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Clerks' Office
California Air Resources Board
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Submitted Electronically

RE: Heavy-Duty Inspection & Maintenance Regulation

The California Trucking Association (CTA) and American Trucking Associations (ATA) appreciate the opportunity to submit the following comments on the California Air Resources Board's (CARB) Heavy-Duty Inspection and Maintenance (HD I/M) Regulation.

CARB Should Revise the Parts Unavailability Compliance Time Extension Provision

The current proposal allows fleets with ten or fewer vehicles to apply for a one-time compliance extension for parts unavailability. CARB staff labeled the situation as "rare" at the time of developing the proposed regulation, but unforeseen events have parked compliant equipment due to lack of parts.

The nation is facing a historic, unprecedented supply chain crisis that has led to shortages of parts such as NOx sensors, diesel exhaust fluid (DEF) sensors, and other emission control system components[1][2]. The shortage of parts indiscriminately affects all sizes of fleets and vehicles like passenger vehicles, light-duty and heavy-duty trucks[3]. Appendix G, subchapter C, Table 24, "*Emission Systems Approved for Repairs"* found 46% of total trucks had a repair for sensors, switches, etc. It is reasonable to assume given the results of the pilot that the shortage of parts will negatively impact a heavy-duty vehicle owner's ability to regularly maintain and repair their fleet. According to a survey conducted by the Technology & Maintenance Council of the American Trucking Associations, 43% of survey respondents said the shortage of parts is impacting maintenance and repair, while 53% of respondents reported average downtime-related delays for more than two weeks[4].

[1] https://www.truckpartsandservice.com/maintenance/components/article/15066147/salvage-yards-are-receiving-an-increase-in-parts-demand
[2] https://www.ttnews.com/articles/diesel-exhaust-fluid-sensor-failures-sideline-thousands-trucks
[3] https://apnews.com/article/auto-prices-soaring-computer-chip-shortage-f49547a45f6a10ca608886893c787891
[4] https://www.ttnews.com/articles/tmc-survey-shows-impact-semiconductor-shortage-fleets

§2196.8(a) should be amended to:

- Apply to all sizes of fleets due to the indiscriminate nature of the shortage of parts many are experiencing.
- Include multiple extensions as the shortage of parts can sideline many vehicles erratically and periodically.
- Specify "vehicles" in the language to include only those with a gross vehicle weight rating (GVWR) of 14,000 pounds or more as required to comply with the proposal.

Revise Requirements for Parts Unavailability Compliance Time Extensions

The regulation requires vehicle owners to provide detailed information as evidence to qualify for the time extension. §2197.2(i) should take into consideration the financial feasibility to acquire a part as a reason for non-compliance. The proposal assumes high demand parts will come at a minimal premium per the cost-effective assumption being advanced by the rulemaking.

For instance, DEF quality sensors which normally cost $300 have been reported to be available at up to $7,000 due to shortages[5].

§2197.2(i) should also be revised to streamline the process for fleets using OEM-certified dealerships or in-house OEM-certified maintenance. As these resources rely on factory-direct OEM parts available through a dedicated distribution network, the need to contact three different repair shops seems redundant.

The period for contacting repair facilities should be extended to account for the time it takes for a truck to finish deliveries, return to a repair facility and diagnose the problem. In some cases, this may extend beyond a seven-day period.

A Soft Enforcement Period is Needed

The current proposal's applicability and requirements will subject a substantial number of trucks to new reporting and testing requirements for the first time. As many of these trucks will be infrequent visitors to the state, an enhanced education effort is needed during the initial program rollout. Similarly, enforcement should initially focus on education, awareness and compliance rather than issuing citations during the initial six-months of reporting and/or testing.

Rentals Should Mirror DMV Smog Inspection

The current proposal requires entities in the business of renting or leasing vehicles without drivers to comply with the regulation that includes a contractual exception. Due to rental or leasing contractual agreements, it may not be possible for maintenance or repairs to be done in a timely manner prior to a compliance deadline. Entities may have equipment that is out of compliance because a renter failed to contact the entity. Renters often haul loads out of state for extended periods of time and may be unable to repair non-compliant equipment owned by the entity in time to meet the compliance deadline before entering back into California. Renters and leasers should follow a similar

[5] https://www.ttnews.com/articles/diesel-exhaust-fluid-sensor-failures-sideline-thousands-trucks

compliance schedule like the Department of Motor Vehicle's smog inspection program and require equipment under their ownership to meet a compliance deadline once a year.

The Compliance Fee should be Apportioned for Interstate Vehicles

§2196.1(f) of the proposed regulation requires vehicle owners to pay an annual $30 "compliance fee" per registered vehicle (to be adjusted annually for inflation). The Supreme Court held decades ago that the Commerce Clause of the U.S. Constitution precludes states from imposing these kinds of flat annual fees on commercial trucks. [American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987).] As the Court observed, such flat fees "are plainly discriminatory" against interstate commerce because "[i]n practical effect" local users will routinely obtain a greater benefit, in cost-per-mile terms, than out-of-state users. [Id. at 286.] Thus, the proposed $30 flat fee would have "a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within [California] rather than 'among the several States.'" [Id. at 286-87.] As noted in CARB's EMFAC 2021 Technical Document, "Using calendar years 2008 through 2018 International Fuel Tax Agreement (IFTA) mileage data, the historical ratio of VMT for out-of-state trucks as compared to VMT by CA IRP trucks was updated … to 0.374 for T7 Neighboring Out-of-state truck (NOOS) for EMFAC2021."

