed procedures, the hearing officer would govern the conduct of the hearing, make decisions on the admissibility of evidence and take whatever actions are necessary for a full and fair adjudication of the matter. Under his or her authority, the hearing officer would be able to limit the number of witnesses and the introduction of irrelevant, immaterial, unduly repetitious or unreliable evidence. In the interest of securing a complete record, the hearing officer would be authorized, in his or her discretion, to call and examine witnesses on his or her own motion; and admit any relevant and material evidence into the record.

After considering the record and submitted arguments by the parties, the hearing officer would issue a written decision and order within 30 days. The written decision would be required to set forth findings of fact, supported by the record, and the reasons and grounds for his or her decision. The hearing officer's decision would be the final decision of the ARB. The final decision, however, would be subject to judicial review by the superior court pursuant to Code of Civil Procedure section 1094.5. Likewise, the ARB would be authorized to seek enforcement of the hearing officer's final order in the superior court.

¹⁰ A motor vehicle manufacturer that fails to request review upon being issued a notice to comply has effectively defaulted, and the hearing officer would be authorized to issue a compliance order against the manufacturer upon the proper filing by the Executive Officer of the matter for review and enforcement.

L. Non-Compliance Penalties

Pursuant to SB1146, the hearing officer would be authorized to assess civil penalties against a manufacturer for continued noncompliance. Such penalties could be assessed if the manufacturer fails to come into compliance within 30 days from the date of a hearing officer's compliance order, or such later date that the hearing officer deems appropriate. The penalties cannot exceed \$25,000 per violation per day that the violation continues. For purposes of section 1969(l), 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, would be considered a single violation.

IV. Discussion of Recommended Action

A. Issues Regarding Proposal

1. Heavy-Duty Vehicles

Representatives of the aftermarket have stated that the proposed regulations should apply to heavy-duty vehicles and engines (i.e., vehicles greater than 14,000 pounds gross vehicle weight) to ensure that service and parts providers for such vehicles have the information they need for proper repair of emission-related problems. Further, they contend that it would be appropriate to apply the regulation to such vehicles and engines because the U.S. EPA is considering including heavy-duty vehicles in its federal service information regulations.

Although recognizing the merits of the above arguments, the staff is proposing that application of the regulation be limited to light- and medium-duty vehicles at this time. This limitation is reflected in the statute itself in that SB1146 only applies to vehicles equipped with certified OBD II systems. California does not currently have any OBD requirements that apply to heavy-duty vehicles. Consequently, certain portions of the regulation (e.g., OBD system descriptions) would have no applicability. Other requirements, such as posting the full content of service manuals on the Internet, may not be practical in light of differences in the light- and heavy-duty vehicle service industries. Automobile manufacturers have stated that the heavy-duty service industry is smaller scale and more product specific than the light-duty industry, reducing the need for broad access to all manufacturers' service information.¹¹ Further, heavy-duty vehicle diagnostic tools and service procedures are typically different from those used for light-duty vehicles. Although resolution of these issues is probably not insurmountable, the ARB staff believes that attempting to extend applicability of this proposed regulation to heavy-duty vehicles at this time would delay and complicate the rulemaking process, and make it difficult, if not impossible, for the ARB to meet the time target set forth in SB1146 requiring ARB to adopt regulation by the end of this year. Therefore, the

¹¹ May 31, 2001, letter from Alliance of Automobile Manufacturers, and Association of International Automobile Manufacturers; May 30, 2001, letter from the Engine Manufacturers Association.

staff recommends that heavy-duty vehicle service information access be addressed at a later time, ideally when OBD requirements for heavy-duty vehicles are established.

2. Implementation Date

As discussed previously, the period of time allotted to a motor vehicle manufacturer to first make service information available is 180 days after the effective date of the regulations or January 1, 2003, whichever is later, for vehicles introduced into commerce on or before these dates. All other vehicles' service information must be provided 180 days after vehicles are introduced into commerce or at the same time that the information is made available to a motor vehicle manufacturer's dealerships, whichever is sooner.

Motor vehicle manufacturers have commented that the initial implementation date of the proposed regulations should coincide with implementation of the revised federal requirements. They propose that this should be set one year from the finalization of EPA's rulemaking.¹² The staff believes the intent of SB1146 is for ARB to adopt and implement service information requirements as soon as practical and independent of the timeline for U.S. EPA's completion of federal requirements. For purposes of harmonization, it is not necessary for the ARB and U.S. EPA to have identical implementation dates provided compliance is feasible. In this regard, the ARB staff believes that manufacturers should readily be able to comply with the requirements of the regulation by January 1, 2003. The basic elements of these and U.S. EPA's proposed regulations (i.e., the establishment of Internet sites) have been known for some time¹³, and manufacturers will have had more than two years lead time from the signing of SB1146 by the time compliance must be achieved.

Aftermarket associations believe the implementation date should be 90 days from the effective date of the adopted regulation for existing vehicles, and no longer than 90 days from introduction into commerce for future vehicle models. Staff initially considered a 90-day implementation period for existing and future vehicles. However, several manufacturers stated that 90 days was not enough time to finish the job of organizing and reformatting data for Internet posting. At the time of initial implementation, manufacturers will be required to post information for up to eight-model years worth of vehicles. Therefore, staff believes that its proposed implementation dates are the earliest practical dates by which compliance can be expected.

3. Initialization Procedures

Many cars today utilize anti-theft systems integrated with vehicle on-board computers. These systems are typically referred to as "immobilizers".

¹² August 3, 2001, letter from Alliance of Automobile Manufacturers and Association of International Automobile Manufacturers

¹³ SB1146 was first introduced in February 1999.

Immobilizers deter theft by disabling engine control functions within the on-board computer (e.g., preventing the fuel injectors from firing) when it has detected that the vehicle is not being started properly. For example, the immobilizer may confirm that the key being used to start the car is the right key for the vehicle.¹⁴ Therefore, a copied key or "hot-wiring" could not be used to steal the car. For some manufacturers, technicians need to re-initialize the immobilizer after replacement of the on-board computer (or possibly after other repair work) in order for the vehicle to be started.

Independent technicians have not always had the information and/or tools in the past to be able to reinitialize these systems, which prevents them from fully completing repairs because initialization must still be done at a dealership. Such situations cause vehicle servicing to be time-consuming and inconvenient for the consumer. This, therefore, disadvantages independent service providers in conducting such repair work. With staff's proposal, covered persons will be granted access to vehicle initialization procedures to the same degree as provided to franchised dealerships in cases where necessary to restart vehicles after emission-related service or repair.

Most motor vehicle manufacturers appear to have no concerns with the statute's treatment of this issue or the staff's proposal to implement it. However, a small number of motor vehicle manufacturers are concerned that providing such capability outside of the dealership structure will compromise vehicle security, making vehicles easier to steal. They contend that under the proposed regulation they would be required to provide codes or other information to technicians, which could be misused to steal cars. The level of concern appears to depend on the design of the immobilizer system, the service procedures set up with dealerships to carry out re-initialization when necessary, and the historical theft rates of vehicle models.¹⁵

The ARB staff is also concerned with the issue of vehicle security, and does not want to create any reduction in anti-theft system integrity. Therefore, if a motor vehicle manufacturer believes that the release of such initialization information would create a situation whereby a vehicle's security is compromised, the ARB would allow a manufacturer to request additional lead-time from the Executive Officer. Upon a manufacturer properly demonstrating the risk to vehicle security and a plan that provides the aftermarket with reasonable alternative means to install computers on its vehicles,¹⁶ the Executive Officer would be authorized to excuse the manufacturer from having to meet the initialization requirements through the 2004 model year. This should provide the manufacturer with sufficient time to make

¹⁴ In such cases, the keys for the vehicle typically have a microchip embedded into them which is sensed by the immobilizer system, similar to the way that card-keys are used to open secured office doors.

¹⁵ Although some common elements exist, immobilizer design, function, and initialization differ from manufacturer to manufacturer.

¹⁶ For example, a manufacturer could develop a program wherein its dealerships would re-initialize a motor vehicle at an independent repair facility in a timely manner so as not to inconvenience the consumer, or disadvantage the service provider.

necessary changes to the immobilizer design and how it is initialized. The staff believes that this proposal properly balances the need for manufacturers to maintain theft deterrence while providing the aftermarket with the means to properly service vehicles, including the ability to restart vehicles after repair or service.

