

State of California
AIR RESOURCES BOARD

**Final Statement of Reasons for Rulemaking,
Including Summary of Comments and Agency Response**

PUBLIC HEARING TO CONSIDER ADOPTION OF REGULATIONS FOR THE
AVAILABILITY OF CALIFORNIA MOTOR VEHICLE SERVICE INFORMATION

Public Hearing Date: December 13, 2001
Agenda Item No.: 01-10-1

I. GENERAL

The Staff Report: Initial Statement of Reasons for Rulemaking (ISOR or "staff report"), entitled "Public Hearing to Consider Adoption of California Regulations for Motor Vehicle Service Information", released October 26, 2001, is incorporated by reference herein.

Following a public hearing on December 13, 2001, the Air Resources Board (the Board or ARB) by Resolution 01-55 approved, with modifications, the service information regulation for 1994 model year and later passenger cars, light-duty trucks, and medium-duty vehicles equipped with second-generation on-board diagnostic systems (OBD II). The regulation is provided in section 1969, title 13, California Code of Regulations (CCR), and sections 60060.1 through 60060.34, title 17, CCR. The changes directed by the Board, in addition to other changes initiated due to comments received during the hearing and the 45-day period prior to it, were made available for public comment in the ARB's Notice of Public Availability of Modified Text (15-Day Notice) on March 29, 2002, which is incorporated by reference herein. In response to the Board's direction, the staff proposed the following amendments:

(1) §1969(c)(3): Modification of the definition for "covered person." The scope of the definition has been modified to include only persons falling in one of four designated categories: (a) persons licensed or registered with the Bureau of Automotive Repair (BAR), (b) persons engaged in the service and repair of vehicles belonging to a business fleet, (c) tool and equipment companies, and (d) persons engaged in the manufacturer or remanufacturer of emission-related parts. The definition is in accord with the purpose and intent of the Legislature in enacting Senate Bill 1146 (SB1146).

(2) §1969(f): Modification of the regulatory language requiring the availability of data stream and bi-directional control information. Language has been added to the paragraph applicable to data stream and bi-directional information that gives motor vehicle manufacturers the right to petition the Executive Officer to refuse to provide such information to specific tool and equipment companies. Under the proposed modification, the Executive Officer could approve such a petition, after consultation with the affected parties and determining that the petitioning motor vehicle

manufacturer holds a reasonably-based belief that a specific tool and equipment company would not produce safe and functionally accurate diagnostic tools. If not approved, the motor vehicle manufacturer would have to make the information available to covered persons requesting the information within two days of the denial of the petition.

(3) §1969(j)(9): Modification of the regulatory language for compliance plans. As provided within the 45-day Notice package, this paragraph would have permitted the Executive Officer to reject a compliance plan if that plan would not bring the motor vehicle manufacturer into compliance within 45 days of approval. The language was modified to make paragraph (j)(9) consistent with paragraph (j)(8), which provides that, if necessary, the Executive Officer could provide manufacturers with additional time, beyond 45 days, to come into compliance.

Staff has included in this Final Statement of Reasons an additional nonsubstantive modification to title 13, CCR, section 1969(f)(3)(B). Due to the reformatting of this section resulting from the 15-Day Notice, the old reference to subsection (f)(2) was inadvertently left in place. The citation to subsection (f)(3)(A) has been substituted instead.

Title 13, CCR, section 1969 incorporates by reference several Society of Automotive Engineers (SAE) recommended practices and documents. The SAE documents that are incorporated by reference in the regulation are:

SAE Recommended Practice J1930, "Electrical/Electronic Systems Diagnostic Terms, Definitions, Abbreviations, and Acronyms," May 1998;
SAE Recommended Practice J1979, "E/E Diagnostic Test Modes," September 1997;
SAE Recommended Practice J2534, "Recommended Practice for Pass-Thru Vehicle Programming," February 2002.

The above SAE documents were initially referenced in the ISOR. As to SAE J2534 specifically, the ARB incorporated the most recent version of the document in the 15-Day Notice.

Existing administrative practice of the ARB has been to have technical recommended practices, such as the SAE documents, incorporated by reference rather than printed in the CCR. These procedures are highly complex and technical documents. They include "nuts and bolts" engineering protocols and have a limited audience. Because the ARB has never printed SAE documents in the CCR, the affected public is accustomed to the incorporation format utilized in section 1969. Printing portions of the documents in the CCR would be unnecessarily confusing to the affected public. Moreover, the SAE copyrights all of its documents, but they are readily available through that organization. They are also available for public inspection from the Clerk of the Board at 1001 "I" Street, 23rd floor, Sacramento, California 95814.

