UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C., 20460

JUN 21 2019

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Expedited Settlement Agreement Pilot for Clean Air Act Vehicle and Engine Violations - Tampering/Defeat Devices

FROM: Rosemarie A. Kelley, Director
Office of Civil Enforcement

TO: Air Enforcement Division
Regional Counsels
Enforcement and Compliance Assurance Divisions Directors

This memorandum describes a new Expedited Settlement Agreement ("ESA") Pilot for Clean Air Act ("CAA") Vehicle and Engine Violations - Tampering/Defeat Devices ("Pilot"). The Pilot is a tool to more efficiently resolve cases that involve certain violations of the CAA. This Pilot rescinds and replaces the 2008 Expedited Settlement of Vehicle and Engine Violations Memorandum ("2008 ESA Memo"), which initially piloted and established an expedited settlement process for resolving violations of the vehicle and engine requirements of Part A of Title II of the CAA. The Air Enforcement Division ("AED") intends to complete an evaluation of this Pilot three years from its effective date. After three years, the Pilot may continue to be implemented unless otherwise revised or rescinded.

1. Purpose and Goals

The goal of the Pilot is to expedite resolution of a limited group of claims concerning illegal tampering of vehicles and engines or the sale, offering for sale, or installation of what are commonly known as aftermarket defeat devices on vehicles and engines[1] in cases which generally involve a civil penalty of $50,000 or less. In a separate memorandum, the Office of Civil Enforcement ("OCE") is launching an ESA Program for CAA violations concerning illegal importations of vehicles and engines.

The Pilot allows higher ESA penalties compared to the 2008 ESA Memo, provides an updated penalty approach and facilitates the expansion of the vehicle and engine enforcement program to the Regions. It is also consistent with the 2014 Revised Guidance on the Use of Expedited Settlement Agreements.

To allow new Regional participants to gain sufficient experience with its implementation, this Pilot will last for three years from the date of this memorandum. AED will then evaluate the Pilot. Beginning in 2020, AED will conduct an annual check-in with participants to review adherence to the parameters outlined in this Pilot.

[1] Manufacturers of defeat devices do not fall within the scope of this Pilot unless the Region obtains prior written concurrence from AED.

Regions are expected to work with AED when using ESAs under this Pilot. Unless AED has waived concurrence for a given Region, Regions shall obtain AED's concurrence on ESA packages under this Pilot.

2. Covered Violations

Cases with the following parameters are generally suitable for ESA resolution under this Pilot. Case teams are expected to exercise sound judgement on when to pursue a matter under this Pilot, versus use of other enforcement and compliance tools.

a) The violations are tampering and/or defeat device prohibitions of Section 203(a)(3) of the CAA, 42 U.S.C § 7522(a)(3), or the equivalent prohibitions for nonroad vehicles and engines in 40 C.F.R. § 1068.101(b);
b) The case involves a first-time violator(s), rather than a repeat violator(s) as defined in Section 4 below;
c) The case involves allegations concerning less than 50 tampered vehicles and less than 50 defeat devices. Cases involving larger quantities may be addressed under this Pilot only with concurrence from AED.
d) Following the methodology described in Section 5 below, the total proposed penalty does not exceed $50,000;[2]
    i) Matters for which the total proposed penalty is $50,001 to $100,000 may be resolved by an ESA only with concurrence from AED;
    ii) Matters for which the total proposed penalty exceeds $100,000[3] require an administrative resolution in accordance with the requirements of 40 C.F.R. Part 22 ("Part 22") or, in appropriate circumstances, a judicial resolution;
e) The violation(s) occur within the issuing office's geographic boundaries. For AED, the geographic boundaries are anywhere EPA has jurisdiction; for Regions, if the respondent's primary place of business is outside its geographic boundaries, the Region is expected to consult with the Region in which the respondent's primary place of business is located to coordinate regarding the enforcement action (AED may be consulted as needed);
f) The case does not involve a Respondent engaged in fleet[4] tampering unless AED has waived this provision in writing; and
g) The case does not involve indicia of criminal or fraudulent behavior[5] and there are no apparent reasons why the case should not be resolved in an expedited manner.