Manufacturers have requested lead-time up to the 2008 model year so that design changes can be phased-in with planned product line changeovers. While the staff understands the convenience this timeframe would provide, it believes the requirement should be met as soon as reasonably feasible. Manufacturers have stated that designs are fixed approximately one year ahead of production. Therefore, the staff's proposed 2005 model year implementation deadline would provide manufacturers with two years of lead-time ahead of the date when designs should be set in place. The staff believes such lead-time is adequate for necessary design changes to be made.

The aftermarket industry has commented that SB1146 requires additional immobilizer information and/or equipment to be provided to on-board computer remanufacturers so that rebuilt on-board computers can be tested for proper function before being offered for sale.¹⁷ It has stated that if manufacturers have vehicle security issues in providing such information, they can develop "black box" devices that connect to the on-board computer in the remanufacturing facility. These devices would initialize the immobilizer and permit the computer to be tested without providing any sensitive information directly to the rebuilder. Further, if necessary, licensing agreements could be set up in order to protect sensitive immobilizer design information.

The ARB staff has not included the request of the California Automotive Task Force into the proposed regulation for two reasons. The staff believes that such a requirement would not be consistent with the language of SB1146. Health and Safety Code section 43105.5(a)(5) specifically permits a motor vehicle manufacturer to use access or encryption codes on powertrain and transmission computers to prevent installation of computers that are not manufactured by the motor vehicle manufacturer or its original equipment suppliers. In so providing, the Legislature crafted an exception to the requirement prohibiting manufacturers from using such codes to prevent the use of aftermarket replacement parts.

The section that follows, 43105.5(a)(6), which requires manufacturers to disclose certain immobilizer initialization procedures, cannot be read to annul the purpose and intent of the security provisions that specifically apply to computers in section 43105(a)(5). To require motor vehicle manufacturers to provide "black-box devices" could potentially subject a manufacturer's security provisions to abuse.¹⁸

¹⁷ California Automotive Task Force letter, dated April 13, 2001.

¹⁸ Motor vehicle manufacturers disagree with the aftermarket industry on the issue of whether the use of a black box device would prevent misuse of immobilizer information. The motor vehicle manufacturers contend that too much of the design of the immobilizer would have to be revealed in order to permit testing of the computer on a test bench apart from the vehicle. In their opinion, a black box would permit reverse engineering or could be used directly to steal vehicles.

That is why staff believes that section 43105.5(a)(6) specifically makes a distinction between on-board computers and other emission-related parts. For computers, the section provides that manufacturers must provide information that is necessary for initialization of the immobilizer system after installation of the computer. In contrast, for all other emission-related parts, initialization information must be provided that allows for proper initialization after the repair and replacement of such parts. (Emphasis added.) Arguably, repair and replacement would include the manufacture or remanufacture of such parts and that initialization information would be necessary to assure that the aftermarket is not excluded from performing such functions. Such a broad reading cannot, however, be inferred from the Legislature's use of the phrase "proper installation," which specifically applies to computers. Thus, in the staff's opinion, the Legislature could not have intended in section 43105.5(a)(6) to override the special recognition for the security that it established in section 43105.5(a)(5) for security.

4. Standardized Reprogramming Protocol

One manufacturer has expressed concern regarding staff's proposal to require manufacturers to conform to the specifications of SAE Recommended Practice J2534 by the 2004 model year for vehicles that can be reprogrammed in the field. As stated previously, conformance with this technical standard will allow independent service providers to purchase a single piece of computer hardware that can be used to reprogram any vehicle make or model. The manufacturer has stated that compliance with SAE J2534 will require computer modifications that will not be completed for all of its vehicle models by the 2004 model year. It thus proposes that the ARB adopt a phase-in schedule for the 2004 through 2007 model years. The ARB staff believes that full implementation for the 2004 model year is reasonable and appropriate as evidenced by the general support of this timing by other motor vehicle manufacturers. Further, the basic elements of the SAE's J2534 program were identified by the SAE subcommittee sometime ago and should be well known to all manufacturers. Consequently, most manufacturers have already considered the implications of the standard on vehicle design and have initiated plans to implement necessary on-board computer design changes. Nonetheless, the 2004 model year deadline would still provide manufacturers with up to two years of leadtime in order to make any necessary changes that remain. In the event that a manufacturer cannot comply with the requirements of SAE J2534 for a specific model by the 2004 model year, it may elect to comply with the regulation by not offering field-reprogramming capability to franchised dealerships until the vehicle model is designed to the SAE standards.

5. Internet Website Guidelines

Motor vehicle manufacturers have argued that the performance specifications for Internet websites are outside the authority of the ARB. Contrary to this contention, the Legislature specifically directed the ARB to adopt regulations requiring motor vehicle manufacturers to make available to all covered persons service-related information "by reasonable business means, including, but not limited to, use of the Internet..." (Health and Safety Code section 43105.5(a)). The ARB

staff has interpreted this directive to mean that, at a minimum, regulations must be adopted that provide access to information set forth in section 43105.5 by means of the Internet. To this end, the ARB has proposed regulation that would require manufacturers to have information available on the Internet by no later than January 1, 2003 or 180 days from the date that the proposed regulations become effective, whichever is later. To assure that information can be readily accessed, and is therefore "available" within the meaning of Health and Safety Code section 43105.5, the proposed regulation includes minimum website performance criteria, Title 13, CCR, section 1969(e)(2)(L). These criteria are neither overly prescriptive nor unduly burdensome, and when balanced against the stated purposes and intent of SB1146, clearly fall within the delegated authority of the ARB.

6. Search Engines

Staff initially proposed that users of service information websites be able to search for service information by a number of query terms: vehicle model, model year, vehicle identification number (VIN), part number, bulletin number, diagnostic procedure, and trouble code. Several vehicle manufacturers have argued that creating a search engine that utilizes VINs or part numbers would place an undue burden on them because it requires them to rewrite much of their existing service information into a format that lends itself to such searches. This process would likely require both extensive financial investment and extensive lead-time to develop. The staff's initial reason for proposing such search capabilities was to provide a fast way for service technicians to navigate to the precise service information needed. Manufacturers countered that the technician could quickly input the relevant information from the VIN (manufacturer name, model year, vehicle model, etc.). Regarding part number searches, manufacturers state that service information typically is not indexed by part number because these numbers often vary from model to model, and can even change mid-year (e.g., if a new component supplier is used). The burden and complexity of tracking all part numbers would be far disproportionate to any benefit for service technicians. Staff has accepted these arguments and, therefore, will not require vehicle manufacturers to use VIN and part number searches.

7. Third-Party Information Providers

Historically, third-party service information providers, such as Mitchell Repair Information Company or Alldata LLC, have supplied consolidated service information to independent service providers. These companies organize and format service information provided to them by motor vehicle manufacturers through licensing agreements. Shops that service several makes of vehicles often use these third-party sources because the information provided meets the technicians' basic needs at a cost that is typically lower than information direct from the motor vehicle manufacturers. The aftermarket Industry has suggested that the proposed regulation should require manufacturers to provide service information to third-party suppliers for this purpose as a way of further fostering competition that would improve service information quality and ensure low costs.

The ARB staff believes that third-party information providers offer a valuable service to the automotive service and repair industry. The staff supports, and even encourages, business relationships between the motor vehicle manufacturers and third-party information providers. The availability of service information in various formats and varying content levels provides automotive service facilities with choices that will allow them to optimize service information purchases in terms of content and price. The staff, however, does not believe that the ARB should mandate licensing agreements between vehicle manufacturers and third-party providers, or otherwise govern the terms of such agreements. Doing so would ultimately require ARB staff to mediate business agreements resulting in an effort that staff believes would be inappropriate and impractical. Further, third-party providers have a history of establishing viable business relationships with vehicle manufacturers absent regulation, indicating that these relationships offer benefits to both sides. Accordingly, the staff believes that prescribing specific requirements for third-party licensing is unnecessary at this time.

