BEFORE THE CALIFORNIA AIR RESOURCES BOARD

COMMENTS OF THE
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

IN RESPONSE TO A NOTICE OF PUBLIC HEARING AND
REQUEST FOR PUBLIC COMMENTS

[on-off-road10]

Proposed Modifications to the Final Regulation Order to Reduce Emissions of
Diesel Particulate Matter, Oxides of Nitrogen, and Other Criteria Pollutants
From In-Use Heavy-Duty Diesel-Fueled Vehicles

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INTRODUCTION

On October 28, 2010, the California Air Resources Board ("CARB") issued a Notice advising the public that it would consider proposed amendments to the Regulation to Reduce Emissions of Diesel Particulate Matter, Oxides of Nitrogen, and Other Criteria Pollutants From In-use On-road Diesel-fueled Vehicles ("Truck and Bus Regulation" or "Regulation"), the Heavy-Duty Vehicle Greenhouse Gas Emission Reduction Measure, and the Drayage Truck Regulation, at a public hearing beginning December 16, 2010, and would accept written comments regarding the proposed amendments until the day before the hearing. OOIDA hereby submits its comments addressing CARB's proposed modifications to the Truck and Bus Regulation.

In December of 2008, the CARB adopted the Truck and Bus Regulation requiring owners of heavy-duty diesel-fueled vehicles operating in California to upgrade their vehicles by stated dates to meet specified best available control technology standards ("BACT") for particulate matter ("PM") and nitrous oxide ("NOx"). In response to concerns raised by motor carriers whose operations have suffered due to the ongoing severe economic downturn that started shortly after the Regulation was adopted, CARB began considering amendments to the Regulation. They were intended in large part to help ease the substantial economic burden the new Regulation placed upon all motor carriers operating in California. The amendments include modified compliance schedules and additional phase-in options that give most regulated parties more flexibility in determining how and when to expend funds to bring their trucks and truck engines into compliance. Other amendments modified some of the pre-existing exemptions from the Regulation for specific types of vehicles or uses, including agricultural vehicles, log trucks, and low-use vehicles. These changes, which did not impair CARB's long-term emission reduction goals, are expected to decrease the number of vehicles subject to replacement and/or retrofit requirements in the Regulation and, at the same time, make compliance easier for many still subject to those requirements.

OOIDA is a not-for-profit trade association incorporated in 1973 in Missouri with its principal place of business located at 1 NW OOIDA Drive, Grain Valley, Missouri 64029. The nearly 153,000 owner-operators, small-business motor carriers, and professional truck drivers ("small-business truckers") that make up OOIDA's membership, including more than 5,000 members in California alone, operate approximately 200,000 trucks in all 50 states and Canada. OOIDA is the largest international trade association representing the interests of these small-business truckers on all issues affecting their operations. OOIDA actively promotes their views in a broad variety of forums – including federal, state, and provincial agencies, legislatures, courts, other trade associations, and private businesses – and committees on the local, state, national, and international level.

Small-business truckers, like those belonging to OOIDA, have a significant presence in the trucking industry. Indeed, one-truck motor carriers represent nearly half of all active motor carriers operating in the United States while approximately 96 percent of active motor carriers operate 20 or fewer trucks. *See* American Trucking Associations, Economic and Group Statistics 2004. This segment of the goods movement industry has been hit particularly hard by the economic contraction, given the low profit margins and levels of compensation that have left many of them struggling to survive. The multiple CARB regulatory requirements have also had a significant impact on small-business truckers who must in many cases comply with CARB's Transportation Refrigeration Unit (TRU) Regulation, the GHG regulation, and Drayage Truck Regulation (DTR), as well as the Truck and Bus Regulation.

