King & Spalding
Client Alert

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For more information, contact:

Logan MacCuish
+1 213 443 4366
lmaccuish@kslaw.com

Granta Nakayama
+1 202 626 3733
gnakayma@kslaw.com

Bradford Singh
+1 202 262 2643
bsingh@kslaw.com

King & Spalding

Los Angeles
633 West Fifth Street
Suite 1600
Los Angeles, CA 90071
Tel: +1 213 443 4355

Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500

EPA Updates Its Vehicle and Engine Tampering & Aftermarket Defeat Device Enforcement Policy

The updates attempt to provide more clarity for modern vehicles and parts

On November 23, 2020, the U.S. Environmental Protection Agency ("EPA") updated its policy for enforcement of vehicle and engine tampering and aftermarket defeat devices under the Clean Air Act ("CAA"). This policy supersedes and replaces several previous enforcement guidance documents, most notably Mobile Source Memorandum 1A, published in June 1974, which has been the foundational guidance for the enforcement of tampering and aftermarket defeat device enforcement actions since its publication. The updated policy accounts for modern vehicle technology, which has drastically changed since 1974, and attempts to provide guidance on how EPA's enforcement approach.

PARTIES MUST HAVE A REASONABLE BASIS FOR THINKING CHANGES OR PARTS DO NOT AFFECT EMISSIONS

Section 203(a)(3) of the CAA, 42 U.S.C. § 7522(a)(3), prohibits the bypass, defeat, or removal or rending inoperative of emissions control devices, known as "tampering." This section also prohibits the manufacture, sale, offer for sale, or installation of any part or component intended to allow tampering. Section 213(d) of the CAA, 42 U.S.C. § 7547(d), extends these prohibitions to nonroad vehicles and engines. Examples of such prohibited parts are "delete kits," which include replacement exhaust pipes that remove aftertreatment systems, and "tuners" that reprogram engine computers and adversely affect emissions.

Under EPA's new policy, the agency will not take enforcement action for conduct that might be a violation of Section 203(a)(3) of the CAA if the party engaged in the conduct has a documented "reasonable basis" to conclude that the conduct does not and will not adversely affect emissions.

A party has a "reasonable basis" if it has written documentation that the part or action should not increase a vehicle's or engine's emissions. When determining whether service performed on an element of an emissions control system was illegal tampering, EPA will usually compare the element after the service to the element's fully-functioning certified configuration (or, if not certified, the original configuration), rather than to the element's configuration prior to the service.

EPA will typically consider the documentation of a reasonable basis to be relevant only if it exists at or ***before*** the time of the conduct that might be a potential violation. This may present practical problems for distributors of aftermarket parts, many of whom rely on information from suppliers.

The new guidance provides examples and explanations of what a party may use as documentation of a "reasonable basis" to determine that an act will not increase emissions and, therefore, not violate section 203(a), including:

- Replacement of certified parts with parts that are identical to the certified part. Such parts, typically referred to as replacement parts, perform identically with respect to emissions control as the original part to be replaced based on documentation showing the part is identical to the replaced part (including engineering drawings or similar documentation) or test results.
- Replacement of emissions aftertreatment systems with a system that is as effective as the vehicle's or engine's original system and is durable enough to last for a period of time equal to at least half of the vehicle's or engine's useful life. However, EPA is "unlikely to find that there is a reasonable basis if the system . . . is not on a list of applications approved by the after-treatment system manufacturer."
- Adding aftermarket aftertreatment systems that decrease a vehicle's or engine's emissions.
- Installation of non-original parts where testing data shows these parts do not adversely affect emissions and where the part or component is marketed as suitable only to the vehicles, engines, or equipment that are "appropriately represented" by the tested product.
- Installation of parts certified or approved by EPA and are installed on approved vehicles in an approved way.
- Installation of parts with a California Air Resources Board ("CARB") Executive Order.

The guidance provides details of the types of information a company should have to support each of these determinations, and a company must provide this documentation to EPA upon request.

EPA reviews companies' reasonable bases in an investigation. The agency will not pre-approve any reasonable bases. Therefore, each manufacturer, distributor, seller, or installer of aftermarket parts or software for on-road vehicles must ensure that it understands EPA's interpretations in order to substantiate its reasonable bases.

EPA'S POLICY DOES NOT APPLY TO CHANGES TO ON-BOARD DIAGNOSTICS ("OBD"), COMPETITION VEHICLES OR PARTS FOR COMPETITION VEHICLES, OR ORIGINAL EQUIPMENT MANUFACTURERS

Any conduct affecting a vehicle's OBD system, which diagnoses failures of emissions-related and controlling parts, "may be subject to enforcement regardless of effect on emissions." Thus, the reasonable basis test does not apply to any alterations to these systems. The reason for this carve-out seems to be concern with "[e]gregious examples of aftermarket defeat devices" that delete pollution controlling systems and reprogram the OBD system so that the vehicle's computer does not identify this modification.

The policy also does not apply to purpose-built race vehicles or equipment—i.e., vehicles and equipment originally built for and used exclusively in competition—and it does not apply to EPA-certified vehicles that are converted into competition vehicles or parts manufactured or sold for that purpose. This carve-out follows the widespread confusion caused by EPA in 2015 when it suggested, then backed away from, a position that EPA-certified vehicles could not be

converted to competition vehicles. *See* 80 Fed. Reg. 40138, 40527 (July 13, 2015) ("[I]f a motor vehicle is covered by a certificate of conformity at any point, there is no exemption from the tampering and defeat-device prohibitions that would allow for converting the engine or vehicle for competition use."); 81 Fed. Reg. 73478, 73529, 73957-58 (Oct. 25, 2016) (EPA declined to finalize its proposed statement concerning on-road vehicles used for competition). Despite this carve-out, it is not clear whether or how EPA will pursue cases involving the sale or installation of parts for use in competition, especially where those parts may fit EPA-certified vehicles.

Finally, this policy does not affect original equipment manufacturers, many of whom submit running changes or field fixes for changes to their certified vehicles or engines.

EPA'S NEW POLICY IS NOT AS STRICT AS CARB'S RECENT POLICY

EPA's updated policy comes several months after CARB issued its own aftermarket enforcement policy in July 2020.

In contrast to EPA's policy, which attempts to provide guidance regarding how companies can comply with the CAA and carves-out competition vehicles, CARB's policy applies a "strict liability" standard to the sale and installation of any part that is used illegally, even if that part was sold for use solely in off-road competition. Thus, CARB has taken an aggressive approach to enforcement.

The different approach in California is largely because California law prohibits the importation, sale, installation, and use of non-original, non-replacement parts unless certified by CARB. Thus, CARB is more active in reviewing and regulating aftermarket parts than EPA. However, companies involved with the sale, distribution, or installation of aftermarket parts in all 50 states must ensure they comply with both regulatory regimes.

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