B. Differences Between Proposed Federal Regulations and California Regulations

The U.S. EPA's proposed regulations for service information (as specified in its June 8, 2001, Notice of Proposed Rulemaking) are very similar in most respects to the ARB's proposed rulemaking. Yet some differences do exist, as described below. These differences are based on the fact that ARB staff's proposals are governed by specific language in SB1146, or due to slight differences of approach regarding how specific aspects of the requirements (e.g., information pricing, and website performance guidelines) should be implemented. In any event, the ARB staff and U.S. EPA have been careful to ensure that the respective regulations do not require manufacturers to produce two different forms of the same information (e.g., requirements that OBD II descriptions be formatted in two different ways).

1. Internet Pricing Structures

In its NPRM, the U.S. EPA proposed that motor vehicle manufacturers create at least a three-tiered approach for access to manufacturer websites. For each tier, the U.S. EPA would set a maximum price that is considered fair and reasonable. The main consideration behind these tiers is the anticipated differences in the usage of the websites. They are as follows:

- a. Short-term access. A timeframe of approximately 24 hours. The maximum a manufacturer could charge for service information during this period would be \$20.
- b. Mid-term access. A timeframe of 30 days. The maximum a manufacturer could charge for service information during this period would be \$300.
- c. Long-term access. A timeframe of 365 days. The maximum a manufacturer could charge for service information during this period would be no more than \$2500.

While specific pricing such as proposed by U.S. EPA provides clear guidance to the parties and perhaps facilitates enforcement, the ARB, at this time, does not possess sufficient data to make such a proposal. Instead, staff believes that the pricing factors that it is proposing will be effective in ensuring that motor vehicle manufacturers implement fair, reasonable, and nondiscriminatory pricing. The proposal provides for necessary flexibility and allows for prices to be set relative to the quality, quantity, and means of distribution¹⁹ of the information.

2. Internet Performance Reports

To determine if manufacturers' websites are compliant with the regulations, both the U.S. EPA and the ARB propose to require annual reports that explain how effective the websites are in providing required information to the aftermarket. However, the U.S. EPA proposal requires that motor vehicle manufacturers include in those reports a number of specific quantitative criteria (e.g., total number of successful requests, total number of failed requests) for which data must be collected. No specific types of information are mandated in the reports required by the ARB. ARB staff's proposal would instead provide the manufacturer with flexibility to provide the information it believes demonstrates adequate website performance. Given the dynamic nature of the Internet, it does not seem appropriate at this time to narrowly define performance criteria that cannot be adequately gauged or benchmarked to an accepted standard. Nevertheless, the ARB would require manufacturers to provide it with a copy of any reports submitted to the U.S. EPA under its regulation. Such a requirement would not be burdensome since the reports must be prepared in any event, and the information could be helpful in ultimately determining acceptable quantitative performance levels.

3. Training materials

The U.S. EPA proposes that motor vehicle manufacturers videotape and/or provide satellite transmissions of their training classes for use by requesting covered persons. ARB staff's proposal includes all such information that the manufacturer has created, but does not require manufacturers to record classes for the purpose of making the recording available. While the staff believes that creating these training materials could be useful to aftermarket service providers, it believes that such a requirement is beyond the scope of SB1146.

V. Air Quality, Environmental and Economic Impacts

A. Air Quality and Environmental Impacts

The proposed regulation will have a positive impact on air quality by providing independent automobile service providers with the tools and information necessary to effectively diagnose and repair emission-related malfunctions. However, instead of creating new emission reductions, the proposed regulation will help ensure that

¹⁹ i.e., whether the information is viewed directly online, or after downloading specific documents from the website.

the emission benefits attributed to California's Low Emission Vehicle (LEV) and OBD II programs will be fully realized. In estimating the emission benefits of OBD II at the time the requirements were put in place, the staff worked under the assumption that identified malfunctions would be promptly and effectively repaired. Thus, vehicle emissions would be maintained close to certified levels throughout their operating lives. The availability of emission-related service information on a widespread scale gives consumers a choice on who will repair their vehicle, causing owners to be more likely to service their vehicles promptly once the malfunction indicator light is illuminated. For reference, the ARB has estimated the following emission reductions of reactive organic gases (ROG), carbon monoxide (CO), and oxides of nitrogen (NOx) in the South Coast Air Basin for its OBD II and LEV programs to be 6, 120, and 51 tons per day, respectively, by the year 2010.²⁰ On a statewide basis, the emissions reduced will be 9 (ROG), 337 (CO), and 146 (NOx) tons per day by 2010.

B. Economic Impacts

The Administrative Procedures Act requires that, in proposing to adopt or amend any administrative regulation, state agencies shall assess the potential for adverse economic impacts on California business enterprises and individuals, including the ability of California businesses to compete with businesses in other states, and fiscal impacts on state and local agencies. Below is staff's assessment of the economic impacts of this proposal.

1. Cost to State Agencies

As recognized in an August 9, 2000, California Assembly Committee analysis on the fiscal effect of Senate Bill 1146, it is estimated that the ARB will incur ongoing costs of up to \$200,000 annually to implement and enforce the regulation. Additionally, through 2009, the Department of Consumer Affairs will be required by Health and Safety Code section 43105.5(g), in conjunction with the ARB, to report to the State Legislature annually on the effectiveness of the regulation. The estimated cost to the Department is not expected to exceed \$75,000 per year. The proposed regulation is not expected to create additional costs to any other state agency, local district, or school district, including any federally funded state agency or program.

2. Costs to Motor Vehicle Manufacturers

The proposed service information regulations will have the largest and most direct effect on the 34 motor vehicle manufacturers that certify passenger cars, light-duty trucks, and medium-duty vehicles for sale in California. These manufacturers are responsible for making available the information required by the proposal on Internet websites, or if the manufacturer qualifies as a small volume manufacturer, through some other reasonable business mean. Only one manufacturer physically produces motor vehicles in California.

²⁰ These emission reductions are based on values stated in the ARB's staff report on the amendments to the Low Emission Vehicle (LEV II) regulations.

The staff has estimated the cost of the proposed regulations to motor vehicle manufacturers using figures provided by the manufacturers themselves. Many motor vehicle manufacturers will need to invest capital for the conversion of service manuals, OBD II information, etc. into an electronic format that is suitable for Internet access. Such cost estimates range from approximately \$600,000 to \$5 million (median cost of \$2.8 million), depending on the extent of a manufacturer's existing hardware and software capabilities. Currently, the majority of motor vehicle manufacturers do not have dedicated service information websites on the Internet. Motor vehicle manufacturers must also maintain their Internet websites by updating service information on a regular basis. It is estimated that such costs would range from \$150,000 to \$450,000 annually (median cost of \$300,000). As explained throughout this report, the U.S. EPA is concurrently proposing that manufacturers develop and maintain Internet websites for the distribution of service information to the aftermarket. The proposed regulation should not require motor vehicle manufacturers to incur any additional costs beyond those required to meet the amended federal regulation.

The ARB does not believe that these costs will result in a significant increase in the price of vehicles. The regulation permits manufacturer to charge reasonable prices for the service information that must be made available, taking into account the cost to provide such information. Therefore, much if not all of these costs can be recovered. Any remaining costs are expected to be minimal relative to the volume of vehicles that the majority of these manufacturers produce annually for sale in California.

3. Potential Impacts on Other Businesses

The regulations should have a positive impact on independent service repair facilities and aftermarket manufacturers through the wider accessibility of emission-related service information and tools. Covered persons such as independent service facilities and aftermarket part manufacturers should only incur additional expenses as part of this regulation if they chose to purchase additional information and tools. However, in doing so, it is assumed that the purchases will be based on business decisions wherein the use of the information would be expected to yield a profit. The cost of purchasing such information should be equal to or less than the costs under the existing federal service information rulemaking given that the Internet would be replacing the underutilized FedWorld database.

Franchised dealerships may likely experience some loss of business as independent facilities conduct more repairs using the service information that would be provided by this rulemaking. However, this stimulation of competition in the service and repair industry was in fact the goal of SB1146 and thus, such an effect was clearly recognized by the California Legislature when the bill was drafted.