Because compliance with the Truck and Bus Regulation imposes a significant financial burden on many of OOIDA's members who haul freight in interstate commerce to and from California, generally on an intermittent and irregular basis, OOIDA appreciates CARB's efforts to implement new compliance schedules and phase-in options that will make compliance easier for some of these and other financially strapped motor carriers and owner-operators. OOIDA also appreciates other changes, including those expanding exemption coverage, that should decrease the number of motor carriers subject to the Regulation. However, the Association also believes that the Regulation in general and some of the recently proposed amendments focus relief on and disproportionately benefit in-state entities, while ignoring the dire economic plight of out-of-state motor carriers, especially small-business truckers, who may occasionally serve California. Indeed, the exemptions will rarely accrue to the benefit of out-of-state truck owners who often operate far fewer miles in California than in-state motor carriers who are exempt. Accordingly, OOIDA suggests that the Board direct CARB staff to explore further means to reduce the regulatory burden being felt by small-business motor carriers and owner-operators nationally.

DISCUSSION

I. The Regulation Gives the Appearance of Being An Even-Handed Regulation.

The Truck and Bus Regulation is intended to reduce emissions of pollutants from in-use diesel-fueled vehicles ("heavy-duty trucks"), in furtherance of California's plan to clean up its air. *See* Regulation, § 2025(a).[1] To achieve the greatest possible effect, the Regulation applies by its terms to "any person, business, federal government agency, school district or school transportation provider that owns, operates, leases, or rents affected vehicles that operate in California." *Id*. at § 2025(b). Thus, the obligations in the Regulation to replace or retrofit equipment apply to any heavy-duty truck that operates in California, wherever it is based, and however infrequently or intermittently it comes into the state. Similarly, the exemptions from the Regulation for certain vehicles and uses are stated in terms that are available in a uniform manner to all otherwise covered trucks, whether based within or outside of California. *Id*. at §§ 2025(c) (15 categories of vehicles); 2025(m) (agricultural vehicles & log trucks), 2025(p) (low-use, NOx exempt areas, three-day pass).

The seemingly uniform regulatory requirements and the exemptions from those requirements give the Truck and Bus Regulation, on its face, the appearance of an even-handed regulation furthering a legitimate state interest. If that were the case, the Regulation would be a totally appropriate exercise of CARB's regulatory authority. Upon closer scrutiny of the Regulation as a whole, however, OOIDA has found that various provisions improperly discriminate against out-of-state interests and place an undue burden on interstate commerce. In short, while the exemption language is crafted to appear non-discriminatory, we believe that is illusory and that benefits will flow primarily to in-state motor carriers.[2] A closer look also shows that other reasonable alternatives exist that could accommodate interstate commerce while still allowing CARB to achieve its emissions reduction goals.

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[1] Unless specifically stated otherwise, all citations to the Truck and Bus Regulation refer to the section of the Regulation with proposed amendments.

[2] OOIDA also notes that in-state motor carriers that must comply with this Regulation are able to access public funding for truck replacements and retrofits through various state programs, such as Carl Moyer grants, that limit participation to those entities located in California.

II. The Interstate Commerce Act Prevents States From Unduly Burdening Interstate Commerce and/or Discriminating Against Out-of-State Interests.

It is beyond dispute that a state and its various authorities may only regulate conduct within their own state's boundaries. Laws or regulations that impose liability on or otherwise regulate conduct occurring wholly outside of the state go beyond inherent limits on the state's authority and may not be allowed to stand. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *Edgar v. MITE Corp.,* 457 U.S. 624, 642-643 (1982). This is so whether or not the extraterritorial reach was intended. *Id*. This general principle is reflected in the Interstate Commerce Clause of the U.S. Constitution, which gives the federal government authority over commerce between the various states and, in so doing, relegates each of the states to the regulation of commerce within their own borders. Article I, Section 8, Clause 3. Thus, CARB's authority extends to the regulation of air quality and vehicle emissions only within the state, which correlates to miles operated within the state. As stated in CARB's enabling statute, the agency is to engage in a coordinated effort, with state, regional, and local authorities to "protect and enhance the ambient air quality **of the state**." *See* Cal. Health & Safety Code 39001 (emphasis added). What happens outside of California is not and cannot be of concern – specifically regarding how vehicle miles are accumulated.

