



Service Specialists Association

160 Symphony Way, Suite 2
Elgin, IL 60120
847-760-0067

Legislative and Regulatory Concerns for the Heavy Duty Aftermarket

By: Michael J. Conlon, Esq.,
Frantz & Phelan, LLP.

1) Information Availability

a) EPA Heavy Duty On-Board-Diagnostic D Rule

In December, 2008, EPA released its final On-Board-Diagnostic (OBD) regulation for large heavy-duty on-road vehicles. The rule is very similar to the OBD information rule in California in that it limits the information which must be provided to that concerning the engine and related systems and places certain limitations, including training requirements, on the acquisition of OE diagnostic tools. Most parts of the rule will take effect for model year 2010 vehicles but some of the provisions regarding access to the manufacturers diagnostic and scan tools do not take effect until the 2013 model year.

The most pertinent parts of the rule are that:

- i. To ensure that repairs can be properly and economically performed and aftermarket and rebuilt parts function properly with the OBD system, vehicle manufacturers must provide service technicians with the information necessary to repair parts which control emissions or are associated with the engine system. However, information deemed by the manufacturer to be a trade secret may still be withheld. Unlike the motor vehicle OBD rule, information related to the transmission system is not covered by the rule.
- ii. All required OBD information for heavy duty vehicles must be made available on an accessible Internet web site.
- iii. Prior to 2013, aftermarket entities will have the right to purchase an OEM's emissions-related diagnostic tools, but only if those tools are made available to the manufacturer's dealers or authorized service networks.
- iv. Starting in 2013, the OEM'S will have to make available to the aftermarket all enhanced diagnostic, recalibration and reconfiguration tools available to their franchised dealers or authorized service networks. However, if the manufacturer requires that its dealers receive training before they can purchase the tool, it can require that aftermarket facilities undergo similar training before they can purchase the tool.
- v. In 2013, the OEMs will also have to provide generic tool manufacturers with the data stream and bi-directional control information used in the OEMs' proprietary

tools so that the generic manufacturers can produce a generic tool to perform the same functions as the OEM tool.

While most of the rule was what the aftermarket was expecting, the engine manufacturers did talk the EPA staff into adding language which would appear to void the emissions warranty for any vehicle or engine that was not serviced by the manufacturer or its dealers, i.e., serviced by the aftermarket. This language clearly violates the Clean Air Act. I brought the language to the attention of the EPA staff shortly after the rule was released. The staff acknowledged that they did not intend that result and on March 30, 2009 issued a clarification letter which stated

“EPA agrees that allowing manufacturers to deny warranty claims solely because the service was performed by an independent service provider is not permitted by the Clean Air Act. Therefore, we want to clarify that this provision does not allow manufacturers to deny warranty claims or otherwise limit their obligations with respect to a heavy-duty engine (1) because emission-related service and repair of that engine was performed by an independent serviced provider; (2) because emission-related service and repair of that engine was performed by an independent service provider with manufacturer’s tools; or (3) because emission-related service and repair of that engine was performed by an independent service provider using third party tools.”

b) Right to Repair

For the last four or five years, at the request of the aftermarket, several Congressman have introduced “Motor Vehicle Owner’s Right To Repair” bills. These bills would require the OEM’s to provide to vehicle owners and their service technicians the information necessary to make repairs to their vehicles and to access and integrate replacement equipment into the vehicle. Unlike the EPA OBD rules, which apply only to information related to emissions-related parts, the Right to Repair rules would apply to information related to all parts of the vehicle. Moreover, it would apply to heavy duty vehicles as well as cars and other light duty vehicles.

In the past these Right to Repair bills ran into major opposition from the automobile manufacturers and even some service associations. The 2009 Right to Repair bill (H.R. 2057) was introduced by Representative Edolphus Towns on April 22, 2009. Currently it has 40 co-sponsors.

The 2009 bill is similar to those introduced previously. However, the chances of the bill being approved in this Congress may be better than before. In previous years the Chairman of the House Energy and Commerce Committee, which must first approve the bill before it goes to the full House, was John Dingell, probably the OEM’s strongest advocate in the Congress. This year he was ousted from the chairmanship and replaced by Henry Waxman, who is more pro-consumer. However, Congressman Dingell still exerts significant influence in the Committee and the Congress as a whole. No action has yet been taken on the bill.

Two states are considering Right to Repair bills. In New Jersey, a bill similar to the federal bill has passed one house of the legislature and is pending in the other house. In Massachusetts a legislative committee just recently had a hearing on a right to repair bill which would affect automobiles only.

2) **Industry Assistance**

a) Commercial Vehicle Advanced Safety Technology Act of 2009(S. 1582 and H. R. 2024)

This bill would allow a taxpayer a business tax credit for up to 50% of the cost of placing in service any “qualified commercial vehicle advanced safety system.”

Application – It applies (1) to a commercial vehicle which is used to transport persons or property in commerce and either has a GVW of 26,001 pounds or more or a seating capacity of at least 15; (2) school buses with a seating capacity of at least 11, and (3) intercity or local buses.