4. Potential Impact on Business Competitiveness

The proposed regulation is expected to have no net effect on the ability of California businesses to compete with businesses in other states. Adoption of the

regulations would allow California independent service facilities to compete more evenly with manufacturer dealerships within the state since they will be able to access the same types of repair information available to franchised dealerships. Since, for the most part, the competition between the aftermarket and franchised dealerships is of an intrastate origin, the regulation should have no effect on the ability of California businesses to compete with businesses in other states. Moreover, federal service information regulations will be substantially similar to those proposed for California and thus, no significant differences would exist in the types of service information that California businesses receive compared to businesses in other states. The ARB expects that motor vehicle manufacturers will offer the exact same information and tools in all 50 states.

5. Potential Impact on Employment

The regulatory proposal would not likely result in the loss of jobs. In fact, it may create some jobs in California. Motor vehicle manufacturers would have a new need for skilled employees that are capable of designing, creating, and maintaining service information websites. Further, although some business may move from dealerships and independent service providers, the staff does not expect any overall reduction in motor vehicle repair work, and thus, no reduction in California jobs. To the extent that more competition in the service industry is achieved, lower prices and better service could offer incentive for more vehicle owners to seek repairs, possibly resulting in increased employment.

B. Regulatory Alternatives

1. No action

Staff rejected this alternative because SB1146 specifically mandates that the ARB develop regulatory language for the availability of emission-related service information. Failing to do so would be a failure to act on California Law.

2. Adopt federal service information regulations

The U.S. EPA's regulations for service information were originally adopted in 1995. These regulations require that service information be listed on the FedWorld database and made available for purchase, but this method of dissemination has proven cumbersome because of a lack of awareness about its existence and its difficulty of use. To address these perceived deficiencies in the original federal regulations, the U.S. EPA proposed amended regulations in June 2001 that are intended to be implemented six months after the effective date; however, it is uncertain as to exactly when they will become effective. As currently proposed, the federal requirements would effectively implement most of the requirements of SB1146. However, simple adoption of the federal requirements would not fully address the responsibilities placed on the ARB by the California Legislature and SB1146.

Health and Safety Code Section 43105.5 requires that the ARB adopt state regulations for service information no later than January 1, 2002. Currently, it does not appear that the U.S. EPA regulations will be effective before that time. Therefore, the ARB cannot currently reference a set of federal regulations that would come close to meeting the requirements of the statute. It is staff's intent, however, to minimize differences between federal and state regulations and to harmonize wherever possible. Doing so will eliminate the chances that motor vehicle manufacturers will need two different compliance plans to obtain the same purpose. In the long term, it may be possible for the ARB to substitute references to U.S. EPA requirements for specific California regulation provisions. The ARB staff plans to work with the U.S. EPA and stakeholders to explore these possibilities in the future.

Secondly, the statute specifically charges the ARB with enforcement and reporting activities relative to the service information regulation, including issuance of notices to comply, participation in administrative hearings, and yearly reports to the legislature. The statute does not permit the ARB to consider relying on federal efforts to enforce U.S. EPA service information requirements.

3. Conclusion

Staff has determined that no feasible alternative considered would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective or less burdensome to affected private persons than the proposed regulations.

VI. Summary and Staff Recommendation

The Staff's proposal would fully and effectively implement the requirements of SB1146 to provide greater access to emission-related motor vehicle service information and diagnostic tools. The regulations in this proposal are necessary to ensure a suitable environment for independent businesses in California to compete with motor vehicle manufacturers and their franchised dealerships for consumers' business when it comes to the repair of their vehicles. The widespread availability of emission-related service information to all service repair facilities would ensure that repair work is accurate, thorough and complete, thereby providing all of California's citizens with the air quality benefits associated with properly maintained vehicles. Furthermore, aftermarket parts manufacturers will be able to use necessary service information to fabricate components that will work compatibly with the advanced emission control systems of today's cars and trucks.

The regulation duly provides for the disclosure of service information as envisioned by the State Legislature when SB1146 was signed into law. However, in doing so, the requirements are also substantially similar to those contained in the U.S. EPA's proposed amendments for service information. ARB and U.S. EPA staff have worked cooperatively to ensure that its respective regulations will not be in conflict with each other.

Consequently, staff recommends that the Board adopt the proposed regulations for service information as outlined in Title 13, CCR, section 1969, and the proposed administrative procedures for review of Executive Officer determinations as outlined in Title 17, CCR, sections 60060.1 through 60060.34.

VII. References

SAE, "Surface Vehicle Recommended Practice, Electrical/Electronic Systems Diagnostic Terms, Definitions, Abbreviations, and Acronyms," J1930, May 1998.

SAE, "Surface Vehicle Recommended Practice, E/E Diagnostic Test Modes," J1979, Rev. September 1997.

SAE, "Recommended Practice for Microsoft Windows™ 32-Bit Application Programming Interface for Pass-Thru Vehicle Reprogramming, J2534, Draft Revision 5.2.

Final Rule, "Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines; Regulations Requiring Availability of Information for Use of On-Board Diagnostic Systems and Emission-Related Repairs on 1994 and Later Model Year Light-Duty Vehicles and Light-Duty Trucks," 40 Code of Federal Regulations, Part 86, Section 86.094-38, 60 FedReg 40474, August 9, 1995.

Staff Report: Initial Statement of Reasons, Proposed Amendments to California Exhaust and Evaporative Emission Standards and Test Procedures for Passenger Cars, Light-Duty Trucks and Medium-Duty Vehicles (LEV II) and Proposed Amendments to California Motor Vehicle Certification, Assembly-Line and In-Use Test Requirements (CAP 2000), September 18, 1998.

Mail-Out #MSO 2001-04, Proposed Regulations for the California Motor Vehicle Service Information Rulemaking, March 14, 2001.

Mail-Out #MSO 2001-09, Proposed Regulations for the California Motor Vehicle Service Information Rulemaking (Revised), July 19, 2001.

Notice of Proposed Rulemaking, "Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines; Revisions to Regulations Requiring Availability of Information for Use of On-Board Diagnostic Systems and Emission-Related Repairs on 1994 and Later Model Year Light-Duty Vehicles and Light-Duty Trucks and 2005 and Later Model Year Heavy-Duty Vehicles and Weighing 14,000 Pound Gross Vehicle Weight or Less." 66 Fed.Reg. 30830, June 8, 2001.

Senate Bill 1146: Motor Vehicles: Pollution Control Devices, authored by State Senator John Burton; approved by Governor Gray Davis September 30, 2000.

Title 13, California Code of Regulations, Section 1968.1.

April 13, 2001, letter from California Automotive Task Force

April 13, 2001, letter from Kirkland and Ellis regarding ARB's Service Information Rulemaking

April 17, 2001, letter from Volkswagen of America on behalf of Rolls Royce & Bentley Motor Cars.

May 30, 2001, letter from Engine Manufacturers Association regarding California ARB Mail-Out #MSO 2001-04 – Proposed Regulations for the California Motor Vehicle Service Information Rulemaking

May 30, 2001, letter from American Honda Motor Co., Inc.

June 18, 2001, letter from Subaru of America, Inc. (Marked Confidential)

August 7, 2001, letter from Alliance of Automobile Manufacturers and Association of International Automobile Manufacturers regarding Service Information Rulemaking (Mail-Out #MSO 2001-09).

August 7, 2001 (via e-mail), letter from California Automotive Task Force, regarding Aftermarket Comments on Mail-Out #MSO 2001-09.

August 14, 2001, letter from American Honda Motor Co., Inc. regarding Service Information Rulemaking – MSO 2001-09 (Marked Confidential)

Attachment A

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

Proposed Regulation Order

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

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

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

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

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

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

1968.1.

- (H) The information required by this subsection shall not include specific algorithms, specific software code or specific calibration data beyond that required to be made available through the generic scan tool pursuant to section 1968.1, except where such algorithms, codes, or data are made available to franchised dealerships. To the extent possible, motor vehicle manufacturers shall organize and format the information so that it will not be necessary to divulge specific algorithms, codes, or calibration data considered to be a trade secret by the motor vehicle manufacturer.
- (3) On-Board Computer Initialization Procedures. Consistent with the requirements of subsection (h) below, motor vehicle manufacturers shall provide to all covered persons computer or anti-theft system initialization information and/or related tools necessary for:
 - (A) The proper installation of on-board computers on motor vehicles that employ integral vehicle security systems; or
 - (B) The repair or replacement of an emission-related part.