Recognizing the reality that state laws and regulations will often have incidental and indirect effects on interstate commerce, however, such effects are ordinarily allowed if the benefits to the local state interest outweigh the burden on interstate commerce. *Healy v. Beer Inst.*, *supra*; *New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988); Brown-Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 579 (1986); *Edgar v. MITE,* *supra*. The burden is undue when a balancing of national and local interests reveals that the costs of complying are disproportionate (i.e., clearly excessive) when compared to the demonstrable local benefits that cannot otherwise be obtained by the state. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt Auth.*, 550 U.S. 330, 339 (2007); *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

Because of the obviously interstate nature of the transportation industry, the interstate commerce issue has often arisen in U.S. Supreme Court cases involving state regulation of transportation. For example, in *Raymond Motor Trans., Inc. v. Rice*, 434 U.S. 429 (1978), the Supreme Court struck down on Commerce Clause grounds a state statute that prohibited trucks longer than 55 feet with one trailer and trucks pulling more than one trailer from operating within that state without a permit, based upon the finding that it substantially interfered with the movement of goods in interstate commerce without a meaningful contribution to highway safety. *See also Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (invalidating state statute banning trucks over 60 feet); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (invalidating state law requiring mudflaps that could not be used in adjacent states); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (invalidating state law restricting length of trains). Although discrimination against out-of-state interests was not the decisive factor in the *Raymond Motor* case, the Court did note that the numerous exemptions from the general rule, some of which were found to discriminate in favor of local industry, raised additional doubts about the validity of the regulation. *Raymond Motor*, 434 U.S. at 446-447.

The Interstate Commerce Clause may also be violated when a state statute or regulation that does not expressly favor in-state over out-of-state economic interests, does so in practice, thereby raising the costs of doing business for out-of-state interests, but not their in-state counterparts. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-351 (1977). The discriminatory result is even more objectionable where the state requirement also deprives out-of-state interests of advantages they might otherwise have over local interests. *Id*. When in-state versus out-of-state discrimination is demonstrated, the burden falls on the involved state to justify it both in terms of the local benefits flowing from the regulation and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. *Id.* at 353.

While the U.S. EPA has primary authority to set emissions standards for new motor vehicles, California alone has the right to regulate emissions from in-use motor vehicles (42 U.S.C. § 7521, 7543), a right that has been delegated to and exercised by the CARB. However, this right is not unlimited. Among other limitations,[3] this right must be exercised consistent with constitutional limitations, including the Interstate Commerce Clause. As discussed above, this requires a careful balancing to make certain that the Truck and Bus Regulation, as modified, does not unduly burden interstate commerce directly or by favoring in-state over out-of-state interests.

III. An Undue Burden is Placed on Distant Out-of-State Truckers Who Drive Only Limited Miles in California.

As applied to the Truck and Bus Regulation, it is undisputed that California, the state with the nation's most polluted air, has a strong and legitimate interest in reducing emissions within the state, including emissions from heavy-duty trucks that jeopardize the health of California's residents. Moreover, it is logical for CARB to extend the Regulation's coverage to

[3] CARB's actions are also limited by the preemption provision of the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c) ("FAAAA"), which prohibits states from adopting any law or regulation related to a price, route, or service of any motor carrier with respect to the transportation of property. Although the effect of that provision on the Truck and Bus Regulation is not addressed in these comments, it is worth noting that barriers to interstate operations, such as those created by the Truck and Bus Regulation, might also run afoul of the FAAAA.

out-of-state heavy-duty trucks that provide transportation services in California, since CARB has found that out-of-state trucks travel millions of vehicle miles annually on California's roads. *See Staff Report: Initial Statement of Reasons for Proposed Rulemaking. Proposed Amendments to the Truck and Bus Regulation, the Drayage Truck Regulation, and the Tractor-Trailer Greenhouse Gas Regulation* (Oct, 2010) ("SOR"), at Appendix G, Emissions Analysis Methodology and Results, p.10. However, just as all in-state trucks are not treated similarly because they are not comparable in all pertinent respects, all out-of-state trucks are not equal and should not be treated as such. Specifically, while many trucks based in states adjacent to California travel a significant number of miles on average in the state, the number decreases substantially for trucks coming from farther away. Yet CARB has lumped them all together in the analyses underlying this Regulation.