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[2] The 2008 ESA Memo recommended using ESAs for matters with penalties below $10,000. This Pilot raises the penalty ceiling allowing EPA to increase its enforcement presence and operation efficiency for matters where an ESA is appropriate.
[3] This cap may be revisited in the future to account for inflation and other factors as appropriate.
[4] Examples of fleet vehicles include, but are not limited to delivery, service, drayage, or long haul vehicles, as well as vehicles used as taxis or in ride-hailing services. If there is any question about the application of this provision to a case, please contact AED.
[5] Case teams should refer such suspected violations to EPA's Criminal Investigation Division or the appropriate criminal enforcement authorities.

3. Timely Return to Compliance

To ensure fast resolution, the respondent has 30 calendar days from receipt of the ESA offer letter to adequately respond before the ESA is automatically withdrawn. Extensions may be granted to extend the deadline up to an additional 60 days (total of 90 days) provided respondents timely request the extension and provide reasonable justification for their request. Extensions must be requested within 30 days from the respondent's receipt of the ESA offer letter and documented by EPA when granted. An adequate response includes returning the signed agreement, paying the penalty, and providing documentation for corrected violations if specified in the terms. In general, violations charged under this Pilot often cannot reasonably be corrected. This is especially true in the case of respondents that tampered vehicles which they no longer possess. Considering these practical limitations, ESAs under this Pilot should not require recalls of vehicles, engines, or parts. Where the respondent has the custody or control of the vehicle/engine alleged to have been tampered, or where defeat devices remain in the respondent's possession, correction may be practical and ESAs should require such correction. Signed and electronically transmitted versions of the agreement may be used to assist with the expedited time frame.

4. Repeat Violators

ESAs may not be offered to repeat violators.

For purposes of this Pilot, a repeat violator is defined as one who, in the past five years, has had the same or a closely-related violation(s) that was the subject of an enforcement action. A "closely-related" violation means any CAA Title II violation. In evaluating potential repeat violators, case teams should consider prior violation(s) of corporate predecessors in interest, and cases where a principal(s) or individual(s) involved in a different business or entity had similar violation(s). Prior enforcement actions include a previously ratified ESA, Consent Agreement and Final Order ("CAFO"), Complaint, or judicial enforcement action. Prior enforcement actions under similar State or local laws may also be considered.

5. Penalty Reductions

To expedite settlements and encourage a timely return to compliance, this Pilot provides an alternative penalty calculation approach, which generally results in a reduced amount compared to the minimum calculation derived from the applicable vehicle and engine penalty policy.

Historically, vehicle and engine ESAs have reduced penalties by over 50 percent. A primary goal for calculating a significantly reduced penalty is to provide case teams with the flexibility needed to expeditiously resolve matters under this Pilot.

This Pilot addresses two categories of violations. The first category encompasses "tampering" violations, which arise under Section 203(a)(3)(A) of the CAA, 42 U.S.C. § 7522(a)(3)(A), or 40 C.F.R. § 1068.101(b). In short, these laws prohibit removing or rendering inoperative any aspect of a motor vehicle's emission control system. Multiple acts of tampering observed on a single vehicle during an investigation (as documented by inspection, work orders, or other investigative tools) should be counted as a single tampering violation for the purposes of calculating a penalty under this Pilot. The penalty for each tampering violation shall be at least twenty percent (20%), but not more than fifty percent (50%) of

the statutory maximum per violation. For example, the penalty amount for a single tampering violation that occurred after November 2, 2015, and before February 6, 2019, would be 20-50% of $4,619 or $924-$2,310. 40 C.F.R. § 19.4.

Case teams also have the discretion to assess and charge a second category of violations related to aftermarket parts under this Pilot: violations that arise under Section 203(a)(3)(B) of the CAA, 42 U.S.C.§ 7522(a)(3)(B), or 40 C.F.R. § 1068.101(b). These are prohibitions against selling, offering to sell, or installing any part or component whose principal effect is to bypass, defeat, or render inoperative a motor vehicle emission control device or element of design (i.e., a "defeat device"), where the person knows or should know that the part is being offered for sale or installed for such use. Under this Pilot, such violations are referred to as "defeat device" violations, and case teams should count one such violation per product or unit. For example, if a respondent sold ten defeat devices and installed them as well, this should constitute ten violations (and these would be violations in addition to violations alleged for "tampering"). The penalty amount should be calculated as at least ten percent (10%), but not more than forty percent (40%), of the statutory maximum per violation. For example, the penalty amount for a single defeat device violation that occurred after November 2, 2015, and before February 6, 2019, would be 10-40% of $4,619 or $462-$1,848. 40 C.F.R. § 19.4.