A manufacturer may request Executive Officer approval to be excused from the requirements above for some or all model year vehicles through the 2004 model year. The Executive Officer shall approve the request upon finding that the availability of such information to covered persons would significantly increase the risk of vehicle theft, and that the manufacturer will provide covered persons with reasonable alternative means to install computers, or to otherwise repair or replace an emission-related part, at a fair, reasonable, and nondiscriminatory price.
- (4) The information in this subsection shall be made available for purchase no later than 180 days after the effective date of these regulations or January 1, 2003, whichever is later, for vehicle models introduced into commerce on or before these dates. For all new vehicle models for which production commences after the effective date of these regulations, motor vehicle manufacturers shall make available for purchase the required information no later than 180 days after the start of vehicle introduction into commerce or concurrently with its availability of the information to franchised dealerships, whichever occurs first.
- (e) (1) Information required to be made available for purchase under subsection (d), excluding paragraph (d)(3), shall be directly accessible via the Internet. As an exception, motor vehicle manufacturers with annual California sales of less than 300 vehicles (based on the average number of California-certified vehicles sold by the motor vehicle manufacturer in the three previous consecutive model years) have the option not to provide required materials directly over the

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

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

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

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

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

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

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

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

determination.

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

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

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

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

(l) Penalties.

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

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

Attachment B

Proposed Adoption to 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

Adopt Title 17, California Code of Regulations, Chapter 1, Subchapter 1.25, to read as follows:

Article 2.5. Administrative Procedures for Review of Executive Officer Determinations Regarding Service Information for 1994 and Subsequent Model Year Vehicles.

Subarticle 1. General Provisions

§ 60060.1. Applicability.

(a) This article governs review of Executive Officer determinations regarding compliance with the provisions of Health and Safety Code section 43105.5, and its implementing regulations, title 13, California Code of Regulations, section 1969 et seq.

(b) The provisions of this article apply only to determinations issued on or after the effective date of this article.

Note: Authority cited: Sections 39600, 39601, 43105.5(e) and (f), Health and Safety Code. Reference: 43105.5(e) and (f), Health and Safety Code; Sections 11500, et seq., Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.2. Definitions.

(a) The definitions applicable to these rules include those set out in the Health and Safety Code (commencing with section 39010) and in Title 13, California Code of Regulations, section 1969(c). The definitions set forth in Title 17, California Code of Regulations, section 60065.2 shall also be applicable to the extent that such definitions do not conflict with any terms as defined below. To the extent that any definition in section 60065.2 is applicable to these hearing procedures, any reference to a section within Article 3 that is set forth in that definition shall be read as the parallel section within this Article.

(b) The following definitions also apply:

(1) "Executive Officer" is the Executive Officer of the state board and employees of the state board authorized to represent the Executive Officer in the determination made pursuant to title 13, CCR, section 1969(j).

(2) "Interested Party" shall mean the covered person who filed the underlying request for audit that led to the issuance of a notice to comply.

(3) "Party" refers to the Executive Officer or motor vehicle manufacturer appearing before a hearing officer in a hearing to review an Executive Officer determination against the motor vehicle manufacturer for noncompliance with Health and Safety Code section 43105.5 and title 13, California Code of Regulations section 1969 and also to an person whose motion to intervene has been granted pursuant to section 60060.8.

(4) "Request for Review" refers to the document requesting an administrative hearing that may be filed by a motor vehicle manufacturer or the Executive Officer.

(5) "Response" means a document that is responsive to the request for review filed by a party opposed to the review or the relief requested.

NOTE: Authority cited: Sections 39010, 39600, and 39601, Health and Safety Code. Reference: Part 5, (commencing with 39010) and 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.

§ 60060.3. Right to Representation.

(a) A party may appear in person or through a representative, who is not required to be an attorney at law. The right to representation is at the party's own expense. Following notification that a party is represented by a person other than him or herself, all further communications regarding the proceedings shall be directed to that representative.

(b) A representative of a party shall be deemed to control all matters respecting the interest of such party in the proceeding. Persons who appear as representatives shall not engage in unethical conduct or intentionally fail to observe the procedures set forth in these rules and the proper instructions or orders of the hearing officer.

(c) A representative may withdraw an appearance by filing a written notice of withdrawal with the hearing office and by serving a copy on all parties.

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 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.4. Time Limits; Computation of Time.

(a) All actions required under these rules shall be completed within the times specified in this article, unless extended by the hearing officer after a showing of good cause and consideration of prejudice to other parties. Requests

for extensions of time for the filing of any pleading, letter, document, or other writing or completing any other required action must be received in advance of the date on which the filing or action is due and should contain sufficient facts to establish a reasonable basis for the relief requested.

(b) In computing the time that a person has to perform an act or exercise a right, the day of the event initiating the running of the time period shall not be included and the last day of the time period shall be included. If the last day falls on a Saturday, Sunday, or a state holiday, time shall be extended to the next working day.

(c) In computing time, the term "day" means calendar day, unless otherwise provided.

(d) Unless otherwise indicated by proof of service, the mailing date shall be presumed to be the postmark date appearing on the envelope if first-class postage was prepaid and the envelope was properly addressed.

(e) Where service of any pleading, petition, letter, document, or other writing is by mail, overnight delivery, or facsimile transmission (fax), pursuant to section 60060.5(c), and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time that such right may be exercised or act performed shall be extended as provided in section 60060.5(c).

(f) Papers delivered to or received by the hearing office during regular business hours (8 a.m. to 5 p.m.) will be filed on that date. Papers delivered or received at times after regular business hours will be filed on the next regular business day.

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 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.5. Service, Notice and Posting.

(a) Except as otherwise provided in this article, the original of every pleading, petition, letter, document, or other writing served in a proceeding under these rules shall be filed with the hearing office.

(b) A copy of the request for review shall be concurrently served on all other parties.

(c) Unless otherwise required, service of any documents in the proceedings may be made by personal delivery, by United States first-class or interoffice mail, by overnight delivery, or by fax.

(1) Service is complete at the time of personal delivery.

(2) In the case of first-class mail, the documents to be served must be deposited in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, properly addressed to the person on whom it is to be served at the address as last given by that person on any document filed in the present cause of action and served on the party making service or otherwise at the place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended five days if the place of address is within the State of California, ten days if the place of address is outside the State of California but within the United States, and fifteen days if the place of address is outside the United States.

(3) If served by overnight delivery, or interoffice mail, the document must be deposited in a box or other facility regularly maintained for interoffice mail or by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the address as last given by the person on any document filed in the present cause of action and served on the party making service or otherwise at that place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.

(4) If served by fax, the document must be transmitted to a fax machine maintained by the person on whom it is served at the fax machine telephone number as last given by that person on any document which he or she has filed in the present cause of action and served on the party making the service. The service is complete at the time of the transmission, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.

(d) Each document filed shall be accompanied by a proof of service on each party or its representative of record on the date of service. The proof of service shall state whether such service was made personally, first-class mail, overnight delivery, or fax.

(1) Where service is made by personal delivery, the declaration shall show the date and place of delivery and the name of the person to whom the documents were handed. Where the person making the service is unable to obtain the name of the person to whom the documents were handed, the person making the service may substitute a physical description for the name.

(2) Where service is made by first-class mail or overnight delivery, the declaration shall show the date and place of deposit in the mail, the name and address of the person served as shown on the mailing envelope and that the envelope was sealed and deposited in the mail with the postage fully prepaid.

(3) Where service is made by fax, the declaration shall show the method of service on each party, the date sent, and the fax number to which the document was sent.

(e) The proof of service declaration shall be signed by the person making it and contain the following statement above the signature: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at (City, State) on (Date)." The name of the declarant shall be typed and signed below this.

(f) Proof of service made in accordance with the California Code of Civil Procedure section 1013a complies with this regulation.

(g) Service and notice to a party who has appeared through a representative shall be made upon such representative.

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 11182 and 11184, Government Code; Sections 1013 and 1013a, California Code of Civil Procedure; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.6. Motions.

(a) Any motion or request for action by the hearing officer filed by any party, except those made orally on the record at a hearing, shall be in writing and filed with the hearing officer, with written notice and proof of service to all parties. The caption of each motion shall contain the title and docket number of the proceeding and a clear and plain statement of the relief sought and supporting rationale.

