California New Car Dealers Association

July 6, 2010

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

Re: Comments on Proposed Tire Pressure Regulation

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 provided separate comments in March and November of 2009, and in January of this year, each of which raised substantial policy and procedural problems with the proposed regulation and subsequent amendments. Subsequently, the Office of Administrative Law disapproved the regulatory proposal on several grounds. While each subsequent draft has been improved, the latest draft remains unacceptable and unsound. In addition to our previous comments, many of which still apply, we have identified additional concerns, described below. In light of these concerns, we again ask for ARB to withdraw the proposed regulation and to hold industry workshops to address the objections raised by CNCDA and other interested parties—we believe that many of these issues can be resolved amicably.

Administrative Procedures Act:

As discussed in our previous comments, ARB's statutory authority for implementing this regulation[1] mandates strict compliance with requirements of the Administrative Procedures Act (APA)[2] when promulgating regulations to implement the Global Warming Solutions Act of 2006 (AB 32). The importance of meeting the emission reduction requirements of AB 32 does not allow ARB to cast aside or water-down the APA's procedural requirements. Unfortunately, this amended draft proposal again fails to meet these standards due to the inclusion of a severability clause, and for expanding the regulation to cover the service of vehicles in business and government fleets. ARB should remove these provisions from the draft regulation.

Severability Clauses Violate the APA:

ARB Cites Discussions of Severability Clauses in *Legislation, and not Regulations*: ARB's discussion of our concerns with severability clauses cites Professor Singer's *Statutes and Statutory Construction* as a scholarly treatise supporting the use of severability clauses in legislation, and cites several court decisions that recognize the use of severability clauses as permissible by legislative bodies. ARB's use of severability clauses in drafting laws would be entirely permissible and supported by such scholarly reference material ***if ARB were a legislative body***. ARB, is *not*

[1] Health and Safety Code Section 39601.
[2] Government Code Sections 11340, *et seq*.

a legislative body, however, but an administrative agency. The legislature is democratically elected and accountable to the public; ARB is not. The state legislature is limited by the constitution and the political ability to achieve a majority vote; ARB is limited by the constitution, the scope of power granted by the legislature to promulgate a regulation, and the APA.

In passing AB 32 (which ARB seeks to implement through the current regulatory proposal), the legislature granted ARB broad rulemaking authority to reduce greenhouse gas (GHG) emissions. All that the legislature asked of ARB in doing so—and all that we as an association ask—is that the agency comply with the APA when drafting such regulations. Government Code Section 11346(a) states that "[i]t is the purpose of [the APA] to establish ***basic minimum procedural requirements*** for the adoption, ***amendment***, or repeal of administrative regulations . . . ." (emphasis added) These minimal procedural requirements include accepting and responding to public comments, and review of any proposed amendments by OAL.

When a court deems a provision of a regulatory package to be invalid, for any reason, the regulation is amended—the law is not the same as it was prior to part of the regulation being declared illegal. By inserting a severability clause into the regulation, ARB seeks to allow the remaining amended portion of the regulation to take effect without meeting ***the basic minimum procedural requirements*** of the APA. Before an amended regulation can take effect, the APA process must be followed, and the proposed amended regulation must face public scrutiny and OAL review, and stand or fall on its own merits. The example used in our previous comment letter provides a good example of our concern: assuming that the current tire pressure proposal meets the APA's necessity requirement only because certain industries are exempted from the scope of the regulation. If this exemption were nullified by a court, the severability clause would allow the amended regulation to take effect immediately despite the fact that the APA's necessity requirement would no longer be satisfied. This amendment would take effect without providing the public the opportunity to comment on the amended regulation, and without giving the OAL the opportunity to review the amended regulation for APA compliance. The previously-exempt industry would be subject to the regulatory requirements without any ability to exercise rights guaranteed under the APA.

The legislature specifically limited ARB's scope of rulemaking authority under AB 32 to draft regulations meeting the **basic minimum procedural requirements** of the APA. By including a clause that allows ARB to avoid such requirements in circumstances described above, ARB seeks to impermissibly expand the scope of their authority beyond that granted by the legislature, in violation of Government Code Section 11342.1. Furthermore, the proposed clause violates the consistency requirements of Government Code Sections 11342.2 and 11349.1(a) due to the inconsistency with Government Code Section 11346, as described above.

Importance to ARB Does Not Justify Violation of the APA: To address the OAL's determination that ARB failed to demonstrate the necessity of including a severability clause, ARB states that such clauses are "necessary to ensure that public health and safety benefits are achieved by the regulation to the greatest extent possible." We fully support ARB's mission of reducing greenhouse gas and criteria pollutant emissions, as does the California legislature—as evidenced by entrusting ARB with the mandate to reduce emissions that cause global warming—but the legislature did not intend to allow CARB to achieve emissions reductions through non-compliant regulations. As discussed previously, a severability clause is not necessary to achieve the GHG emission reductions sought by ARB through this regulation—all ARB must do to achieve these reductions is to promulgate a regulation that meets APA's basic minimal procedural requirements. Removing the severability provision will be a major step toward APA compliance. In fact, by including such a provision, ARB seems to acknowledge that the regulatory

proposal *may not* meet legal requirements. While we recognize ARB's desire and perceived "good cause" to include such a provision, ARB fails to demonstrate the *necessity* of including the provision to effectuate the purpose of AB 32, as required by Government Code Section 11342.2, nor has ARB provided substantial evidence of this necessity, as required by Government Code Section 11349.1.

Existing Regulations Are Irrelevant: ARB mentions that several existing regulations contain severability clauses, but this has no bearing on whether the inclusion of such clauses is permissible under the APA. Approval of a regulation by OAL does not carry precedential value, nor does it necessarily mean that a regulation is completely compliant with the APA. Given limited resources, OAL's regulatory review may decide only to investigate issues raised in public commentary—which may not have addressed the inclusion of a severability clause.

Expansion to Business Fleets:

The amended regulation expands the definition of "Automotive Service Provider" to include "government or private vehicle fleet maintenance providers," and defines "vehicle fleet" to include one or more vehicles "owned, leased, or managed as a unit within or by a business or government agency" New car dealerships have an internal fleet of vehicles consisting of demonstrator vehicles, parts trucks, rental vehicles, and service loaners, our new and used vehicle inventory that we offer for sale to the public—all of which would fall under the definition of "vehicle fleet." Our dealerships all have service facilities, which internally perform automotive maintenance and repair services on each of the vehicles within their fleets. The proposed amendments would require our members to not only check and inflate the tires of our fleet vehicles anytime we perform a repair or maintenance service, but also to reflect this service on an invoice. Since many dealers do not issue invoices for minor internal repairs or services, this would completely change internal recordkeeping requirements for such repairs—imposing a significant, costly, and unnecessary burden. Since many of these fleet vehicles, particularly those in our retail inventory, are rarely driven but oft-maintained, this proposal does not make much sense. Imposing new invoicing requirements for minor internal repairs is not necessary to achieve the goals specified by ARB, and ARB has failed to demonstrate the necessity of this proposal. Furthermore, this amendment to cover government and business fleets constitutes a significant change to the substantive provisions of the regulation—greatly expanding the scope of the regulation—and was neither previously discussed nor apparent from the initial draft regulation. Pursuant to Government code Section 11394.4, ARB should readopt the regulation by re-noticing the regulation and allowing government and business fleet owners and service providers the ability to comment on the proposal.

Conclusion:

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