Factors to consider when determining the appropriate penalty amount include the number of acts of tampering on a single vehicle/engine, the size of the vehicles/engines involved, the extent of the tampering conducted (e.g., the penalty amount for a fully deleted vehicle/engine should be higher than the penalty for tampering that does not affect filters and catalysts), and whether a respondent committed more than one of the following for each violation count: sold, offered for sale, and/or installed. Case teams are expected to document in the case file the factors considered in assessing the penalty.

Inflation adjustments do not need to be made because the penalty is tied to the statutory maximum, which already evolves over time with inflation.

The approach described above is expected to simplify the penalty calculation for matters resolved under this Pilot and eliminate the need for a more resource intensive analysis that comes with calculating economic benefit, gravity, and other penalty adjustments.

6. Model ESA Documents

See attached for a model ESA package for vehicle and engine tampering and defeat device violations based on AED's guidance.[6] This package includes an ESA offer letter template, terms, and tables describing the information collected and violation(s) charged.

Questions about this Pilot may be directed to Evan Belser, Acting Associate Director, Air Enforcement Division. Mr. Belser can be reached at (202) 564-6850 and belser.evan@epa.gov.

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[6] Authorized by CAA § 205(c)(1), 42 U.S.C. § 7524(c)(1), AED's model ESA package represents an informal administrative process to resolve matters under this Pilot. The formal administrative process is described by Part 22. Participants choosing to resolve ESAs using the Part 22 procedures should make modifications to their ESA packages necessary to ensure compliance with Part 22.

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

Amy Doe
ABC Company LLC
12345 Road
Big City, CA 00000

Re: Docket No. XX-XX-XXXX

Dear Ms. Doe:

An authorized representative of the United States federal government conducted an inspection to determine your company's compliance with the Clean Air Act (CAA) and regulations promulgated thereunder. The details of this inspection are outlined in the enclosed Clean Air Act Vehicle and Engine Expedited Settlement Agreement (Agreement). As a result of the inspection, it was determined that your company failed to comply with the CAA and the associated regulations. The Agreement describes the violations.

Based upon the information we currently have, it appears your company has not previously been found in violation of the CAA. Because of this, you may resolve violations using an expedited process that involves significantly lower penalties than those sought through the normal settlement process. The United States Environmental Protection Agency (EPA) is authorized to enter into the Agreement under the authority vested in the EPA Administrator by Section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1). Should your company violate the CAA in the future, the EPA does not intend to offer this expedited process again. After the Agreement becomes effective, the EPA will take no further civil penalty action against your company for the violation(s) described in the Agreement. However, the EPA does not waive any rights to take an enforcement action for any other past, present, or future violations of the CAA or of any other federal statute or regulation.

If you do not sign and return the enclosed Agreement as presented within **30 calendar days** of its receipt, and meet all of your obligations under the Agreement, the proposed Agreement is withdrawn, with no need of additional notice to you, and without prejudice to the EPA's ability to file any other enforcement action for the violation(s) identified in the Agreement and seek penalties of up to $X,XXX per violation pursuant to 40 C.F.R. § 19.4. Please refer to "CAA Vehicle and Engine Expedited Settlement Agreement Instructions," attached, for instructions on accepting this Agreement.

Please contact [EPA contact name] at (123) 123-4567 or [EPA contact email] with any questions.

Sincerely,

[Delegated Official Name], [Title]
[EPA Program/Office/Division]

Enclosure

Enclosure
CLEAN AIR ACT VEHICLE AND ENGINE EXPEDITED SETTLEMENT AGREEMENT

DOCKET NO. XX-XX-XXXX

Respondent: ABC Company LLC
12345 Road
City, State, Zip

1. The parties enter into this Clean Air Act Vehicle and Engine Expedited Settlement Agreement (Agreement) in order to settle the civil violation(s) discovered as a result of the inspection(s) specified in Table 1, attached, incorporated into this Agreement by reference. The civil violation(s) that are the subject of this Agreement are described in Table 2, attached, incorporated into the Agreement by reference, regarding the vehicle(s)/engine(s) specified therein.