Also included into the rulemaking record (in the 15-Day Notice) was a letter sent to the Honorable John L. Burton, president of the California State Senate, to Tom Cackette, ARB Deputy Executive Officer, dated August 21, 2001.

Background. The service information regulation was developed pursuant to the requirements of SB1146, which created HSC section 43105.5. Enacted on September 30, 2000, the statute required the ARB to adopt the regulation by January 1, 2002.

Both the ARB and the United States Environmental Protection Agency (U.S. EPA) have recognized the importance of making service information available to the aftermarket industry since the inception of OBD II systems in motor vehicles. OBD II systems alert vehicle operators when emission-related malfunctions occur, and provide service technicians with information regarding the nature of the problem. Complete service information is needed to enable technicians to repair the identified problems. Historically, independent service providers have not always been able to obtain the same level of information that is available to the service centers of franchised dealerships.

In order to meet the requirements of SB1146, staff proposed that motor vehicle manufacturers provide all emission-related service information, including service manuals, technical service bulletins, and training materials, over the Internet. In general, the proposal requires motor vehicle manufacturers to provide the same level of information that is available to franchised dealerships. If it is not already available, the regulation would require manufacturers to develop and make available descriptions of the basic design and operation of OBD II systems.

The regulation also requires vehicle manufacturers to offer for sale the emission-related diagnostic tools that are used by dealership technicians, along with necessary information that would allow aftermarket tools to have the same diagnostic capabilities as manufacturer-specific tools. Similarly, the regulation requires that motor vehicle manufacturers make available to the aftermarket equipment necessary to install updated on-board computer software. Included in the regulation is a requirement for manufacturers to provide information relative to initializing on-board computers (also known as electronic control units, or ECUs) with integrated vehicle theft deterrents (known as immobilizers), if such information is necessary for installation of the computer or the repair and replacement of other emission-related parts. The staff's proposal contains provisions for the protection of trade secret information. The regulation also sets forth procedures for determining whether manufacturers are in compliance once the requirements take effect.

Under the regulation, initial non-compliance determinations are made by the Executive Officer who would issue a notice to comply to the affected motor vehicle manufacturer. The noncomplying manufacturer would have the option of submitting a compliance plan to remedy the non-compliance, or to request an administrative review of the Executive Officer's determination. The Executive Officer would also be able to request an administrative hearing for appropriate action and/or civil penalties

to be imposed in cases where a manufacturer does not act in response to a notice to comply, files an unacceptable compliance plan, or fails to follow through on a compliance plan approved by the Executive Officer. A civil penalty of up to \$25,000 per day could be imposed on manufacturers that do not correct issues of noncompliance.

Similar, but not identical, requirements obligating motor vehicle manufacturers to make available service information exist under federal regulations. (See title 40, Code of Federal Regulations, section 86.094-38.) Under the federal rule, independent service providers may order information available to dealers directly from manufacturers' clearinghouses. The information available is listed in an online database within FedWorld. The U.S. EPA is currently considering amendments to these requirements that would, among other things, also call for direct access to required service information over the Internet in order to facilitate faster and more convenient access to emission-related service information. In passing SB1146, the legislature specifically provided that the regulation adopted by the ARB may include subject matter similar to that adopted in the federal regulations. Throughout the development of these proposals, the ARB staff has been in contact with U.S. EPA staff in order to harmonize the respective regulations as much as possible.

Economic and Fiscal Impacts. The staff has estimated that the primary costs of compliance with this regulatory action will be the transfer of data to manufacturer websites and the maintenance of such websites. Based on information from motor vehicle manufacturers, it is expected that start-up costs for the development of a compliant website would range from \$600,000 to \$5 million, while annual maintenance costs would be in the vicinity of \$150,000 to \$450,000. Manufacturers are permitted by the regulation to set fair, reasonable, and non-discriminatory prices for the tools and information that must be made available under the regulation, thereby offsetting some or all of the compliance costs.