(b) Except as otherwise provided by statute or these regulations, or as ordered by the hearing officer, a motion shall be made and filed at least 15 days before the date set for the motion to be heard or the commencement of the hearing on the merits. Any response to the motion shall be filed and served no

later than five days before the motion is scheduled to be heard or as ordered by the hearing officer.

(c) The hearing office shall set the time and place for the hearing of the motion. The hearing shall occur as soon as practicable.

(d) Except as otherwise provided by statute or these regulations, the hearing officer may decide a motion filed pursuant to this section without oral argument. Any party may request oral argument at the time of the filing of the motion or the response. If the hearing officer orders oral argument, the party requesting oral argument, or any party directed to do so by the hearing officer, shall serve written notice on all parties of the date, time and place of the oral argument. The hearing officer may direct that oral argument be made by telephone conference call. The hearing officer may order that the proceedings be recorded.

(e) The hearing officer shall issue a written order deciding any motion, unless the motion is made during the course of the hearing on the merits while on the record. The hearing officer may request that the prevailing party prepare a proposed order.

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 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.7. Form of Pleadings.

(a) Except as otherwise expressly provided in this article or by the hearing officer, there are no specific requirements as to the form of documents filed in a proceeding under these rules.

(b) The filing party or its representative shall sign the original of any pleading, letter, document, or other writing (other than an exhibit). The signature constitutes a representation by the signer that it has read the document, that to the best of its knowledge, information and belief, the statements made therein are true, and that it has not filed the document for the purpose of delay.

(c) The initial document filed by any person shall indicate his or her status (as a party or representative of the party) and shall contain his or her name, address and telephone number. Any changes in this information shall be communicated promptly to the hearing office and all parties to the proceeding. A party who fails to furnish such information and any changes to it shall be deemed to have waived his or her right to notice and service under these rules.

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 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 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) If the motion filed under paragraph (b) 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.

§ 60060.9. Limitations on Written Legal Arguments or Statements

(a) Any written legal argument or statement submitted to the hearing officer by a participant in an action under this part shall be double spaced and typed in a font size 12 point or larger. Except as otherwise provided by this part, or otherwise authorized by the hearing officer for good cause shown, no written legal argument, exclusive of any supporting documentation, may exceed:

- (1) Fifteen pages, for arguments in support of or opposition to motions; and
- (2) Five pages, for reply arguments.

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 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 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.

Subarticle 2. Hearing Officers

§ 60060.11. Authority of Hearing Officers.

(a) The hearing officer shall have authority to review matters arising under Health and Safety Code section 43105.5 and title 13, CCR, section 1969(k). Such authority shall include those matters in which:

(1) A motor vehicle manufacturer has contested a notice to comply that has been issued by the Executive Officer because the motor vehicle manufacturer has allegedly failed to comply with the provisions of section 43105.5 or the implementing regulations, title 13, CCR, section 1969;

(2) The Executive Officer has requested review and issuance of a compliance order against a motor vehicle manufacturer who has failed to request review of a notice to comply and has not filed a compliance plan as required by the notice to comply; and

(3) The Executive Officer has rejected a compliance plan submitted by a motor vehicle manufacturer pursuant to section 43105.5(e); and

(4) The Executive Officer has requested review and issuance of a compliance order against a motor vehicle manufacturer that has failed to comply with the terms of an approved compliance plan.

(b) Except as may be specifically limited in title 13, CCR, section 1969, in any matter subject to review pursuant to these rules, the hearing officer shall have the authority to do any act and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules, including, but not limited to, authority to hold prehearing conferences; conduct hearings to determine all issues of fact and law presented; to rule upon motions, requests and offers of proof, dispose of procedural requests, and issue all necessary orders; administer oaths and affirmations and take affidavits or declarations; to issue subpoenas and subpoenas duces tecum for the attendance of a person and production of testimony, books, documents, or other things; to compel the attendance of a person residing anywhere in the state; to rule on objections, privileges, defenses, and the receipt of relevant and material evidence; to call and examine a party or witness and introduce into the hearing record documentary or other evidence; to request a party at any time to state the respective position or supporting theory concerning any fact or issues in the proceeding; to certify official acts; to extend the submittal date of any proceeding; to hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings, decisions, and appropriate remedies, including penalties, as may be necessary for the full adjudication of the matter.

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 11181-11182 and 11425.30, Government 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 11425.40 and 11512, Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

Subarticle 3. Ex Parte Communications

§ 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 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; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

Subarticle 4. Filing Requests for Administrative Hearing Review

§ 60060.15. Requests for Review by a Motor Vehicle Manufacturer.

(a) A motor vehicle manufacturer may file a request that a hearing officer review an Executive Officer determination to issue a notice to comply against the motor vehicle manufacturer, pursuant to Health and Safety Code section 43105.5(e) and title 13, CCR, section 1969(j).

(b) The motor vehicle manufacturer shall file the request for hearing within 30 days from the date that the Executive Officer issues a determination to issue a notice to comply. The hearing officer may, for good cause, extend the time for such filing.

(c) A failure to file a timely request for hearing of the Executive Officer's determination to issue a notice to comply, without alternatively serving on the Executive Officer a compliance plan as required by title 13, CCR, section 1969(j)(8), will result in the Executive Officer determination becoming final. The manufacturer's failure to pursue administrative review could subject the manufacturer to penalties pursuant to Health and Safety Code section 43105.5(f) and title 13, CCR, section 1969(l).

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.

§ 60060.16. Requests for Review by the Executive Officer

(a) The Executive Officer shall file a request for hearing officer review and issuance of a compliance order when:

(1) The Executive Officer has issued a notice to comply against a manufacturer and the manufacturer has failed to either request administrative review of the determination, or, in the alternative, to submit a compliance plan as required under Title 13, CCR, section 1969(j)(8). The Executive Officer shall file the request for review within 30 days from the last day that the manufacturer had to file either a request for review of the determination with the hearing office or submit a compliance plan to the Executive Officer.

(2) A motor vehicle manufacturer has submitted a compliance plan pursuant to Title 13, CCR, section 1969(j)(8), and the Executive Officer has determined pursuant to the procedures set forth in section 1969(j)(9) that the compliance plan is unacceptable. The Executive Officer shall file the request for review within 30 days from the date that he or she issues the determination.

(3) A motor vehicle manufacturer has had a compliance plan approved pursuant to Title 13, CCR, section 1969(j)(9) but has failed to comply with the terms of the plan.

(b) The hearing officer may, for good cause, extend the time for such filing.

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.

§ 60060.17. Content of a Request for Review.

A request for review is not required to follow any particular form or format. But the request for review shall include all of the following.

(a) The signature of the requesting party or its designated representative.

(b) Copies of and specific reference to the respective determination of the Executive Officer that is the subject of the request for review (i.e., the notice to comply issued against the motor vehicle manufacturer, or the determination rejecting the motor vehicle manufacturer's compliance plan).

(c) The correct business address of the requesting party and, if applicable, the name and address of the party's designated representative.

(d) The name and address of any interested party identified in the challenged determination.

(a) A statement of the circumstances or arguments that are the basis of the request for hearing, with specific reference to the evidence that was before the Executive Officer that supports such arguments.

(f) A statement of the proposed relief sought by the requesting party.

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.

§ 60060.18. 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 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.19. Response to Request for Review.

Any party opposed to a filed request for review shall file a response within 30 days after service of the notice of filing by the hearing office. The response shall be in writing and address the issues raised in the request for hearing. The response should include any rebuttal to the issues and arguments raised by the party requesting review, with specific reference to the investigative record that was before the Executive Officer when he or she made a determination that is the subject of the review before the hearing officer. The response shall be in the form of a declaration signed under penalty of perjury.

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.

§ 60060.20. Reply.

Within 15 days of receipt of the last submitted response, the party requesting review may file a reply responding to the contentions raised in any response. The reply shall be in the form of a declaration signed under penalty of perjury.

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.

§ 60060.21. Extensions of Time for Submitting a Response or Reply.

The time period for submitting a response required under section 60060.19 or a reply under section 60060.20 may be extended:

(1) By stipulation of the parties for 30 additional days to allow the parties to conduct informal settlement negotiations; or

(2) Upon motion to the hearing officer, who may extend the time period for up to 30 days, if the moving party can show good cause and if the other parties are not prejudiced by a delay.

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.