2. Respondent admits to being subject to the Clean Air Act (CAA) and its associated regulations and that the United States Environmental Protection Agency (EPA) has jurisdiction over the Respondent and the Respondent's conduct described in Table 2. Respondent neither admits nor denies the findings detailed therein, and waives any objections Respondent may have to the EPA's jurisdiction.

3. Respondent certifies that payment of the penalty has been made in the amount of **$X,XXX**. Respondent has followed the instructions in "CAA Vehicle and Engine Expedited Settlement Agreement Instructions," attached, incorporated into this Agreement by reference. Respondent certifies that the required remediation, specified in Table 3 and incorporated into this Agreement by reference, has been carried out.

4. By its first signature below, the EPA approves the findings resulting from the inspection(s) and alleged violation(s) set forth in Table 1 and Table 2. Upon signing and returning this Agreement to the EPA, Respondent consents to the terms of this Agreement without further notice. Respondent acknowledges that this Agreement is binding on the parties signing below, and becomes effective on the date of the EPA Delegated Official's ratifying signature.

5. The parties consent to service of this Agreement by electronic delivery at the Respondent's e-mail noted below.

APPROVED BY EPA:

_____ Date:_____
Delegated Official: Name, Title

APPROVED BY RESPONDENT:

Name (print):_____

Title (print):_____ Email (print):_____

_____

Signature:_____ Date:_____

RATIFIED BY EPA:

_____ Date:_____
Delegated Official: Name, Title

Table 1 - Information Collection	
Date(s) Information Collected:	**Docket Number:**
Respondent Location:	
City:	**Inspector(s) Name(s):**
State: **Zip Code:**	**EPA Approving Official:**
Respondent:	**EPA Enforcement Contact(s):**

Table 2 - Description of Violations and Vehicles/Engines

EPA obtained evidence that [ABC Company] (Respondent) tampered with the vehicle(s)/engine(s) listed below. EPA obtained evidence that Respondent [installed, and/or sold, and/or offered for sale] defeat devices, products listed below which render inoperative emission control systems on EPA-certified motor vehicles and/or. [Insert other case-specific facts as needed such as the type of evidence available to substantiate the claims and how the evidence was obtained]. It is a violation of Section 203(a)(3)(A) of the CAA, 42 U.S.C. § 7522(a)(3)(A) to tamper with EPA-certified vehicles and engines. It is a violation of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B) to sell, offer for sale, and install defeat device intended for use with EPA-certified motor vehicles and engines. Based on information summarized below, EPA finds that Respondent has committed XX violations of Section 203(a)(3) of the CAA, 42 U.S.C. § 7522(a)(3).

Tampered Motor Vehicle/Engine Violation(s)

Tampering Date(s)	Model Year	Make	Model	License Plate	Tampered Emission Parts or Components

Defeat Device Violation(s)

Defeat Device Description	Make	Part #	Quantity	Sold, installed, and/or offered for sale?	Date Range

Table 3 - Penalty and Required Remediation	
Penalty	$X,XXX
Required Remediation	In addition to paying the monetary penalty, Respondent must cease and refrain from purchasing, selling, or installing any device that defeats, bypasses, or otherwise renders inoperative an emission component of any motor vehicle or engine regulated by the EPA. Respondent must cease and refrain from tampering with emission control systems on EPA-certified motor vehicles and engines. Respondent acknowledges receipt of the Compliance Plan attached as Appendix A.

CAA VEHICLE AND ENGINE EXPEDITED SETTLEMENT AGREEMENT INSTRUCTIONS

Within 30 days from your receipt of the Agreement, you must pay the penalty as described below:

Payment method 1 – Preferred (electronic): Pay online through the Department of the Treasury using WWW.PAY.GOV. In the Search Public Form field, enter SFO 1.1, click EPA Miscellaneous Payments - Cincinnati Finance Center and complete the SFO Form Number 1.1. The payment shall be identified in the online system with Docket Number listed below.

On the same day after submitting your payment, send an email to cinwd_acctsreceivable@epa.gov and the EPA contact email address noted below. Include in the subject line: "Payment Confirmation for [Respondent] Docket Number [XX-XX-XXXX]." Attach a copy of the Agreement and your payment receipt to the email.