Since Scheiner, numerous courts have held flat fees on commercial trucks invalid under the Commerce Clause. [See, e.g., Owner-Operator Independent Drivers Ass'n v. N.Y. State Dept. of Taxation and Finance, 34 N.Y.S.3d 332, 337 (N.Y. Sup. Ct. 2016) ($15 flat fee for certificate of registration and $4 flat decal fee discriminatory because "the cost per mile … is greater for non-New York based businesses than it is for New York based businesses"); Am. Trucking Ass'ns v. State of New Jersey, 852 A.2d 142 (N.J. 2004) (invalidating flat hazardous waste transporter registration fee); Am. Trucking Ass'ns, Inc. v. State of Wisconsin, 556 N.W.2d 761 (Wis. Ct. App. 1996) (invalidating flat hazardous materials transportation registration fee); Am. Trucking Ass'ns, Inc. v. Sec. of Admin., 613 N.E.2d 95 (Mass. 1993) (invalidating $7 flat fuel license fee and $200 flat annual hazardous materials fee); Gov't Suppliers Consolidating Servs., Inc. v. Bayh, 975 F.2d 1267 (7th Cir. 1992) (invalidating Indiana's $100 biannual flat fee for registration to transport municipal waste); Commonwealth v. Am. Trucking Ass'ns, 746 S.W.2d 65, 67 (Ky. 1998) (invalidating Kentucky unapportioned supplemental highway users fee); Black Beauty Trucking, Inc. v. Indiana Dept. of State Rev., 527 N.E.2d 1163, 1165 (Ind. Tax Ct. 1998) (invalidating Indiana unapportioned supplemental highway users fee); Am. Trucking Ass'ns v. Sec. of State, 595 A.2d 1014, 1017 (Me. 1991) (invalidating flat $25 fee for carriage of hazardous materials); Am. Trucking Ass'ns v. Goldstein, 541 A.2d 955 (Md. 1988) (invalidating flat $25 marker fee).]

The flat "compliance fee" proposed here would be similarly invalid under the Commerce Clause principles at issue. To be sure, "the Commerce Clause does not require the States to avoid flat taxes when they are the *only practicable means* of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens." [Id. at 296 (emphasis added).] But against the background of California's participation in other apportionment programs in the motor carrier context

(such as the International Registration Plan for registration fees, and the International Fuel Tax Agreement for fuel taxes), "[t]he administrative machinery of revenue collection … is … obviously capable" of collecting the fee at issue here on an apportioned basis. [Id. at 297.]

Alternatives to the VIN-based Compliance Year should be Available

An administrative process should be available where fleets can request a compliance year that deviates from the proposed VIN-based scheme. Some fleets may want to submit the required data on an alternative schedule that is more consistent with their existing business practices, such as tied to vehicle maintenance intervals or a specific time period.

Referee Services Must be Widely Available

§2196.7 directs the use of referee services for a number of circumstances including "a Notice to Submit to Testing" and "the vehicle owner requests a compliance time extension." Since these services are the only path some vehicles may have to demonstrate compliance, availability of these services is essential. How these services will be made available, especially to businesses in low population counties or out-of-state locations, should be addressed both in terms of staffing and program funding.

Additional Bottlenecks to the Supply Chain must be Avoided

A process needs to be in place to allow vehicle owners/operators the opportunity to instantaneously demonstrate compliance and pay fees prior to or upon entering the state. Additionally, fleets should have the ability to receive refunds for any vehicle which was enrolled in the program but did not enter California during the fee period. This will provide national fleets the option of enrolling a greater number of vehicles in order to maintain supply chain flexibility without incurring additional costs unless they actually enter the state. This can be accomplished through an apportioned fee scheme (as is done with IRP and IFTA) which more closely links to the level of activity in the state.

In-Cab Certificates of Compliance are Prohibited by Federal Law

§2196(e) of the proposed regulation requires drivers to carry certificates of compliance in the cab of their truck. [See ("[u]pon request from CARB staff, inspectors, or peace officers, the vehicle operator shall present a valid compliance certificate"); §2196(a)(1) ("the vehicle owner shall [o]btain a valid compliance certificate … and be able to present the certificate during inspections"); §2198.1(a)(2) ("[t]he driver of a heavy-duty vehicle selected to undergo the in-person field inspection shall … [s]how proof of … compliance certificate to the inspector or officer upon request").] This requirement, if implemented, would run afoul of federal law that preempts state and local identification requirements for commercial vehicles, with limited exceptions not applicable here.

Specifically, federal law preempts any state law or regulation "that requires a motor carrier, motor private carrier, freight forwarder, or leasing company to display any form of identification on or in a commercial motor vehicle." [49 U.S.C. §14506(a).] For the purposes of this provision, a "commercial motor vehicle" is defined to include vehicles used in commerce that have a gross vehicle weight or weight rating of at least 10,001

pounds; is designed to transport more than 10 passengers; or is used in transporting hazardous materials. [49 U.S.C. §31101(1); see also id. §14504a(a)(1)(a)(ii).] And the provision includes a narrow set of enumerated exemptions to the preemption rule, none of which are applicable here. [See 49 U.S.C. §14506(a) (allowing "forms of identification required by the [U.S.] Secretary of Transportation under [49 C.F.R. 390.21]); §14506(b) (exempting requirements to display credentials required under the International Registration Plan, under the International Fuel Tax Agreement, under state license plate laws, in connection with federal hazardous materials requirements, or in connection with federal vehicle inspection standards).] And courts—including the U.S. Supreme Court—have consistently applied this provision to strike down state identification requirements like the one at issue here. [See American Trucking Ass's, Inc. v. City of Los Angeles, 569 U.S. 641, 646 n.1 (2013); United Motorcoach Ass'n v. City of Austin, 2016 WL 5107736, *10-11 (W.D. Tex. Jan. 13, 2016).]

Again, thank you for the opportunity to comment on the draft regulatory language. For any questions or concerns in regard to our submitted comments, please contact us.

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