



California New Car Dealers Association

April 2, 2010

Mr. James Goldstene
Executive Director
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Comments on Proposed Enhanced Fleet Modernization Program

Dear Mr. Goldstene,

The California New Car Dealers Association (CNCDA) is a statewide trade association which represents the interests of over 1,100 franchised new car and truck dealer members. CNCDA members are primarily engaged in the retail sale of new and used motor vehicles, but also engage in automotive service, repair, and parts sales. We were heavily involved in drafting and advocating for the passage of Assembly Bill 118 (Nunez), which created the Enhanced Fleet Modernization Program (EFMP), and have worked closely with CARB staff to assist in developing the EFMP regulations. In addition to re-emphasizing the comments made during the first 15-day amendment process, we would like to express additional concerns as described below.

Registration Requirement

When AB 118 was being deliberated in the legislature, one of the points of contention was whether to mandate that a person taking advantage of the Enhanced Fleet Modernization Program (EFMP) should be required to have registered the vehicle in California over a specified period of time. Rather than require lawful registration over a specific period, the legislature opted to instead require that an owner provide evidence that the vehicle had been driven primarily in California for the two years prior to vehicle retirement. This compromise would ensure that interested parties do not “game” the system by bringing in a fleet of cars from out of state to take advantage of the program, while removing as many high-polluting vehicles from the road as possible. While this approach was not without controversy, the legislature decided that the benefits of cleaning the air through fleet modernization outweighed the problems with rewarding non-registered owners of high-polluting vehicles. The proposed regulation contravenes legislative intent by requiring that any vehicle to be retired must have current registration. Current registration, of course, requires that outstanding fees and penalties on a vehicle be paid; over a two year period, this can result in hundreds, if not thousands of dollars. This mandate puts an enormous burden on income eligible owners of high-polluting vehicles—the very parties who the legislature most intended to assist.

Registration Requirement Violates APA Consistency Standard

The statute being implemented by CARB, Health and Safety Code Section 44125, requires that CARB's regulatory guidelines "*shall ensure*" that the program is available for vehicles continuously registered for two years prior to retirement, "***or otherwise proven to have been driven primarily in California for the last two years. . .***" (emphasis added). By mandating that the vehicle has current registration, the proposed regulations fail to ensure that non-registered vehicles meeting statutory standards are eligible for retirement. The Administrative Procedures Act requires that a proposed regulation be consistent with the statute being implemented.¹ By failing to live up to the statutory requirements for CARB's EFMP regulations, the proposed regulations violate APA's consistency standard.

Air District Contracting

The proposed language requires dealers to enter into contracts with local air quality management or air pollution control districts ("air districts") for redemption of vouchers toward the purchase of a newer vehicle. While we see no problem with air district participation in administering the voucher program, we are concerned with requiring dealers to consent to unspecified contractual terms as mandated by individual air districts.

Air District Contracting Requirements Violate APA Clarity Standard: While the draft regulation specifies that air districts must contract with participating dealers, it fails to provide any guidance as to how the contracting process will take place, which dealers are eligible to contract in a particular air district, which contract terms may or may not be included in a contract, or when or how a dealer will be repaid for applying a voucher toward the purchase of a vehicle. While the regulation establishes specific criteria to determine which consumers are eligible for a voucher, which vehicles are eligible for retirement, and the vehicles for which a voucher may be redeemed, it leaves dealers without any guidance as to their role in the program aside from signing a contract with an unspecified third party. Any proposed regulation must adhere to the APA's clarity standard, requiring, among other things, that the regulation must be clearly understood by affected parties. Since neither the processes for becoming eligible to redeem vouchers nor for redemption of the voucher are specified, the industry targeted to provide voucher-eligible vehicles to consumers is not in a position to clearly understand how they are affected by the regulation. By delegating this crucial rulemaking step to 35 individual air districts, each of which will create their own dealer contracts at some unspecified point in the future, CARB leaves dealers in a very awkward position—effectively establishing a program for which dealers are informed that they play a crucial role, but without providing any guidance on how they are expected to play their part. For these reasons, the proposed regulation does not meet the clarity requirement of the APA.