Systems covered by the bill are:

- Brake stroke monitoring systems – These systems use electronic sensors to determine if the brakes are out of adjustment, not operational or not fully releasing and to notify the driver.
- Lane Departure Warning Systems – These systems alert a driver of unintended movement out of the lane of travel or of an object or vehicle in the adjacent lane blind spot.
- Collision Warning System – These systems monitor the roadway in front or to the rear of the vehicle and warn the driver when a potential collision risk exists
- Vehicle Stability system -- These are active systems that automatically reduce vehicle speed or apply brakes to better align the vehicle when there is a high risk of rollover or directional instability
- Other Systems – Any other system identified by the National Highway Traffic Safety Administration or the Federal Motor Carrier Safety Administration

Conditions –The system must be certified by the manufacturer as appropriate for the vehicle in which it is installed and will function properly

- The original use of the system must begin with the taxpayer
- The system must be eligible for depreciation
- If not installed by the manufacturer, the installer of the system must certify that it is properly installed and functioning in the vehicle before the vehicle is used.
- The system must be installed and placed in service by the end of 2013

Limits:

- \$1500 per vehicle.
- \$3500 per vehicle
- \$350,000 per taxpayer

A taxpayer may elect not to take credit.

No action has yet been taken on this bill.

b) Advanced Vehicle Technology Act of 2009 (H.R. 3246)

This is a large funding bill which would increase Federal funding for advanced vehicle technologies which are designed to reduce or eliminated petroleum use and emissions from automobiles and commercial vehicles. Among the areas targeted are electrification and hybridization of vehicles, batteries, transmissions and drivetrains, hydrogen vehicles, friction and wear reduction, engine and component durability, and after treatment technologies. Also targeted for research activities are retrofitting advanced vehicle technologies to existing vehicles, and recycling and remanufacture of batteries and other vehicle components for reuse in vehicles.

The bill has specific authorization to provide up to \$1.1 billion dollars for research on systems for medium and heavy duty vehicles. It also includes a grant program to demonstrate the integration of multiple advance technologies on Class 8 truck and trailer platforms to improve freight efficiency by 50%. Also included is funding for a pilot program for research on how these technologies can be applied to off-road vehicles such as agricultural and construction equipment.

The bill passed the House of Representatives by a 312 to 114 vote on September 16th. It is now pending in the Senate.

3) Other Industry-Related Federal Action

a) Climate Change Legislation

The House of Representatives climate change bill, the American Clean Energy and Security Act of 2009 (HR 2454), was passed by the House of Representatives on June 26th and is now in the Senate for consideration. In addition, last week Senator Barbara Boxer, the Chairman of Environment and Public Works Committee, also introduced another climate change bill, the Clean Energy Jobs and American Power Act. Both these bills are primarily focused on reducing carbon and other emissions that lead to global warming. The main sections of both these bills address carbon allowances and trading, energy efficiency, promotion of electric vehicles and other emissions reduction programs.

Each bill however also directs the EPA to promulgate new emissions standards for new heavy duty vehicles and engines by the end of 2010. The new standards are to “reflect the

greatest degree of emissions reduction achievable through the application of technology which the [EPA] Administrator determines will become available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors.” These new standards would apply to the first model year commencing four years after these standards are finalized. The bills also call for EPA to promulgate new emissions standards for certain categories of nonroad vehicles as selected by the EPA.

The bills also direct states and metropolitan areas to develop transportation plans which would greenhouse emissions by establishing reduction targets and strategies to meet those targets. While there are no specific provisions which would require any retirement or retrofitting of in use heavy duty vehicles, many of these transportation plans could include vehicle retirement or fleet replacement programs.

b) Scrappage Bills -- “Cash for Clunkers”

The “Cash for Clunkers” program this past summer was initially hailed as a great success by automobile manufacturers, dealers, consumers and legislators. The sales of new cars exploded in August as a result of the program and over 690,000 older vehicles were replaced by new ones. However, sales returned to pre-Clunker levels or worse in September and many economists now view the program as merely pushing normal fall trade-ins and sales into August and not really stimulating new sales.

The environmental benefits are also questionable. The average mileage of the vehicles traded in was 15.8 MPH and the average of the new vehicles was 24.9 MPH. However, the program was uneconomical. Carbon credits trade in Europe for around \$20 a ton, thus setting the standard at which it is cheaper to buy a carbon credit than clean up an emissions source. It was estimated that it cost \$207 to remove each ton of carbon emissions through the Clunker program ten times the cost of a carbon credit. In addition it was estimated that the program will cost aftermarket service facilities over \$2 billion in lost sales and service from the vehicles that were retired.

Dealers were also less than overjoyed about how the program was operated because many of them are still waiting for reimbursement from the government for the credits they gave their customers.

While the previous Clunker legislation did not apply to heavy duty vehicles, it could be the precursor to legislation to mandate retirement of older vehicles from trucking, construction and farming fleets. If heavy duty manufacturers continue to experience low sales as a result of the recession, they could lobby to have the same type of scrappage legislation applied to heavy duty.