§ 60060.22. Stays Pending Issuance of Hearing Officer's Decision.

Pending the hearing officer issuing its decision, a motor vehicle manufacturer contesting an Executive Officer determination to issue a notice to comply or to reject a compliance plan submitted in response to a notice to comply shall not be required to take any action in response to the challenged Executive Officer determination.

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 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

Subarticle 5. Pre-Hearing Procedures

§ 60060.23. Schedule of Review Proceedings.

(a) Upon receipt of a request for review, the administrative hearing office of the state board shall assign an administrative law judge to be the hearing officer, unless staffing and other resources of the hearing office would prevent timely consideration of the matter. If the resources of the administrative hearing office prevent assignment, the administrative hearing office shall refer the matter to the State Office of Administrative Hearings for assignment.

(b) With the consent of the parties, hearings shall be conducted based on the written record certified by the Executive Officer and the written submissions of the parties, whenever possible.

(c) For matters that are to be decided based upon the submitted written record, the hearing officer shall serve upon the parties a schedule setting forth the date that the record will be closed and submitted for decision.

(d) For hearings requiring personal appearances, the hearing officer shall serve upon the parties the dates scheduled for hearing for the purpose of taking evidence. Such hearing shall not be set earlier than 30 days from the date that the notice is served on all parties.

(e) Upon either a motion of the hearing officer or any party, the hearing officer may grant such delays or adjustments to the schedule for the review proceedings as may be necessary or desirable in the interest of fairness. In filing a motion, the moving party shall file the request not less than five days prior to the date set for the action covered by the request and shall submit such evidence to establish good cause for the requested delay or adjustment to the schedule. If the hearing officer orders a delay or adjustment to schedule, he or she shall provide written notice to all parties.

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 11509 and 11440.30, Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.24. Consolidation, Separation of Proceedings.

(a) Upon the motion of a party or upon the hearing officer's own motion, the hearing officer may consolidate for review and decision:

(1) Any number of proceedings involving the same parties; and

(2) Any number of proceedings involving common issues of law or fact where consolidation would expedite and simplify consideration of the issues and would not adversely affect the rights of the parties.

(b) Upon the motion of a party or upon the hearing officer's own motion, the hearing officer may, in furtherance of convenience or to avoid prejudice, or when separate review proceedings will be conducive to expedition and economy, order a separate review proceeding of any issue or any number of issues, including issues raised in a party's response to a request for hearing.

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 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.25. Discovery.

(a) The provisions of this section provide the exclusive right to, and method of, discovery as to any proceeding governed by these review procedures. Nothing in this section prohibits the parties from voluntarily stipulating to exchange any information that they deem appropriate. This section does not authorize the inspection or copying of, any writing or thing that is privileged from disclosure by law or protected as part of an attorney's work product.

(b) No discovery is available to the parties in matters forwarded to the hearing officer for issuance of compliance orders pursuant to section 60060.16(a)(1).

(c) For other hearings, within 30 days from the date of service of the notice of filing, a party may serve on any other party to the proceeding a written request, for the following:

(1) The names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing; and

(2) The opportunity to inspect and make a copy of any thing, document, statement or other writings relevant to the issues for hearing that are in the possession, custody or control of another party to the proceeding and would be admissible in evidence. This includes the following information from the investigative file compiled by the Executive Officer: (i) the names and addresses of witnesses or of persons (other than confidential informants) having personal knowledge of the issues involved in the proceeding, (ii) matters perceived by the investigator in the course of his or her investigation (as opposed to his or her analysis or conclusions), and (iii) statements related to the issues of the proceedings which are otherwise admissible.

(d) The parties subject to the requirements of paragraph (c) shall arrange a mutually convenient time for the exchanging of the names and addresses of witnesses and the inspecting and copying of relevant things, documents, statements, and other writings identified in subparagraph (B) above, but such date shall not be later than 30 days from the date of receipt of the request made pursuant to subparagraph (b)(1). Unless other arrangements are made, the party requesting the writings shall pay for the copying.

(e) Absent a stipulation between the parties, a party claiming that certain writings or things are privileged against disclosure shall, within 15 days of receipt

of the request for inspection and copying, serve on the requesting party a written statement setting forth what matters it claims are privileged and the reasons supporting its claims.

(f) A party may file a motion requesting that the hearing officer allow further discovery. The motion shall specify the proposed method of discovery that it would like to use and shall include affidavits describing in detail the nature of the information that the requesting party seeks through discovery, the relevance and probative value of the information, proposed time and place of the discovery (if applicable), and why the need for the information was not previously raised with the Executive Officer during his or her consideration of the determination under review. After fully considering the arguments of the parties, the hearing officer may order such discovery that will promote a full and fair hearing. The hearing officer's order shall set forth the form and method of permissible discovery and the time and place for its occurrence.

(g) Proceeding to Compel Discovery.

(1) Any party claiming that its request for discovery pursuant to this section has not been complied with or that the opposing party has failed to comply with a stipulated agreement to provide discovery may serve and file with the hearing officer a motion to compel the party who has refused or failed to produce the requested or stipulated discovery to comply. The motion shall include the following:

(A) Facts showing the party has failed or refused to comply with a discovery request or stipulation;

(B) A description of the information sought to be discovered;

(C) The reasons why the requested information is discoverable;

(D) Evidence that a reasonable and good faith attempt to contact the noncomplying party for an informal resolution of the issue has been made; and

(E) To the extent known by the moving party, the measures for the noncomplying party's refusal to provide the requested information.

(2) The motion shall be filed within 15 days after the date the requested information was to be made available for inspection and copying or the date a deposition was scheduled to take place and served upon the party who has failed or refused to provide discovery.

(3) The hearing on the motion to compel discovery shall be held within 15 days after the motion is filed, or a later time that the hearing officer may on his or her own motion for good cause determine. The party who has refused or

failed to provide discovery shall have the right to serve and file a written answer or other response which shall be due at the hearing office and personally served on all parties at least three days prior to the date set for hearing.

(4) Where the matter sought to be discovered is under the custody or control of the party who has refused or failed to provide discovery and that party asserts that the matter is not a discoverable matter under this section, or is privileged against disclosure, the hearing officer may order that the party in custody lodge with the hearing office the matters identified in subdivision (b) of section 915 of the Evidence Code, and the hearing officer shall examine the matters in accordance with those provisions.

(5) The hearing officer shall decide the case on the matters examined in a closed meeting, the papers filed by the parties, and such oral argument and additional evidence as the hearing officer may allow.

(6) Unless otherwise stipulated by the parties, the hearing officer shall no later than 15 days after the hearing make its order denying or granting the motion. The order shall be in writing setting forth the matters the moving party is entitled to discover. The hearing office shall serve a copy of the order by mail upon the parties. Where the order grants the motion in whole, or in part, the order shall not become effective until ten days after the date the order is served. Where the order denies relief to the moving party, the order shall be effective on the date it is served.

(7) If after receipt of an order directing compliance with the provisions of these rules regarding discovery, a party fails, without good cause, to comply with the order, the hearing officer may draw adverse inferences against that party and may prevent that party from introducing any evidence that had been requested and not produced during discovery into the administrative 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 11189 and 11507.6, Government Code; Section 915(b), Evidence Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

Subarticle 6. Contempt and Sanctions

§ 60060.26. Contempt.

If any person in proceedings before the hearing officer disobeys or resists any lawful order or, if applicable, refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing, the hearing officer may certify the facts to the superior court in and for

the county where contempt proceedings are held pursuant to Government Code section 11455.20.

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 11455 and 11525, Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.27. Sanctions.

(a) Notwithstanding the above, the hearing officer may order a party, a party's representative or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions and the failure to comply with a lawful order of the hearing officer.

(2) "Frivolous" means:

(A) Totally and completely without merit, or

(B) For the sole purpose of harassing an opposing party.

(b) An order for sanctions shall be in writing and shall set forth the factual findings that are the basis for the imposition of sanctions.

(1) In determining reasonable expenses, the party or parties to whom payment is to be made shall, at the hearing officer's discretion, either make a statement on the record under oath or submit a written declaration under penalty of perjury setting forth with specificity the expenses incurred as a result of the other party's conduct.