The International Registration Plan (IRP) – which is the mandatory vehicle registration program for commercial motor vehicles, including heavy-duty trucks engaged in interstate commerce - is the definitive resource in determining the minimum <u>average</u> annual miles a vehicle from another state travels in California during any calendar year. A cursory examination of the data for 28 geographically scattered states shows that, with the exception of vehicles from states that border California or are located along the I-5 corridor, the average mileage operated in California is quite low. In fact, it shows that more distant motor carriers tend to operate fewer miles to/from California, going there irregularly and intermittently.

Alabama	2,891	Arizona	32,143	California	42,243	Delaware	910
Georgia	2,388	Idaho	6,658	Iowa	1,956	Illinois	2,985
Kentucky	980	Maryland	424	Mass.	231	Michigan	2,016
Montana	5,184	Mississippi	4,718	Missouri	3,323	Nebraska	3,379
Nevada	8,568	New Jersey	2,160	New Mexico	4,446	New York	944
N. Carolina	2,177	Oregon	15,404	Ohio	2,005	Oklahoma	7,386
S. Dakota	3,344	Tennessee	3,092	Vermont	2,496	Washington	15,041

Source: IRP Estimated mileage/distance charts from each jurisdiction's respective motor carrier licensing division.

Thus, while the actual out-of-pocket costs of purchasing compliant equipment (to replace or retrofit) are comparable no matter where a truck or fleet is based, the economic benefits gained by motor carriers from those expenditures are far less for more distant truckers who typically operate relatively few miles in California. Accordingly, the burden imposed by the regulation on distant motor carriers operating in interstate commerce is far greater than the burden on in-state interests who will be the primary beneficiaries of the exemptions.

Further, the primary factor affecting the amount of harmful emissions in California is miles traveled within the state.[4] *See* EMFAC 2007. Out-of-state heavy-duty vehicles are estimated to account for only approximately 30 percent of heavy-duty truck mileage in California. *See* Assessment of Out-of-State Heavy-Duty Truck Activity Trends in California, UC Davis, Institute of Transportation Studies (March 2008). Yet compliance is demanded for the occasional entry into the state of all heavy-duty trucks engaged in interstate commerce even though in-state entities that could be performing the same services can be exempt. When that is done, the burden on interstate commerce, in the form of increased costs for motor carriers who must comply or stop serving California altogether, outweighs the minimal health benefits that accrue given the limited number of miles many of these motor carriers operate in the state. Under those circumstances, as discussed in Section II above, the Interstate Commerce Clause is violated. *See United Haulers Ass'n v. Oneida-Herkimer*, *supra*; *New Energy Co. v. Limbach*, *supra*; *Brown-Forman Distillersv. New York State, supra*; *Pike v. Bruce Church, Inc., supra*.

IV. The Various Exemptions Used Overwhelmingly By In-State Interests Raise Questions About the Lack of Exemptions Available to Out-of-State Interests.

[4] EMission FACtors is the model used by CARB to calculate emissions rates from all motor vehicles operating on California highways.

Although the Truck and Bus Regulation purports to impose emissions-related requirements equally on all heavy-duty diesel-fueled vehicles operating in California, this Regulation, like the objectionable state statutes involved in the *Raymond Motor* and *Hunt v. Washington* cases, contains numerous exemptions to the rule's requirements that will be used predominantly by in-state businesses. For example, paragraph (c) of the Regulation identifies 15 classes of vehicles that are exempted from the Truck and Bus Regulation. While a number of these vehicles are exempted because they are covered by other CARB regulations, a larger number are exempted for policy reasons unrelated to emissions. These include military tactical support vehicles, authorized emergency vehicles, dedicated snow removal vehicles, two-engine cranes, historic vehicles, motor homes for non-commercial private use, two-engine water well drilling rigs, and certain school buses. Regulation, § 2025(c). Of course, most of the vehicles taking advantage of these exemptions would be registered and based in California.