There is presently no strong sentiment in Congress for a new Clunkers program.

c) Fleet Replacement Programs

While similar to scrappage programs, fleet replacement programs are different in several ways. First, while scrappage programs are usually voluntary, fleet replacement programs are generally not. They usually require that a fleet of vehicles meet certain emissions quality standards which become more stringent over time. To meet the more stringent requirements, the fleet owner may either retrofit its older vehicles to reduce their emissions (if that is possible) or replace older vehicles with cleaner new ones. Funds are usually provided through federal grants or state fee programs to assist the fleet owner in converting old vehicles or purchasing new ones. Fleet replacement programs are one likely strategy for states and cities to use to reduce greenhouse gas emissions

4) General Business Issues

a) Health Insurance

Whether major health care legislation will pass this year and what form it will take is still an open issue. The bill which seems most likely to be the basis for any final action is the draft bill called America's Healthy Future Act, introduced in mid-September by Senator Max Baucus. The main requirements of this Act (and how it is different from earlier proposals) are:

Required Coverage – All individuals would be required to get health insurance, with government subsidies and expanded programs to help lower income people. However, it is estimated that about 25 million people would still be uninsured, with about one-third of those being illegal aliens.

Public Option -- This bill does not have a public option, i.e., a new government run insurance program to compete with insurers, but all other bills currently being considered do. Whether or not a public option should be included is an issue that is still being hotly contested.

Cooperatives -- Instead of a public option, this bill would create nonprofit cooperatives or networks of health insurance plans owned by the customers they serve.

Employer Mandate – This bill would not require that employers cover all employees or pay a penalty as do the previous bills. But it would require every employer who employs more than 50 full time employees to pay a fee for every lower-income employee who qualifies for a new tax care credit. The other bills would require an employer to cover all employees or pay a penalty (except that some businesses would be exempted on the basis of size or hardship).

Insurer Conditions --- Insurers would no longer be able to reject new customers with pre-existing conditions and there would be new restrictions placed on the insurer's ability to set premiums.

Preventive Care --- This bill and all the other plans require greater access to preventive care, either with new programs or the elimination of co-payments for such care.

Paying for the New Law – This bill calls for a tax on insurers related to their most generous "Cadillac" plans as well as other annual fees on insurers, medical-device

manufacturers, drug makers and clinical laboratories. The other bills would impose surtax on the wealthiest Americans, starting with 1% on couples whose annual income exceeds \$350,000 and topping out with 5.4% on those with annual income of \$1Million or more.

b) Employee Free Choice Act of 2009 (S. 560 and H.R. 1409)

Under current law if the National Labor Relations Board receives a petition claiming that a majority of the employees of a certain business or unit desire to be represented by a specific labor organization or individual, the Board then directs that an election be held among the involved employees to see if a majority will vote for that labor organization or individual as their bargaining representative.

This Act would allow a union or individual to be certified as the bargaining representative without an election if a majority of the bargaining unit employees have signed authorization cards designating such union or individual as their representative. This is called "card check". Unlike an election where the ballots are secret; the authorization cards are open to inspection by anyone.

The Act also would also require that for a new bargaining units, if the employer and the union cannot reach an agreement within a specified period (90 days unless both sides agree on a longer period), the terms of the agreement shall be submitted to binding arbitration.

The bill has run into opposition not only from Republicans but also some key Democrats. Therefore, proponents of the bill are now offering "quick elections" as an alternative to card check. Under this approach an election would be required in as little as 7 days.

The situation concerning where this bill stands is confusing. Senator Arlen Specter says that the involved parties have reached an agreement that removes the card check in favor of speedy elections but keeps the binding arbitration for new bargaining units. Labor says that no agreement has been reached and that card check is still on the table.

The bill has 40 Co-Sponsors in Senate and 227 Co-Sponsors in the House of Representatives and therefore seems likely to pass in some form.

c) Employment Non-Discrimination Act of 2009 (HR 3017)

This bill would prohibit discrimination based on sexual orientation or gender identity by employers who have 15 or more employees. Hearings were held on it recently. It has over 180 co-sponsors and therefore seems likely to pass.

d) Estate Taxes

Under current law, during 2009, the first \$3.5 million dollars of a person's assets when he or she dies is exempted from the estate tax and then the remainder is taxes at the rate of 45%. For individuals dying in 2010 there is no estate tax, but in 2011 the tax comes back with a much lower exemption of \$1 million dollars per individual and a tax rate that tops out at 49%.

Neither political party is happy with this situation. The Republicans generally would like to see the estate tax eliminated, while the Democrats are not pleased with the one year exemption for 2010. Neither group wants to see the exemption or the rate revert back to \$1 million and 49%.

During his campaign, President Obama supported continuation of the estate tax at the current level, i.e., a \$3.5 million personal exemption and a 45% top rate. Efforts will be made to both increase the exemption amount and lower the rate of tax over that amount. However, it seems likely that something close to the current levels will be approved, but probably not until next year. If so this would mean that with proper tax planning, a married couple could keep up to \$7 million from being taxed.