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## CARB Strictly Interprets Performance Aftermarket Part Laws in New Enforcement Advisory

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CARB takes the position that distributors, sellers, and installers of uncertified performance aftermarket parts are liable for any illegal use of those products.

On July 10, the California Air Resources Board (“CARB”) published an [enforcement advisory](#) addressing the distribution, sale, installation, and use of performance aftermarket parts, such as software tuners, exhaust headers, air intakes, superchargers, and turbochargers that increase vehicle performance, including parts designed for competition. CARB’s aggressive interpretation of California law means companies may be held liable for third-party misuse of products, which presents several practical difficulties for companies distributing or selling competition parts in the state.

### **CARB’s Strict Liability Interpretation of California’s Aftermarket Parts Laws**

CARB typically prohibits companies from advertising, distributing, selling, installing, or using performance parts for on-highway vehicles unless the parts have a CARB Executive Order (“EO”), which certifies that the parts do not affect emissions or on-board diagnostics.

Less clear has been CARB’s approach to advertising, distributing, selling, or installing emissions-related performance parts without an EO where those parts are intended for use in competition. Competition vehicles—vehicles used exclusively in racing and not on public highways—are exempt from emission control requirements, and therefore it is legal to advertise, distribute, sell, or install competition parts without an EO on these competition vehicles. However, CARB is skeptical that competition parts are, in fact, used solely in competition, particularly where they fit emissions-certified vehicles.



California law permits advertisement of competition parts so long as they contain a “legally adequate disclaimer,” such as “NOT LEGAL FOR SALE OR USE IN CALIFORNIA” or “LEGAL IN CALIFORNIA ONLY FOR RACING VEHICLES WHICH MAY NEVER BE USED, OR REGISTERED OR LICENSED FOR USE, UPON A HIGHWAY.”

However, there is no such safe harbor regarding distribution, sale, or installation of such parts. CARB’s advisory states that companies may be liable if they sell performance parts without an EO and those parts are used on a public highway, regardless of whether the part was properly advertised for use in competition, stating:

[V]iolations can occur regardless of any real or claimed intent regarding how the part will be used – such as the part will only be used on racing or competition vehicles.

...

Any manufacturer, wholesaler, distributor, dealer, installer, retailer, and/or repair shop or facility is potentially liable if they offered for sale or sold an uncertified vehicle, illegally modified a vehicle, or offered for sale, sold, or installed a performance aftermarket part without an applicable CARB EO on a vehicle operating on a public highway.

The advisory states that companies may wish to follow certain practices that “help minimize the possibility of unintentionally violating the laws,” such as:

- Collecting information on purchasers, such as license plate and/or DMV identification / registration numbers.
- Verifying there is no license plate and/or registration for the vehicle.
- Confirming that a customer has a legitimate reason for purchasing a product without a CARB EO by verifying and keeping documentation including the make, model, and vehicle identification number (“VIN”) for the vehicle for which the part is purchased.

However, the advisory says these actions “will not absolve” a company from liability if the parts are mis-used.

### **CARB’s Interpretation Presents Practical Problems**

There is currently no case law directly addressing CARB’s interpretation. However, CARB’s interpretation conflicts with established law that a party is not responsible for negligent or illegal acts of another person and it arguably shifts the burden of proof in violation of the California Evidence Code. It also presents practical difficulties for companies distributing and selling powersports equipment because powersports competition vehicles are typically converted from emission-controlled vehicles. Thus, it is difficult for companies selling powersports equipment to predict how purchasers will use the parts.

To limit potential exposure, companies may consider which of the business practices recommended by CARB they can implement. However, companies should take care in reviewing these practices and review whether they are consistent with other legal obligations. For example, there may be privacy issues associated with the collection and retention of certain customer information, such as VINs.



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King & Spalding has a national Environmental, Health & Safety practice with attorneys experienced with California and Federal aftermarket parts regulation and enforcement. If you have questions about CARB's advisory or enforcement of California or Federal aftermarket part requirements, please contact our lawyers noted in the contact section.

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