¹ Government Code Section 11342.2 states that "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purposes of the statute."

Air District Contracting Requirements Violate APA Necessity Standard: The APA requires that a regulation must be reasonably necessary to effectuate the purpose of the statute² and the record must contain information explaining why each provision of the regulation is required to carry out the described purpose of the provision³. Requiring dealers to contract with air districts to redeem vouchers for eligible vehicles is absolutely unnecessary to carry out the purpose of the statute, which is getting the largest number of high-polluting vehicles off of the road in favor of newer and cleaner vehicles. In fact, by creating new administrative burdens for retailers of eligible vehicles, the proposed regulation *inhibits* the goals of the EFMP program by introducing a complicated and convoluted step into the process. Nothing in the record justifies forcing dealers to sign contracts with air districts to redeem vouchers.

Regulation is Silent as to Contract Terms: If insistent upon requiring dealers to enter into contracts with air districts, CARB should provide some limitation as to the requirements that air districts may impose upon dealers, or (preferably) put together a model contract that each air district must use. Without such limitation, air districts may impose additional contractual requirements upon interested dealers as a condition to allowing redemption of vouchers. Such contract terms could involve anything from participation fees to more-stringent vehicle eligibility requirements. By using the regulatory process to provide guidance on contract terms (or to create a model contract), CARB can ensure that the regulation does not inadvertently allow air districts to establish contractual requirements to impose fees or achieve ulterior goals.

Contract with Which Air District?: Unlike with the sale of homes or other fixed properties, vehicles are mobile—allowing a consumer to shop throughout the state to find the best deal. A person who retires an eligible vehicle in the South Coast air district may seek to redeem the voucher at a dealership in Redding. Under the regulatory proposal, the Redding dealer would not be allowed to process the transaction without signing a contract with the South Coast district—the same would apply to transactions with consumers who hold vouchers issued from any other air district than the district from which a consumer is granted a voucher. By centralizing the process through uniform redemption rules that apply to any licensed dealer, this unnecessary contracting burden would be eliminated.

Burden on Individual Counties: Since the program is set to roll out statewide, requiring each air district to create and administer voucher redemption contracts is an unjustified waste of scarce district resources. Centralizing the process through development of a model contract form or centralized redemption process would be a much more effective use of government resources.

Consumer Confusion: Under the proposed language, only dealers that have signed a contract with the applicable air district will be suitable retailers for customer redemption. How is a customer to know which dealerships to shop for a replacement vehicle? Opening up the market to all licensed dealers who

² Government Code Section 11342.2.

³ Government Code Section 11349.1; 1 California Code of Regulations Section 10.

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follow standardized registration or redemption rules will ensure consumer convenience, a larger marketplace, and therefore better deals.

Alternative "Centralized" Approach: Rather than requiring dealers to enter into contracts with air districts, a better policy would be to establish requirements through the regulatory process that apply to voucher redemption. By creating a simple redemption process applicable to all dealers, confusion that will inevitably arise from 35 unique air district redemption programs can be eliminated for both dealers and consumers. Last year's federal Cash for Clunkers program gave us a fresh perspective of the difficulties in administering a vehicle retirement program. While we acknowledge that similar difficulties will undoubtedly exist even under a single centralized redemption process, tracking and adhering to regional redemption requirements would be an administrative nightmare.

In addition to simplified administration for our dealers, a uniform approach will allow CNCDA to approach other agencies for guidance on the taxation, disclosure, and advertising implications for a single uniform redemption program. Approaching agencies for separate guidance for each of 35 separate air district programs is untenable and unnecessary.

Conclusion

To improve the effectiveness of the regulatory proposal, we urge CARB to eliminate the requirement that a vehicle be currently registered as a condition of eligibility for retirement under EFMP, and to establish a centralized, uniform dealer registration requirement instead of requiring dealers to track and adhere to 35 separate air district contracting requirements.

Thank you for this opportunity to comment on the proposed regulation. We look forward to working with ARB to address our concerns in the near future. If you have any questions or comments concerning this letter or tire inflation issues in general, please feel free to contact me at (916) 441-2599, or at jmorrison@cncda.org.

Sincerely,



Jonathan Morrison
Staff Counsel