Another exemption, which probably excludes more vehicles from the Regulation's emissions-related strictures than all others combined, is the exemption for "agricultural vehicles." California is the world's fifth largest supplier of food and agriculture commodities. Thus, the state and its regulatory agencies have repeatedly bowed to pressures from the agricultural industry to exempt various aspects of its operations from environmental restrictions that could affect their profitability. The provision exempting "agricultural vehicles" from the Truck and Bus Regulation exemplifies this practice. *Id*. at § 2025(m).

First, the definition of "agricultural vehicles" includes virtually all vehicles used in agricultural operations on farms, ranches, and in forests, as well as vehicles that deliver fertilizer and other agricultural chemicals to those facilities, and vehicles that transport agricultural products from those locations to the facility where they will first be processed, which is ordinarily within the state. *Id*. at § 2025(d)(5). Further, CARB staff has, in the proposed amendments, responded to the legitimate economic concerns of in-state agricultural interests by clarifying the definition in a way that could only increase the number of vehicles that come within the scope of this exemption. *Id*. Pertinent here, however, the definition does not, in either its original or amended format, include vehicles that move the same products in interstate commerce from the first processing facility to points farther along the supply chain, ending with the retail establishments where they are sold to the ultimate consumers. *Id*. The disparity is not readily justifiable when "[i] n the supply chain that stretches from the farm to the consumer, trucking provides the first miles, the last miles, and sometimes all the transportation miles." USDA Study of Rural Transportation Issues (April 2010), www.ams.usda.gov/AMSv1.0/ RuralTransportationStudy, at pp.xii,403,432. Indeed, it is an efficient interstate trucking industry that allows California to be competitive in the national and global marketplace for agricultural products. *Id*. at 403.

Second, to qualify for the exemption, agricultural vehicles must travel less than specified annual total miles to qualify. Until January of 2017 the annual mileage limits are as follows: for a truck with a pre-1996 model year engine, fewer than 15,000 miles; for a truck with a 1996 through 2005 model year engine, fewer than 20,000 miles; and for a truck with a 2006 or newer model year engine, fewer than 25,000 miles. *Id*. at § 2025(m)(1). Emissions restrictions are delayed until January of 2023 for agricultural vehicles that have not exceeded 10,000 miles per year prior to 2017. *Id*. at § 2025(m)(2).

CARB has also added a new provision under the agricultural vehicle section for "log trucks," which exempts them from the use of PM filters without mileage restrictions, but subjects them to an accelerated BACT schedule. *Id*. at § 2025(m)(11). However, logging trucks with

1997 or older engines, which operate exclusively in NOx exempt areas of the state (21 northern California counties), may also avail themselves of a delayed compliance schedule for vehicle replacement if they meet the PM filter requirements. *See id.* at § 2025(p)(1). Although the cleaner air in the northern part of the state provides the principal justification for this exemption, the reality is that these specialized log trucks stay in a relatively confined area that limits their annual mileage.

As described above, annual vehicle mileage is a key metric utilized to measure (and presumably justify) the agriculture-related exemptions, presumably in recognition of the fact that emissions are related to either the miles operated or total engine hours.[5] OOIDA would like to bring to the Board's attention, as shown in the IRP mileage chart at Page 9, with the exception of a few states surrounding California, trucks entering California from non-neighboring states do not even come close to operating the total annual total miles on California highways that is being permitted to in-state agricultural interests under the exemptions. Moreover, as we get further away from California, the mileage disparity gets even greater. Nevertheless, the vast majority of these trucks, because of their total annual mileage usage in jurisdictions outside of California, will not qualify for these mileage-based exemptions.