Payment method 2 (check): Mail, via CERTIFIED MAIL, a certified check payable to the United States of America marked with [Respondent], and the Docket Number listed below, with a copy of the Agreement to:

U. S. Environmental Protection Agency Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000
Attn: Docket Number [XX-XX-XXXX]

Within 30 days from your receipt of the Agreement, you must email [insert EPA contact's e-mail address] a scanned copy of the original signed Agreement, the documentation of your Required Remediation corrective action(s) taken, and proof of payment (meaning, as applicable, a photocopy of the original certified penalty check or confirmation of electronic payment). If you prefer to mail this information via CERTIFIED MAIL, you may contact the EPA at the number listed below to arrange (Note that mailed information must be postmarked within 30 days of your receipt of the Agreement).

If you have any questions or would like to request an extension due to extraordinary circumstances, you may contact [EPA contact name] at (123) 123-4567. The EPA will consider whether to grant an extension on a case-by-case basis where appropriate justification is provided. The EPA will not accept or approve any Agreement returned more than 30 days after the date of your receipt of the Agreement unless an extension has been granted by the EPA. If you believe that the alleged violations are without merit (and you can provide evidence contesting the allegations), you must provide such information to the EPA as soon as possible but no later than 30 days from your receipt of the Agreement.

Unless an extension has been granted in writing by the EPA, if you do not sign and return the Agreement with proof of payment of the penalty amount and a report detailing your corrective action(s) within 30 days of your receipt of the Agreement, the Agreement is automatically withdrawn, without prejudice to the EPA's ability to file an enforcement action for the above or any other violations. Failure to return the Agreement within the approved time does not relieve you of the responsibility to comply fully with the regulations, including correction of the violation(s) specifically identified in the enclosed Tables. If you choose not to enter into this Agreement and fully comply with its terms, the EPA may pursue more formal enforcement measures to correct the violation(s) and seek penalties of up to $X,XXX per violation pursuant to 40 C.F.R. § 19.4.

Appendix A:

Compliance Plan to Avoid Illegal Tampering and Aftermarket Defeat Devices

This document explains how to help ensure compliance with the Clean Air Act's prohibitions on tampering and aftermarket defeat devices. The document specifies what the law prohibits, and sets forth two principles to follow in order to prevent violations.

The Clean Air Act Prohibitions on Tampering and Aftermarket Defeat Devices

The Act's prohibitions against tampering and aftermarket defeat devices are set forth in section 203(a)(3) of the Act, 42 U.S.C. § 7522(a)(3), (hereafter "§ 203(a)(3)"). The prohibitions apply to all vehicles, engines, and equipment subject to the certification requirements under sections 206 and 213 of the Act. This includes all motor vehicles (e.g., light-duty vehicles, highway motorcycles, heavy-duty trucks), motor vehicle engines (e.g., heavy-duty truck engines), nonroad vehicles (e.g., all-terrain vehicles, off road motorcycles), and nonroad engines (e.g., marine engines, engines used in generators, lawn and garden equipment, agricultural equipment, construction equipment). Certification requirements include those for exhaust or "tailpipe" emissions (e.g., oxides of nitrogen, carbon monoxide, hydrocarbons, particulate matter, greenhouse gases), evaporative emissions (e.g., emissions from the fuel system), and onboard diagnostic systems.

The prohibitions are as follows:

> "The following acts and the causing thereof are prohibited–"
>
> > **Tampering:** CAA § 203(a)(3)(A), 42 U.S.C. § 7522(a)(3)(A), 40 C.F.R. § 1068.101(b)(1): "for any person to remove or render inoperative any device or element of design installed on or in a [vehicle, engine, or piece of equipment] in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser;"
> >
> > **Defeat Devices:** CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B), 40 C.F.R. § 1068.101(b)(2): "for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any [vehicle, engine, or piece of equipment], where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a [vehicle, engine, or piece of equipment] in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use."

Section 203(a)(3)(A) prohibits tampering with emission controls. This includes those controls that are in the engine (e.g., fuel injection, exhaust gas recirculation), and those that are in the exhaust (e.g., filters, catalytic convertors, and oxygen sensors). Section 203(a)(3)(B) prohibits (among other things) aftermarket defeat devices, including hardware (e.g., certain modified exhaust pipes) and software (e.g., certain engine tuners and other software changes).

The EPA's longstanding view is that conduct that may be prohibited by § 203(a)(3) does not warrant enforcement if the person performing that conduct has a documented, reasonable basis for knowing that the conduct does not adversely affect emissions. *See* Mobile Source Enforcement Memorandum 1A (June 25, 1974).

