

October 14, 2020

CALIFORNIA AIR RESOURCES BOARD URGES SELF-DISCLOSURE OF NON-COMPLIANT SOFTWARE AND REGULATORY VIOLATIONS BY DECEMBER 31, 2020

To Our Clients and Friends:

On October 14, 2020, the California Air Resources Board (CARB) issued a letter to light-, medium-, and heavy-duty vehicle and engine manufacturers encouraging industry to report any hardware or software changes made to their vehicles or engines if such changes (i) affect emissions and (ii) were not previously or properly disclosed to CARB. The letter indicates that the agency is in the process of selecting new targets for investigation and is implementing new enhanced testing to identify potential violations. In connection with this forthcoming enforcement initiative, CARB urges industry to proactively and voluntarily disclose any violations under California mobile source regulations before the end of this year. Companies that do so could secure a reduction in penalties ranging from 25% to 75%, depending on the relevant facts and circumstances of the case.

Background. California law, like the federal Clean Air Act, requires manufacturers to disclose all auxiliary emission control devices (“AECs”) at the time a particular vehicle or engine is submitted for certification. California and federal law also prohibit the installation of any AEC that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use, unless certain exceptions apply. Such functions are referred to as defeat devices. These requirements, or other reporting requirements, apply to a number of mobile source categories including light-duty vehicles, heavy-duty on-road engines and vehicles, highway motorcycles, off-road compression ignition engines, off-road small and large spark-ignition engines, off-highway recreational vehicles, spark-ignition marine engines, and evaporative systems for off-road small and large equipment and marine watercraft.

CARB’s October 14 letter builds upon, and incorporates by reference, a September 25, 2015 letter sent by CARB to light-, medium-, and heavy-duty vehicle and engine manufacturers in the wake of the Volkswagen diesel emissions scandal related to its installation of defeat devices in its 2.0L and 3.0L diesel vehicles and reporting issues related thereto. That letter reiterated manufacturers’ obligations to disclose all AECs at the time of certification, and informed industry of CARB’s intent to begin implementing a robust testing program in support of CARB’s enforcement efforts designed to screen for undisclosed AECs and defeat devices.

CARB's letter explains that through this expanded testing program, since 2015, it has achieved multiple settlements with vehicle and engine manufacturers. It further notes that certain manufacturers have “stepped forward” to disclose potential violations, and it encourages others to make voluntary disclosures of any potential violations with respect to the applicable regulatory requirements.

Finally, the letter states that CARB currently is identifying new targets for investigation and plans to open a new, state-of-the-art testing laboratory in 2021, which will better enable it to identify violations related to vehicles and engines sold in California.

Potential Violations Highlighted in the Letter. The letter lists the specific violation types CARB is presently investigating and for which it encourages manufacturers to make proactive reports:

- Undisclosed AECDs
- Defeat Devices
- Unreported Running Changes and Field Fixes
- Failure to Report or Address Warranty Claims
- Manufacturer In-Use Compliance Testing and Manufacturer’s Self-Testing
- Failure to Report Corrective Actions that Should be Under a CARB Approved Recall
- Submission of False Data or Non-Compliance with Regulatory Test Requirements
- Failure to Meet OBD Requirements
- Failure to Disclose Adjustable Parameters that May Affect Emissions

CARB’s Request for Self-Disclosure. The letter concludes by urging manufacturers to voluntarily disclose any potential violations in the above-listed categories by the end of 2020, and reiterates CARB’s authority to enforce California’s emissions laws against noncompliant manufacturers, including through the assessment of maximum penalties of \$37,500 per mobile source or engine, per identified violation. CARB states that voluntary disclosure “will trigger a reduction in penalties,” whereas failure to make a voluntary disclosure could result in future enforcement actions or influence ongoing investigations by CARB.

CARB’s letter states that this initiative reflects California’s ongoing efforts to meet existing and future air quality targets and to protect affected communities in the state from the effects of exposure to air pollution.



Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm’s Environmental Litigation and Mass Tort practice group, or the following practice leaders and authors in Washington, D.C.:

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