The regulation should have a positive impact on independent service repair facilities and aftermarket part manufacturers through the wider availability of emission-related service information and tools. Covered persons such as independent service facilities and aftermarket part manufacturers should only incur additional expenses as part of this regulation if they chose to purchase additional information and tools. However, in doing so, it is assumed that the purchases will be based on business decisions wherein the use of the information would be expected to yield a profit. The cost of purchasing such information should be equal to or less than the costs under the existing federal service information rulemaking given that the Internet would be replacing the underutilized FedWorld database.

Franchised dealerships may experience some loss of business as independent facilities conduct more repairs using the service information that would be provided by this rulemaking. However, this stimulation of competition in the service and repair industry was in fact the goal of SB1146 and thus, such an effect was clearly recognized by the California Legislature when the bill was drafted and adopted.

The Board has determined that this regulatory action will not result in a mandate to any local agency or school district the costs of which are reimbursable by the state pursuant to Part 7 (commencing with section 17500), Division 4, Title 2 of the Government Code.

Alternatives. For the reasons stated in the Initial Statement of Reasons and this Final Statement of Reasons, the Board has determined that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective and less burdensome to affected private persons than the action taken by the Board.

II. SUMMARY OF COMMENTS AND AGENCY RESPONSE

At the December 13, 2001, hearing, oral testimony was received in the following order from:

Mr. Aaron Lowe, California Automotive Task Force (CATF)*
Mr. John Cabral, Blue Streak Electronics*
Mr. Jeff Trask, Motor and Equipment Manufacturers Association (MEMA)*
Lt. Greg Williams, California Highway Patrol (CHP)
Mr. Chuck Herr, California / Nevada Automotive Wholesalers' Association (CAWA)
Mr. Paul French, Automotive Traders Associations of California (Auto – CA)
Mr. Jim O'Neill, Automotive Service Councils of California (ASCC)
Mr. Will Woods, Automotive Trade Organizations of California (ATOC)
Mr. Greg Dana, Alliance of Automobile Manufacturers (Alliance)*
Mr. John Cabaniss, Association of International Automobile Manufacturers (AIAM)*
Mr. David Raney, American Honda Motor Company (Honda)*
Mr. John Trajnowski, Ford Motor Company (Ford)
Mr. Dan Dryke, General Motors (GM)
Mr. Robert Gasaway, Alliance of Automobile Manufacturers / Association of International Automobile Manufacturers*
Mr. James Gowan, Crestec Corporation

Those names above noted with an asterisk also submitted written comments. Most of these written comments were received during the 45-day comment period prior to the hearing. Almost two-thirds of the oral testimony was in general support of the service information proposal, while the remainder was neutral.

Other written comments were received by the hearing date from:

Mr. Michael J. Conlon, Conlon, Frantz, Phelan and Pires, LLP
Mr. Charlie Gorman, Equipment and Tool Institute (ETI)
Mr. Wolfgang Groth, Volkswagen of America (VWoA)
Mr. Russ G. Sermersheim, Cummins Inc.
Ms. Suanne Thomas, VWoA (2 letters)
Dr. Michael J. Whinihan, GM (Submitted by Robert Gasaway at Board Hearing)

Written comments in response to the 15-Day Notice were received during the 15-day comment period from:

Mr. Wayne Brumett, Bureau of Automotive Repair (BAR)
Mr. Aaron Lowe, CATF
Mr. Charlie Gorman, ETI
Mr. Robert Gasaway, Alliance/AIAM

No comments were submitted by the Office of Small Business Advocate or the Trade and Commerce Agency.

Below is a summary of each objection or recommendation made regarding the specific regulatory actions proposed, together with an explanation of how the proposed action was changed to accommodate each objection or recommendation, or the reasons for making no change. The comments have been grouped by topic wherever possible. Comments not involving objections or recommendations specifically towards the rulemaking or to the procedures followed by the ARB in this rulemaking are not summarized below.

DEFINITIONS AND REGULATORY TERMS

1. Comment: Section 1969(d)(2)(G) of the regulation should reference the diagnostic messages of SAE J1939-73 in addition to “Mode 6” of SAE J1979. Additionally, section 1969(e)(2)(K) of the regulation should reference SAE J2403 in addition to SAE J1930. (Cummins)

Agency Response: SAE J1939 and J2403 deal primarily with diagnostic information for heavy-duty vehicles. The addition of the requested references is not necessary because the California service information regulation currently applies to passenger cars, light-duty trucks, and medium-duty vehicles only. If, at a later time, heavy-duty engines and vehicles are addressed in the regulation, such references can be considered.