V. <u>There Are No Viable Exemptions for Out-of-State Truckers</u>.

As shown above, CARB has taken care, in crafting this Regulation, to ease the burden it places on California businesses, particularly its substantial agricultural and logging businesses. In contrast, CARB has displayed almost a total disregard for the burdens imposed on out-of-state truckers by the same Regulation. The current Regulation has only two exemptions that in any

[5] Emission Facts: Greenhouse Gas Emissions from a Typical Passenger Vehicle, U.S. EPA website at www.epa.gov/oms/climate/420f05004.htm#key (Step 6: Using EPA MOBILE6.2 fuel economy numbers).

way address the needs of out-of-state motor carriers, but neither of these are very useful in their current or modified formats.

First, the Regulation exempts from coverage "low-use vehicles," which are defined as vehicles that operate less than 1,000 miles and 100 hours per year. Regulation, §§ 2025(d)(40) & (p)(3). The definition does not qualify the hour and mileage requirement in any respect and, accordingly, seems to mean the total miles driven by a vehicle in any state. There are not likely to be any out-of-state vehicles driven less than a total of 1,000 miles per year that would be entering California under this exemption. This is a striking departure from the current Regulation (at § 2025(d)(47)), which expressly provides that the mile/hour limits only include California operations.[6] Even with that qualification, however, few out-of-state motor carriers are willing to comply with the Regulation's reporting requirements for such a limited number of California miles. *Id*. at § 2025(p)(3).

Second, the Regulation contains an exemption for non-compliant "Vehicles Operating with a Three Day Pass." *Id*. at § 2025(p)(4). The exemption describes the procedures to be used by out-of-state interests operating non-compliant vehicles seeking to enter California with such a three-day pass. The current language (at § 2025(p)(5)) reads:

> (A) Until January 1, 2021, a fleet that obtains a three-day pass will be allowed to operate one vehicle in California without complying with section 2025(e) for the specified three day period per calendar year.
>
> (B) To obtain a three-day pass, a request to the Executive Officer, identifying the initial date that an out-of-state vehicle or vehicle operating without meeting the compliance requirements within California will be traveling within the state making a one-time annual visit to the state, the vehicle owner, company name, and vehicle identification number and must obtain written approval, which must be carried within the vehicle, prior to operating in the state.

[6] It is not clear whether this change was intentional since it is not mentioned in the SOR, and Appendix I to the SOR, captioned Costs and Cost Methodology, at p.12, mentions the California limitation. If intentional, it is another slap at out-of-state long-haul truckers. If inadvertent, then the proposed new definition should be amended.

> (C) A three-day pass must be obtained from the Executive Officer either online, email, or by fax. The Executive Officer will have three business days to respond from receipt of the request before the vehicle may operate in California.

A fleet owner wishing to make use of the three-day pass exemption must have also complied with the reporting requirements set forth in the Regulation (currently at § 2025(d)(7)). The proposed amendment retains all the current requirements for use of this once-yearly exemption, but expands the timeframe for requesting a pass to "at least seven days prior to the vehicle's planned entry into California." *Id*. at §2025 (p)(4)(B).

The Three Day Pass exemption both as currently structured and with the more onerous proposed modifications is unusable for the vast majority of out-of-state vehicle owners. First, the reporting requirements are overly burdensome for applying just to get one isolated vehicle into California once during the year, whether it is the only vehicle owned by a small-business motor carrier or is part of a larger fleet.

Second, goods movement is a dynamic business, where motor carriers – especially small-businesses – often do not know their next freight offering until the day before or even the same day of expected pick-up. Or a carrier might be dispatched on a Friday for an expected delivery in California on Monday. The lack of advance notice makes the three-day pass unworkable. Thus, both the current "three business days" allowed for a response from the Executive Officer or the minimum "seven days" timeframe for requesting a pass, plus the fleet reporting requirements, would discourage the vast majority of out-of-state motor carriers from attempting to utilize this exemption.

Finally, limiting the pass to a maximum three-day timeframe is problematic. There are significant seasonal fluctuations in freight availability, mostly driven by agricultural and import availability. If goods are not available for pick-up immediately after delivery (in industry parlance – a quick turn-around), anyone utilizing a three-day pass runs the very real risk of having to leave the state empty in order to not be in violation. One can hardly imagine a more inefficient and wasteful use of resources than forcing out-of-state motor carriers into this position.