The EPA evaluates each case independently, and the absence of such reasonable basis does not in and of itself constitute a violation. When determining whether tampering occurred, the EPA typically compares the vehicle after the service to the vehicle's original, or "stock" configuration (rather than to the vehicle prior to the service). Where a person is asked to perform service on an element of an emission control system that has already been tampered, the EPA typically does not consider the service to be illegal tampering if the person either declines to perform the service on the tampered system or restores the element to its certified configuration.

Below are two guiding principles to help ensure Respondent commits no violations of the Act's prohibitions on tampering and aftermarket defeat devices.

Principle 1: Respondent Will Not Modify any On Board Diagnostic ("OBD") System

Respondent will neither remove nor render inoperative any element of design of an OBD system.[i] Also, Respondent will not manufacture, sell, offer for sale, or install any part or component that bypasses, defeats, or renders inoperative any element of design of an OBD system.

Principle 2: Respondent Will Ensure There is a *Reasonable Basis* for Conduct Subject to the Prohibitions

For conduct unrelated to OBD systems, Respondent will have a *reasonable basis* demonstrating that its conduct[ii] does not adversely affect emissions. Where the conduct in question is the manufacturing or sale of a part or component, Respondent must have a *reasonable basis* that the installation and use of that part or component does not adversely affect emissions. Respondent will fully document its *reasonable basis*, as specified in the following section, at or before the time the conduct occurs.

Reasonable Bases

This section specifies several ways that Respondent may document that it has a "reasonable basis" as the term is used in the prior section. In any given case, Respondent must consider all the facts including any unique circumstances and ensure that its conduct does not have any adverse effect on emissions.[iii]

A. **Identical to Certified Configuration:** Respondent generally has a reasonable basis if its conduct: is solely for the maintenance, repair, rebuild, or replacement of an emissions-related element of design; and restores that element of design to be identical to the certified configuration (or, if not certified, the original configuration) of the vehicle, engine, or piece of equipment.[iv]

B. **Replacement After-Treatment Systems:** Respondent generally has a reasonable basis if the conduct:

(1) involves a new after-treatment system used to replace the same kind of system on a vehicle, engine or piece of equipment and that system is beyond its emissions warranty; and

(2) the manufacturer of that system represents in writing that it is appropriate to install the system on the specific vehicle, engine or piece of equipment at issue.

C. **Emissions Testing:**[v] Respondent generally has a reasonable basis if the conduct:

(1) alters a vehicle, engine, or piece of equipment;

(2) emissions testing shows that the altered vehicle, engine, or piece of equipment will meet all applicable emissions standards for its full useful life; and

(3) where the conduct includes the manufacture, sale, or offering for sale of a part or component, that part or component is marketed only for those vehicles, engines, or pieces of equipment that are appropriately represented by the emissions testing.

D. **EPA Certification:** Respondent generally has a reasonable basis 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).[vi]

E. **CARB Certification:** Respondent generally has a reasonable basis 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 ("CARB").[vii]

ENDNOTES

[i] *OBD system* includes any system which monitors emission-related elements of design, or that assists repair technicians in diagnosing and fixing problems with emission-related elements of design. If a problem is detected, an OBD system should record a diagnostic trouble code, illuminate a malfunction indicator light or other warning lamp on the vehicle instrument panel, and provide information to the engine control unit such as information that induces engine derate (as provided by the Original Equipment Manufacturer) due to malfunctioning or missing emission-related systems. Regardless of whether an element of design is commonly considered part of an OBD system, the term "OBD system" as used in this Appendix includes any element of design that monitors, measures, receives, reads, stores, reports, processes or transmits any information about the condition of or the performance of an emission control system or any component thereof.

[ii] Here, the term *conduct* means: all service performed on, and any change whatsoever to, any emissions-related element of design of a vehicle, engine, or piece of equipment within the scope of § 203(a)(3); the manufacturing, sale, offering for sale, and installation of any part or component that may alter in any way an emissions-related element of design of a vehicle, engine, or piece of equipment within the scope of § 203(a)(3), and any other act that may be prohibited by § 203(a)(3).