2. Comment: The third line of title 13, CCR, section 1969(h) should be amended to replace the term “emissions-related part” with the term “emissions-related motor vehicle part.” Section 43105.5(a)(5) of the Health and Safety Code (HSC) uses the latter term and the regulation should be consistent. (CATF)
3. Comment: The reference to “fair, reasonable and nondiscriminatory cost” in title 13 CCR, 1969(i)(3)(A) should be changed to “fair, reasonable and nondiscriminatory price” as this latter term is used throughout the regulation. (CATF)

Agency Response to Comments #2-3: The staff agrees with the above comments. Both terms were modified as suggested in the 15-Day Notice. For other related issues related to “fair, reasonable and nondiscriminatory price”, please refer to Comments #62-76 in this document.

4. Comment: Section 1969 (c)(3): Changes made to the covered persons definition might be used to limit availability of critical tools and information for service technicians that might be employed by licensed shops, but who are not licensed themselves. According to section 39027.3(b) of the HSC, repair facilities are required to become licensed, not the individual technicians that are employed by the facility. While we understand that the changes made to this section are to ensure that the definition of “covered person” is consistent with statutory language of SB1146, we also believe that the California State Legislature did not intend this provision to limit the availability of the information to only the shops or shop owners. Therefore, we ask that the covered person provision be clarified as follows: “any person or entity or persons employed by that entity engaged in the business of service or repair of motor vehicles who is licensed or registered with BAR, pursuant to Section 9884.6 of the Business and Professions Code, to conduct that business in California...” This revision would ensure that the definition represents both the statutory language and its intention. (CATF)

Agency Response: It is true that the automotive repair “dealer” is the person required to be licensed under the Business and Professions Code and that the definition of a covered person in HSC section 39027.3(b) included licensing as a requirement for service and repair providers. However, all employees of the repair dealer are covered under the license. As such, the repair dealer would have access to service information under the regulation which would extend to all employees working for the dealer to carry out the business of the repair shop. Therefore, information access and use will not be limited to solely the shop owner to the exclusion of the shop owner’s employees.

5. Comment: Section 1969 (c)(12): The 15-Day Notice deleted the criterion for determining if information and tools are being furnished to franchise dealerships at a discriminatory price. Under the new language, discrimination would occur if the price charged for information or tools to covered persons would give the franchised dealerships “an unfair economic advantage over covered persons”. Originally, the price was discriminatory if it afforded the franchised dealerships “greater access to information or tools than is provided to covered persons”. The new language not only makes the criteria less clear and more subjective, and thus more difficult to enforce, but would permit some discrimination and potentially expands the scope of the analysis that would need to be conducted before a decision could be made. (CATF)

Agency Response: The ARB staff determined that the term “greater access” was too vague in setting a threshold for determining if manufacturers’ pricing is discriminatory. Therefore, the staff opted for language that more clearly ties discriminatory pricing to its effect, which would be an unfair economic advantage for dealerships over covered persons. The staff disagrees with the commenter that the modified language makes the requirement less clear or enforceable. In reality, it will have the opposite effect.

6. Comment: The definition of “emission-related motor vehicle information” should be modified by restricting its applicability to specifically referenced systems and components that impact emissions. (Alliance/AIAM)

Agency Response: The definition of “emission-related motor vehicle information” is verbatim to that given in HSC section 39027.3(d). It is intended to be inclusive of any possible part or component can feasibly affect the exhaust or evaporative emissions of a motor vehicle. Restricting the definition to only specific systems and components might result in a lack of availability of important emission-related information. Motor vehicle manufacturers should be well suited to determine what repair information is emission-related, and therefore, covered by the regulation.

7. Comment: The term “day” used throughout the regulation should be defined as a business day, which would be consistent with the use of the term in the proposed OBD enforcement regulation. (Alliance/AIAM)

Agency Response: In specifying time periods in terms of days in the 15-Day Notice, the ARB chose to use calendar days in most cases to ensure clarity throughout the regulation. In each case, the staff specified a number of days recognizing that manufacturers’ offices are typically closed on weekends, but at the same time, understanding that service providers often work on Saturdays. The ARB has determined that each time period specified using “days” contains an adequate number of business days for the required action or response in balance with the need for covered persons to obtain service information quickly to repair customer vehicles in a timely manner. Beyond this, the ARB does not believe it is necessary to align the definition of days with its proposed OBD enforcement regulation. The required action under the two regulations is not significantly related.