(2) Within five days of the receipt of the hearing officer's order for the payment of expenses, a party or representative may, on the ground of hardship, request reconsideration from the hearing officer issuing the order. The request for reconsideration shall be filed in writing, and include a declaration under penalty of perjury.

(c) The order or denial of an order to pay expenses under paragraph (b) is subject of procedural review in the same manner as a final decision pursuant to Subarticle 11.

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 11455.30 and 11525, Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

Subarticle 7. Review Proceedings

§ 60060.28 Failure to Appear.

If after service of a notice of hearing, including notice of consolidated hearing or continuance, a party fails to appear at a hearing either in person or by representative, the hearing officer may take the proceeding off the calendar or such other appropriate action to insure the rights and interests of all parties under Health and Safety Code section 43105.5 and title 13, CCR, section 1969 et seq.

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 11455.30 and 11525, Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.29. Conduct of Hearings.

(a) All hearings shall be presided over by a hearing officer who shall conduct a full and fair hearing in which all parties have a reasonable opportunity to be heard and to present evidence.

(b) All hearings shall be conducted in the English language, although any party may request the assistance of an interpreter.

(c) In matters brought before the hearing officer pursuant to a request for review filed by the Executive Officer under section 60060.16(a)(1), no hearing on the merits of the underlying Executive Officer determination issuing a notice to comply shall be held. At the hearing officer's discretion, the hearing officer may issue an order to comply without convening a formal hearing.

(d) For all other hearings, subject to reasonable limitations that may be imposed by the hearing officer, each party to the proceeding shall have the right to:

(1) Call and examine witnesses.

(2) Introduce exhibits.

(3) Question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examinations.

(4) Impeach any witness regardless of which party first called the witness to testify.

(5) Call and examine an opposing party as if under cross-examination, even if that party has not testified on its own behalf.

(e) The burden of proof and of going forth with evidence in hearings covered by paragraph (c) shall be as follows.

(1) In all hearings for the review of Executive Officer determinations to issue a notice to comply against a motor vehicle manufacturer, to reject a motor vehicle manufacturer's compliance plan, or to seek enforcement of a motor vehicle manufacturer's failure to comply with the terms of an approved compliance plan, the burden of proof and of going forward shall be on the Executive Officer.

(2) At the conclusion of Executive Officer's case-in-chief, the motor vehicle manufacturer has the burden of producing evidence to show that no basis exists to support the Executive Officer determination that is under review.

(3) At the close of the motor vehicle manufacturer's presentation of evidence, the parties respectively have the right to introduce rebuttal evidence that is necessary to resolve disputed issues of material fact, subject to any limits imposed by the hearing officer pursuant to subparagraph (f)(1) below.

(f) The hearing officer may:

(1) Limit the number of witnesses and the scope and extent of any direct examination, cross-examination, or rebuttal testimony, as necessary, to protect the interests of justice and conduct a reasonably expeditious hearing;

(2) Require the authentication of any written exhibit or statement;

(3) Call and examine a party or witness and may, on his or her own motion, admit any relevant and material evidence;

(4) Exclude persons whose conduct impedes the orderly conduct of the hearing;

(5) Restrict attendance because of the physical limitations of the hearing facility; or

(6) Take other action to promote due process or the orderly conduct of the hearing.

(g) The taking of evidence in a hearing shall be controlled by the hearing officer in the manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the hearing officer shall define the issues and the order in which evidence will be received.

(h) The hearing officer shall base its decision as to whether a motor vehicle manufacturer is not in compliance or whether the Executive Officer properly rejected a manufacturer submitted compliance plan upon a preponderance of the evidence.

(i) Hearings shall be recorded electronically or by a court reporter. The record made by the Administrative Hearing Office shall be the official record of the hearing.

(1) A verbatim transcript of the official recording will not normally be prepared, but may be ordered by the hearing officer if deemed necessary to permit a full and fair review and resolution of the case. If not so ordered by the hearing officer, a party may, at its own expense, request that a verbatim transcript be made. The party making the request shall provide one copy to the hearing officer and one copy to every other party.

(2) The official record of the hearing and transcript of the recording, together with all written submissions made by the parties, shall become part of the administrative record for the proceeding.

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 11455.30 and 11525, Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.30. Evidence.

(a) Oral testimony shall be taken only under oath or affirmation.

(b) The hearing need not be conducted in accordance with technical rules of evidence. Rather, the hearing officer shall admit evidence that is the type of evidence that responsible persons are accustomed to relying upon in the conduct of serious affairs. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but upon timely objection shall not be sufficient by itself to support a finding unless it would be admissible over objection in a civil court action.

(c) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized.

(d) Regarding evidence claimed to be trade secrets or other confidential information, the hearing officer will defer to the findings and conclusions of law made by the superior court pursuant to Health and Safety Code section 43105.5(b) and title 13, CCR, section 1969(i). The hearing officer shall preserve the confidentiality of information determined to be a trade secret and may make

such orders as may be necessary, including considering such information in a closed meeting.

(e) In reaching a decision, official notice may be taken, either before or after submission of the proceeding for decision, of any generally accepted technical or scientific matter within the state board's area of expertise, and determinations, rulings, orders, findings and decisions, required by law to be made by the hearing officer.

(1) The hearing officer shall take official notice of those matters set forth in section 451 of the Evidence Code.

(2) The hearing officer may take official notice of those matters set forth in section 452 of the Evidence Code.

(3) Each party shall give notice of a request to take official notice and be given reasonable opportunity on request to present information relevant to:

(A) The propriety of taking official notice; and

(B) The effect of the matter to be noticed.

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 451 and 452, Evidence Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.31. Evidence by Declaration.

(a) At any time 20 or more days prior to a hearing or a continued hearing, a party may mail or deliver to the opposing party or parties a copy of any declaration which the proponent proposes to introduce in evidence, together with a notice as provided in paragraph (b). Unless an opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine the declarant the opposing party's right to cross-examine such declarant is waived and the declaration, if introduced in evidence, shall be given the same effect as if the declarant had testified orally. If an opportunity to cross-examine a declarant is not afforded after a request is made as herein provided, the hearing officer may allow the declaration to be introduced, but it shall only be given the same effect as other hearsay evidence.

(b) The notice referred to in paragraph (a) shall be a separate document concurrently served with the declaration, entitled "Notice of Intent to Use Declaration in Lieu of Oral Testimony." The title shall be in bold print. The content of the notice shall be substantially in the following form:

The accompanying declaration of [insert name of declarant] will be introduced as evidence at the hearing in [insert title and docket number or petition number of proceeding]. [Insert name] will not be called to testify orally and you will not be entitled to question the declarant unless you notify [insert name of the proponent or representative] at [insert address] that you wish to cross-examine the declarant. To be effective, your request must be mailed or delivered to [insert name of proponent or representative] on or before [insert a date 7 days after the date of mailing or delivery of the declaration to the opposing party]."

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 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

Subarticle 8. Decisions of the Hearing Officer

§ 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 of 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 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.33. Penalty Assessment

In determining the appropriate conditional daily penalties that a motor vehicle manufacturer may be subject to under Health and Safety Code section

43105.5(f) and these regulations, the hearing officer shall consider the following factors.

- (a) The extent of noncompliance by the motor vehicle manufacturer.
- (b) The harm caused by the noncompliance to the covered person and other persons, as well as any violations to public health and safety and to the environment.
- (c) The nature and persistence of the noncompliance.
- (d) The compliance history of the motor vehicle manufacturer, including the history of past noncompliance.
- (e) The efforts made to comply, and any special circumstances preventing or delaying compliance.
- (f) The cooperation of the motor vehicle manufacturer during the course of the Executive Officer's investigation.

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

Subarticle 9. Judicial Review

§ 60060.34. Judicial Review.

(a) Except as provided in paragraph (b) below, a party adversely affected by the final decision of the hearing officer may seek judicial review by filing a petition for a writ of mandate in accordance with section 1094.5 of the California Code of Civil Procedure. Such petition shall be filed within 30 days after the order or decision becomes final.

(b) A motor vehicle manufacturer adversely affected by a compliance order issued pursuant to section 60060.33(a) may only request judicial review of a penalty assessment and not the merits of the underlying notice to comply, which the manufacturer never itself contested.

(c) The state board may seek to enforce a final order or decision in superior court in accordance with applicable law.

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 1094.5, California Code of Civil Procedure; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.