Further, CARB makes it very difficult for out-of-state truck owners wanting to send only compliant trucks from their fleets into California, in an apparent attempt to improperly control conduct outside its borders. *Cf. Healy v. Beer Inst.*, *supra*; *Edgar v. MITE*, *Corp., supra*. Specifically, in determining the size of a fleet of vehicles subject to the Regulation's replacement and retrofit requirements, the fleet owner is required to count the total number of heavy-duty diesel trucks that are subject to common ownership or control "regardless of whether the vehicles operate in California. . ." Regulation, § 2025(d)(3). Additionally, the Regulation requires a motor carrier to notify and update CARB on equipment changes to its fleet. Thus, an out-of-state vehicle owner who puts on more than 1,000 miles/100 engine hours per year or who needs more than one three-day pass each year, must count vehicles that may never enter California in determining what equipment must be retrofitted or replaced, and must bring the overall fleet into compliance before any truck can transport goods within the state. It is not sufficient for an out-of-state motor carrier to dedicate one or a limited number of vehicles to California service and bring those vehicles into compliance with the Regulation, even though that would serve California's legitimate interest in controlling emissions within its borders.

VI. There is a Less Burdensome and Non-discriminatory Alternative.

As discussed above, neither the three-day pass nor the low-use vehicle exemption provides adequate relief to out-of-state motor carriers who come into California on an intermittent and irregular basis. However, CARB could both eliminate the undue burden on interstate commerce and equalize the treatment of in-state and out-of-state truckers, by focusing exclusively on miles driven in the state, the only factor that truly affects emissions, and increasing the corresponding number of hours allowed under the low-use exemption to a more reasonable level. Indeed, OOIDA strongly urges CARB to consider either an annual mileage limit of 15,000 miles in the state, the number of miles allowed until 2017 by the dirtiest and most heavily-polluting agricultural vehicles with engines from model year 1995 and earlier, or the 10,000 mile limit applicable to any agricultural vehicle that wants to remain exempt from the Regulation until 2023.

While these suggested limits are far higher than those contained in the current low-use exemption and would allow the out-of-state vehicles using them to spend far more than the three days currently allowed by the one-time three-day pass exemption, the trucks making use of the exemption would not pollute any more than the agricultural vehicles that already have comparable mileage exemptions. In fact, they are likely to pollute even less because, as CARB staff recognized in its Cost and Cost Methodology analysis in the SOR, "most out of state fleets would send their newer vehicles to California and keep the small percentage of older trucks outside of California." *see* SOR, Appendix I, at p.12. Further, given the IRP statistics on the average number of miles operated in California by trucks registered in other states, those based in nearby states (e.g., Arizona, Oregon, and Washington) would exceed both of these limits and not be able to make use of the exemption. At the same time, those farthest away (e.g., Delaware, Maryland, Massachusetts, New York, and Kentucky) would actually operate less and, as distance from California increases, substantially less than the maximum allowed miles. However, the higher limit would allow those out-of-state motor carriers who do find themselves in California for more than 1,000 miles and 100 engine hours or more than three days to conduct their interstate business without undue interference.

CONCLUSION

Although OOIDA appreciates the additional compliance options now being offered by CARB to alleviate the economic burdens placed on financially-strapped motor carriers by the ongoing economic downturn, the Association believes, for all the reasons discussed above, that it is incumbent upon CARB to consider further amendments that will reduce the regulatory burden imposed by the Truck and Bus Regulation on small-business motor carriers and owner-operators nationwide. In particular, in order to eliminate conflicts with the Interstate Commerce Clause, CARB should make adjustments to existing exemptions that allow out-of-state motor carriers operating only limited miles in California to be exempted from the Regulation in a manner that is comparable to exemptions available primarily to agricultural and other in-state interests.

Respectfully submitted,

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