8. Comment: There is concern about the suggestion by the ARB staff that no additional information is needed to be disclosed by motor vehicle manufacturers if required specifically for the design and manufacture of replacement parts. We believe staff and industry may need to monitor this provision of the rule as it's implemented and assure that all covered persons, including parts manufacturers, are obtaining the information required to conduct their business. We encourage staff to continue to work with us to ensure that parts manufacturers obtain additional information, if needed, to continue to independently produce automotive parts and components. (MEMA)

Agency Response: The statute, and correspondingly, the regulation, specify the type of information that is to be disclosed. The suggestion to which the comment refers to simply states that motor vehicle manufacturers are not required to provide information beyond what is specified. Nonetheless, as requested by the Board, the staff will continue to monitor the effectiveness of the regulation in carrying out the purposes and intent of SB1146 and will propose modifications (if

necessary) to the regulation to address any deficiencies that may appear during implementation.

9. Comment: The definition of “covered person” does not track the statutory definition provided in SB1146. (CATF)
10. Comment: The definition of “covered person” does not track the statutory definition and the broadened definition potentially increases the liability for motor vehicle manufacturers under other provisions of the regulation. (Alliance/AIAM)
11. Comment: The regulation departs from the plain terms of the statute and the legislature’s clear intent by redefining “covered person” to include “tool and equipment companies” in section 1969(c)(3). The ARB has no authority to rewrite the plain language of the statute. *See, e.g., Public Employees Ret. Sys. Of Ohio v. Betts*, 492 U.S. 158, 171 (1989)(“agency interpretations must fall to the extent they conflict with statutory language”). Accordingly, as the Alliance and AIAM have noted in earlier comments, the regulation should be revised to track the definition of “covered person” provided in SB1146. (Alliance/AIAM)

Agency Response to Comments #9-11: Contrary to the claims of the commenter, HSC section 39010 specifically confers authority on the ARB to revise definitions set forth at section 39010.5 et seq. In trying to craft the definition of “covered persons” for the regulation, the ARB wanted to make certain that all businesses and government agencies that perform emission-related automotive repairs have access to the service information covered by the provisions of SB1146. The final definition balances the needs of the independent service industry for such information against the broader liability concerns identified by motor vehicle manufacturers.

12. Comment: The definition of covered person in title 13, CCR, section 1969(c)(3) should also include automotive training facilities. With the current trend of automotive manufacturers dropping their training departments, it is imperative that public and private automotive training facilities have access to current and in-depth automotive repair information and diagnostic tools. (BAR)

Agency Response: In trying to maintain the balance envisioned by the governing legislation, the regulation limits the definition of “covered person” to persons and entities which directly service or repair motor vehicles, produce emission-related parts for vehicles, or produce tools and equipment for vehicle servicing. As a practical matter, the ARB does not believe that manufacturers will limit service information access to covered persons. However, the manufacturers have commented that the definition should not be broadened further because a covered person is given the right to pursue concerns regarding manufacturers’ compliance with the regulation with the ARB.

13. Comment: The Internet disclosure requirements of the regulation should be limited to “covered persons” (i.e., California aftermarket participants and not those from out-of-state). (Alliance/AIAM)

Agency Response: The definition of “covered person” in the current proposal applies only to those independent repair facilities licensed to operate in California, California fleet owners that service their own vehicles, and aftermarket part makers and tool and equipment companies that provide components and tools for California vehicles. So, while independent service facilities and fleets must be located within the state, out-of-state parts, tools, and equipment companies do not have to provided they sell their products for use on California vehicles. Many manufacturers of emission-related parts and diagnostic tools are located outside of the state. To exclude them as covered persons could deny them information needed to provide parts and tools for California vehicles. Such a situation would be contrary to the declared intent of the legislation. Section 1(b) of SB1146 declares it important to “...ensure that the ability of California motorists to obtain service, repair, or replacement of faulty emissions-related components...is not limited by the arbitrary withholding of service, repair or parts information by motor vehicle manufacturers.” Limited availability of aftermarket replacement parts would have adverse competitive and air quality consequences.