[iii] General notes concerning the Reasonable Bases: Documentation of the above-described reasonable bases must be provided to EPA upon request, based on the EPA's authority to require information to determine compliance. CAA § 208, 42 U.S.C. § 7542. The EPA issues no case-by-case pre-approvals of reasonable bases, nor exemptions to the Act's prohibitions on tampering and aftermarket defeat devices (except where such an exemption is available by regulation). A reasonable basis consistent with this Appendix does not constitute a certification, accreditation, approval, or any other type of endorsement by EPA (except in cases where an EPA Certification itself constitutes the reasonable basis). No claims of any kind, such as "Approved [or certified] by the Environmental Protection Agency," may be made on the basis of the reasonable bases described in this Policy. This includes written and oral advertisements and other communication. However, if true on the basis of this Appendix, statements such as the following may be made: "Meets the emissions control criteria in the United States Environmental Protection Agency's Tampering Policy in order to avoid liability for violations of the Clean Air Act." There is no reasonable basis where documentation is fraudulent or materially incorrect, or where emissions testing was performed incorrectly.

[iv] Notes on Reasonable Basis A: The conduct should be performed according to instructions from the original equipment manufacturer (OEM) of the vehicle, engine, or equipment. The "certified configuration" of a vehicle, engine, or piece of equipment is the design for which the EPA has issued a certificate of conformity (regardless of whether that design is publicly available). Generally, the OEM submits an application for certification that details the designs of each product it proposes to manufacture prior to production. The EPA then "certifies" each acceptable design for use, in the upcoming model year. The "original configuration" means the design of the emissions-related elements of design to which the OEM manufactured the product. The appropriate source for technical information regarding the certified or original configuration of a product is the product's OEM. In the case of a replacement part, the part manufacturer should represent in writing that the replacement part will perform identically with respect to emissions control as the replaced part, and should be able to support the representation with either: (a) documentation that the replacement part is identical to the replaced part (including engineering drawings or similar showing identical dimensions, materials, and design), or (b) test results from emissions testing of the replacement part. In the case of engine switching, installation of an engine into a different vehicle or piece of equipment by any person would be considered tampering unless the resulting vehicle or piece of equipment is (a) in the same product category (e.g., light-duty vehicle) as the engine originally powered and (b) identical (with regard to all emissions-related elements of design) to a certified configuration of the same or newer model year as the vehicle chassis or equipment. Alternatively, Respondent may show through emissions testing that there is a reasonable basis for an engine switch under Reasonable Basis C. Note that there are some substantial practical limitations to switching engines. Vehicle chassis and engine designs of one vehicle manufacturer are very distinct from those of another, such that it is generally not possible to put an engine into a chassis of a different manufacturer and have it match up to a certified configuration.

[v] Notes on emissions testing: Where the above-described reasonable bases involve emissions testing, unless otherwise noted, that testing must be consistent with the following. The emissions testing may be performed by someone other than the person performing the conduct (such as an aftermarket parts manufacturer), but to be consistent with this Appendix, the person performing the conduct must have all documentation of the reasonable basis at or before the conduct. The emissions testing and documentation required for this reasonable basis is the same as the testing and documentation required by regulation (e.g., 40 C.F.R. Part 1065) for the purposes of original EPA certification of the vehicle, engine, or equipment at issue.

Accelerated aging techniques and in-use testing are acceptable only insofar as they are acceptable for purposes of original EPA certification. The applicable emissions standards are either the emissions standards on the Emission Control Information Label on the product (such as any stated family emission limit, or FEL), or if there is no such label, the fleet standards for the product category and model year. To select test vehicles or test engines where EPA regulations do not otherwise prescribe how to do so for purposes of original EPA certification of the vehicle, engine, or equipment at issue, one must choose the "worst case" product from among all the products for which the part or component is intended. EPA generally considers "worst case" to be that product with the largest engine displacement within the highest test weight class. The vehicle, engine, or equipment, as altered by the conduct, must perform identically both on and off the test(s), and can have no element of design that is not substantially included in the test(s).

[vi] Notes on Reasonable Basis D: This reasonable basis is subject to the same terms and limitations as EPA issues with any such certification. In the case of an aftermarket part or component, there can be a reasonable basis only if: the part or component is manufactured, sold, offered for sale, or installed on the vehicle, engine, or equipment for which it is certified; according to manufacturer instructions; and is not altered or customized, and remains identical to the certified part or component.

[vii] Notes on Reasonable Basis E: This reasonable basis is subject to the same terms and limitations as CARB imposes with any such certification. The conduct must be legal in California under California law. However, 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.