

Preview of the Draft “EPA Tampering Policy” for Stakeholder Awareness September 2018

Purpose: EPA plans update to Clean Air Act (“Act”) enforcement policy concerning vehicle and engine tampering and aftermarket defeat devices. This policy will be called the “EPA Tampering Policy.” This update will restate long-standing enforcement policy, but in terms of today’s technology and in a single document. It will also replace a 1986 enforcement policy regarding replacement catalytic converters to align with today’s state-of-the art converters. This updated policy will complement the Agency’s enforcement efforts, which are ongoing and focused on companies that are defeating the emissions controls designed to protect air quality. Resolved vehicle and engine enforcement cases are available at <https://www.epa.gov/enforcement/clean-air-act-vehicle-and-engine-enforcement-case-resolutions>.

Scope of Policy: The EPA Tampering Policy will address civil enforcement of the Act’s prohibitions on tampering and aftermarket defeat devices. CAA § 203(a)(3), 42 U.S.C. § 7522(a)(3), and 40 C.F.R. § 1068.101. These prohibitions concern all vehicles, engines and equipment that are subject to the Act. These prohibitions apply to companies who service vehicles and engines or who manufacture, sell, and install aftermarket parts (e.g., catalytic converters, performance parts, software and hardware). The Policy will *not* address any conduct already addressed by EPA regulation (such as locomotive engine remanufacturing), nor any provision of the Act other than the prohibitions on tampering and aftermarket defeat devices. The Policy will not address EPA-certified motor vehicles that are converted into a vehicle used solely for competition motorsports, nor aftermarket parts purportedly manufactured or sold for that purpose. The EPA intends to finalize the EPA Tampering Policy no later than December 2018. For replacement catalysts for out-of-warranty light-duty gasoline vehicles within the scope of the 1986 Catalyst Policy, EPA will continue to adhere to the 1986 Catalyst Policy until 18 months after the EPA Tampering Policy is finalized at which point EPA will adhere to that policy.

Synopsis of draft EPA Tampering Policy:

- The EPA Tampering Policy will supersede and replace the following: Mobile Source Enforcement Memorandum 1A (June 25, 1974); Sale and Use of Aftermarket Catalytic Converters, 51 Fed. Reg. 28,114 and 51 Fed. Reg. 28,132 (August 5, 1986) (“1986 Catalyst Policy”); Exhaust System Repair Guidelines (March 13, 1991); Engine Switching Fact Sheet (March 13, 1991). The EPA Tampering Policy would consolidate and restate the principles of these policies, but state these principles in terms of today’s technology and for all vehicles, engines, and equipment subject to the Act’s prohibitions on tampering and aftermarket defeat devices.
- The Policy will, in plain language, answer common questions from service technicians and parts manufacturers and thereby prevent violations. For example, the Policy will state that where a person is asked to perform service on an element of an emission control system that has already been tampered, the EPA will generally take no enforcement action if the person restores the element to its certified configuration or declines to perform the service.
- The Policy will establish a uniform enforcement stance for all replacement after-treatment systems (not just catalysts for older, gasoline, light-duty vehicles, but also, for example, diesel particulate filters).
- This is not a rulemaking; the Policy creates no obligations on regulated parties, but instead describes how EPA will exercise enforcement discretion in this area.

- The centerpiece of the EPA Tampering Policy will be the following statement (or similar):

The EPA typically does not take enforcement action for conduct that may be a violation of § 203(a)(3) if the person performing the conduct has a documented “reasonable basis” demonstrating that the conduct (or, where the conduct in question is the manufacturing or sale of a part or component, the installation and use of that part or component) does not adversely affect emissions. This Policy Statement does not apply, however, to conduct affecting an OBD systems, which is subject to enforcement regardless of effect on emissions.

- The Policy will identify several ways that a person may document that they had a “reasonable basis” as follows:

A. **Identical to Certified Configuration:** The EPA will typically find that a person has a reasonable basis for conduct if that conduct:

- (1) is solely for the maintenance, repair, rebuild, or replacement of an emissions-related element of design; and
- (2) restores that element of design to be identical in all emissions-related respects to the certified configuration (or, if not certified, the original configuration) of the vehicle, engine, or piece of equipment.

B. **Emissions Testing for Replacement After-Treatment Systems for Older Vehicles, Engines, and Equipment:** The EPA will typically find that a person has a reasonable basis for conduct if:

- (1) that conduct involves a replacement after-treatment system, the replacement after-treatment system is used to replace the same kind of system on a vehicle, engine, or piece of equipment, and that replaced system is beyond its emissions warranty; and
- (2) emissions testing shows that the vehicle, engine, or equipment with the replacement after-treatment system will meet all applicable emissions standards for an amount of time or distance (as applicable) that is equivalent to at least 75% of the original regulatory useful life of the vehicle, engine, or equipment; and
- (3) the replacement after-treatment system is warranted to last, both in terms of emissions performance and structural integrity, for an appropriate amount of time or distance (as applicable) that is equivalent to a minimum 5 years or 50% of the original regulatory useful life of the vehicle, engine, or equipment, whichever occurs first.

C. **New After-Treatment Systems that Decrease Emissions:** The EPA will typically find that a person has a reasonable basis for conduct if:

- (1) that conduct involves mechanically adding an after-treatment system where none previously existed;
- (2) the after-treatment system is added into the exhaust of a vehicle, engine, or piece of equipment;
- (3) the vehicle, engine, or piece of equipment is EPA-certified as having no such system and originally manufactured without any such system; and

- (4) any person familiar with emission control system design and function would reasonably believe adding the system would decrease emissions.

- D. **Emissions Testing:** The EPA will typically find that a person has a reasonable basis for conduct if:
- (1) that conduct alters a vehicle, engine, or piece of equipment;
 - (2) emissions testing of an appropriate test vehicle, engine, or piece of equipment that had been identically altered by the conduct shows that the vehicle, engine, or piece of equipment will comply with all applicable regulations including emissions standards for its full useful life; and
 - (3) (if the conduct includes the manufacture, sale, or offering for sale of a part or component) that part or component is marketed as applicable only to those vehicles, engines, or pieces of equipment that are appropriately represented by the tested product.
- E. **EPA Certification:** The EPA will typically find that a person has a reasonable basis for conduct if the emissions-related element of design that is the object of the conduct (or the conduct itself) has been certified by the EPA under 40 C.F.R. Part 85 Subpart V (or any other applicable EPA certification program).
- F. **CARB Certification:** The EPA will typically find that a person has a reasonable basis for conduct if the emissions-related element of design that is the object of the conduct (or the conduct itself) has been certified by the California Air Resources Board. In the case of an aftermarket part or component, the EPA will consider certification from CARB to be relevant even where the certification for that part or component is no longer in effect due solely to passage of time.

Opportunity for Discussion: The EPA would like to discuss any questions or concerns you may have. Please contact Mr. Belser and Ms. Cook (below) and we will make time to meet and discuss.

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