SMALL VOLUME MANUFACTURERS

14. Comment: The regulation as initially proposed stated that if a motor vehicle manufacturer’s annual California sales are less than 300 vehicles, it can use an alternative to the direct Internet access requirements if approved by ARB. The provision should be amended from 300 to 500 vehicles. This slight increase in sales number would not change the effectiveness of the regulation however it will allow the Rolls-Royce & Bentley Motor Cars group the ability to consider use of this flexibility. Five hundred vehicles represents only about 0.05% of the passenger car sales per year in California. This is a minor sales volume. (VWoA)
15. Comment: The small volume manufacturer (SVM) provision should be modified to allow a vehicle model with the SVM limit at the time of their introduction to continue to be supported by other than Internet means in the event that the manufacturer subsequently introduces a new vehicle model that causes the total annual California-certified vehicles sold to exceed the SVM limit, or alternately, change to a SVM limit related to a Test Group (CAP 2000) annual sales volume. Annual volume of an existing Test Group is unlikely to increase with the introduction of a new Test Group; therefore, the demand for maintenance/repair should not be expected to increase significantly. Also, the maintenance/repair industry will be familiar with the information format supplied for the existing Test Group, and any change to the format would cause unnecessary disruption to that group. By applying the SVM limit to the ‘Annual sales of a Test Group’, there would be an automatic control that would be clearly linked to the volumes of

specific model ranges and not triggered by total volumes which will cause unnecessary disruption for manufacturer and service provider as a consequence of change to the information format. (VWoA)

Agency Response to Comments #14-15: In response to this comment, the ARB modified the language in section 1969(e)(1) to make clear that a motor vehicle manufacturer would not be required to reformat existing service information for direct online access when transitioning out of small volume manufacturer status. The manufacturer may continue to make such information available through alternate reasonable business means for as long as it is able to carryover emissions certification for the vehicle models in question. Prior to release of the 15-Day Notice, the staff confirmed with the commenter that this change would be sufficient to satisfy the commenter's overall concern.

The staff does not believe that use of the annual sales volume for individual test groups to determine small volume status would be appropriate. Motor vehicle manufacturers are typically responsible for defining test groups. As such, a manufacturer could improperly limit the number of models subject to the Internet access requirements by defining test groups in an overly narrow manner.

The ARB set the small volume manufacturer sales cutoff at 300 vehicles per year because it believes that a manufacturer with a greater sales volume should possess the resources necessary to format and post service information on an Internet website. Although an adjustment to 500 sales would allow the commenter to possibly remain within the definition of small volume manufacturer longer, the staff believes, in keeping with the intent of the governing legislation, that direct Internet access to service information should be required for all motor vehicle manufacturers for which it is economically feasible.

REPROGRAMMING AND DIAGNOSTIC TOOLS/EQUIPMENT

16. Comment: The language of section 1969(f)(1) as initially proposed implies that auto manufacturers would be required to sell the same diagnostic and reprogramming tools to non-dealers as dealers. Auto manufacturers would like flexibility to package the non-dealer tool to better fit the needs of the non-dealer shops. Dealership tools usually contain functions that are specific to dealer operations and thus have no use for nondealer shops. (Alliance/AIAM)

17. Comment: Motor vehicle manufacturers must be required to sell the same tool to the aftermarket as they sell to their dealers. The only way the aftermarket will be able to judge equipment capability and functionality is to test it against a dealership known standard. Any attempt to substitute may or may not provide the same capability and the aftermarket will not be able to identify and report differences. (ETI)

Agency Response to Comments #16-17: The regulatory language reflects the staff's agreement with aftermarket stakeholders that access to actual dealer tools

should be provided as specified in HSC section 43105.5(a)(2). As stated in the staff report, motor vehicle manufacturers may sell a modified version of its dealer tools with non-emission-related information (such as warranty information) removed. The ARB believes that this addresses the concerns raised by the motor vehicle manufacturers.

18. Comment: Title 13, CCR, section 1969(f)(1)(B) as initially proposed requires auto manufacturers to release tool information to "all" equipment and tool companies. Manufacturers would like flexibility to do business with tool and equipment companies of their choosing. (Alliance/AIAM)

19. Comment: The staff proposal would require manufacturers to make tool information available to "all tool companies." Manufacturers would like some additional flexibility in this area. We believe changing the provision to requiring manufacturers to make information available to "three or more," rather than all, tool companies would ensure competition and provide manufacturers the flexibility to decide which tool companies they wish to do business with. Our concern is what if there's an unscrupulous tool manufacturer, one that has had a checkered history in the past of providing good tools, may have provided tools that damage our vehicles? So what we're trying to do is look for a way to allow us to not have to work with every company that we may have concerns with the quality. And so that's why we limited it -- we came up with the idea of, well, three or more, thinking that most manufacturers would probably work with more than three. (AIAM) (Ford)

20. Comment: Vehicle manufacturers would like to limit the number of aftermarket tool companies they have to deal with. ETI feels that this is even more unfair than requiring OEMs to deal with "all" companies. We know of examples where OEMs have refused to do business with companies because they compete in other business areas. (ETI)

Agency Response to Comments #18-20: The issue of whether motor vehicle manufacturers should be required to work with all tool and equipment companies was raised and debated by the Board at the December 13, 2001, hearing. The Board directed the staff to modify the regulation to permit a manufacturer to be excused from working with a particular tool and equipment company on the basis of evidence that the company would not produce a safe or reliable tool.

The staff made such an amendment to the regulation in its 15-Day Notice. Section 1969 (f)(2) permits motor vehicle manufacturers to petition the Executive Officer for approval to refuse to disclose diagnostic tool information to specific tool and equipment companies based on a reasonably-based belief that the company would not produce a safe or accurate product. The staff believes this addresses the manufacturers' concerns regarding any requirement to work with disreputable companies. However, it is important for the regulation to require a show of cause in order to guard against manufacturers making arbitrary and capricious, or discriminatory decisions not to work with particular diagnostic tool

companies. This is in accord with the intent of SB1146 to stimulate automotive repair business competition.

21. Comment: The regulation burdens a motor vehicle manufacturer to petition the Executive Officer for approval to refuse to disclose such information to a requesting equipment and tool company if it believes that the company could not produce safe and functionally accurate tools. There are three fundamental problems with this. (Alliance/AIAM)

- a) The proposal undercuts competition by depriving manufacturers of the flexibility to do business with whichever equipment and tool companies they select;
- b) The proposal undermines the goal of reducing emissions by putting the burden on the manufacturer to demonstrate that it has a “reasonably-based belief” that the requesting company will not produce safe and functionally accurate tools. The burden should instead be on the equipment and tool company; and
- c) The 2-day deadline within which motor vehicle manufacturers must provide requested information if the Executive Officer denies the petition is unreasonable. The Alliance and AIAM believe that 5 business days would be more appropriate and reasonable. In addition, the Alliance and AIAM respectfully request that the regulatory language be revised to make clear that any decision by the Executive Officer is stayed pending appeal.

Agency Response: The intent of the regulation is for motor vehicle manufacturers to provide scan tool information to all companies interested in producing emission-related tools. Therefore, the ARB believes that it is appropriate to require a motor vehicle manufacturer to demonstrate that a tool and equipment company is not capable of developing a safe and functionally accurate tool instead of requiring the tool maker to qualify itself. This approach prevents the manufacturer from simply refusing access to data stream and bi-directional control information based on frivolous or discriminatory reasons.

That said, the 2-day period is consistent with the disclosure of information not determined to be a trade secret. The staff believes that motor vehicle manufacturers will have licensing packages available because of their work with other diagnostic tool companies. Once the issue of whether or not a motor vehicle manufacturer is required to work with a tool company is settled, there is no reason why the necessary information cannot be transmitted within a short period of time.

The regulation does not provide for an appeal of Executive Officer decisions on this issue. However, should a motor vehicle manufacturer seek judicial review of a decision, the ARB will abide by any orders for stays, injunctions or other instructions that may be issued by the court.

INTERNET WEBSITES

22. Comment: The 48-hour response time called out in section 1969(e)(2)(E) of the initial proposal is for responses to website issues, not some form of mechanic “hot line” on how to repair a vehicle. For this reason, manufacturers should be given a reasonable response time within normal business hours in order to ascertain answers to inquires, such as database issues. They should also not be required to provide website support outside normal business hours. This provision imposes a significant but unnecessary cost on manufacturers. (Alliance/AIAM)

Agency Response: First, for purposes of consistency throughout the regulation, the ARB has converted all references to “hours” to “days.” In this case, 2 days in place of 48 hours. The ARB agrees that the 2-day time period is to be used as a method of resolving issues concerning access to a motor vehicle manufacturer’s website(s) only. The ARB staff realizes that some questions may require the assistance of other staff in order to accurately reply and/or retrieve the needed information that may be archived or otherwise not readily available. In such cases, the motor vehicle manufacturer can provide an initial response within the 2-day timeframe which includes a timetable for providing a complete answer to the issue raised.

A definition of “days” was proposed in the 15-Day Notice. It includes Saturdays (in addition to Monday through Friday) as a day on which motor vehicle manufacturers must respond to inquiries regarding their Internet website(s). The inclusion of Saturdays is based on many independent repair facilities being open for business on Saturday. The staff believes it is reasonable for technicians to have Saturday access to service information which may facilitate the same-day repair of malfunctions. Further, the staff does not believe there is any significant added cost burden in requiring motor vehicle manufacturers to provide a website contact on Saturdays. Motor vehicle manufacturers may adjust normal employee work hours to include Saturdays, or may set up an “on-call” system that would allow Saturday work hours to be conducted on an as-needed basis. The ARB expressly avoided using the reference “normal business hours” in the context of response times knowing that many motor vehicle manufacturers shut down business operations at various times during the year, and did not want this fact to impede responding to Internet inquiries.

INITIALIZATION PROCEDURES

(a) Security and Lead Time Issues

23. Comment: Widespread release of immobilizer codes, which allow repair facilities to reinitiate vehicle operations after an ignition system is replaced, may adversely impact the effectiveness of the immobilization anti-theft technology. The ARB-proposed definition of a “covered person” would allow access to any person

engaged in the business of service or repair of motor vehicles in California. Persons falling under this definition will have access to reinitialization procedure and codes. The definition, as it applies to anti-theft immobilization information, appears overly broad. Limiting the dissemination of the information until such time as the manufacturers have redesigned anti-theft systems may ensure that disclosure of these procedures would not compromise vehicle security. In summary, I believe that the rulemaking can be accomplished in such a manner that it both complies with the new statute and ensures for the security of anti-theft systems. (CHP)

24. Comment: The release of reinitialization procedures for on-board electronic control modules and security code information for anti-theft systems will lead to an increase of vehicle theft and a step backwards in the considerable progress we have made in reducing theft. (Honda)

Agency Response to Comments #23-24: The regulation only requires release of initialization procedures for anti-theft systems to the extent that such procedures are needed to successfully install an ECU or to repair or replace some other emission-related part. These are the same procedures that motor vehicle manufacturers supply to their many dealers operating within the state. In supplying such information on this wide basis, the ARB believes motor vehicle manufacturers have had the opportunity to address the protection of sensitive design information. However, to further ensure that anti-theft system integrity can be maintained, the regulation provides motor vehicle manufacturers with lead time through the 2007 model year so they can provide the aftermarket with an alternative way to reinitialize ECUs as needed if significant security concerns still exist.

With respect to the definition of covered persons, the ARB agrees that the more narrowly this term is defined, the more narrow the availability of potentially sensitive information. However, as discussed previously, the ARB has attempted to craft a definition that meets the intent and purposes of the legislation, balancing the respective needs and interests of both the motor vehicle manufacturers and the aftermarket industry. To provide an even narrower definition could lead to a conflict with the statute, or could deny service information access to California fleets and businesses that would rely on the information to diagnose and repair emission-related malfunctions.

25. Comment: The aftermarket does not agree with the 15-day modification to provide additional time (from model year 2004 to 2007) to motor vehicle manufacturers before having to make reinitialization capabilities directly available to covered persons. The Board should closely monitor the alternative means that vehicle manufacturers will be allowed to use in providing independents with the ability to reinitialize vehicles. The alternative must be workable and affordable for small independent service facilities. The ARB staff should closely review any petitions filed by motor vehicle manufacturers to determine whether there are

legitimate security concerns, and to make sure the process is not being abused for anti-competitive reasons. (CATF)

Agency Response: The change in the lead time provided to motor vehicle manufacturers was made to address their concerns regarding the ability to adequately provide initialization information without compromising vehicle security. Although the Board directed the staff to report back within one year of the hearing on the ability of motor vehicle manufacturers to comply with the initialization information requirements by 2004, another model year (2003) will have passed. Considering that some motor vehicle manufacturers may already have the next two model years set in terms of vehicle configuration, the previously proposed 2004 lead time appeared to be insufficient. The newly proposed lead time through the 2007 model year is deemed to be adequate to address motor vehicle manufacturers' concerns. Notwithstanding, before the added lead time is granted, a requesting manufacturer must be able to adequately demonstrate the need for additional lead time, and have an alternative means for providing the information to covered persons.

In connection with the added lead time provided, the staff also strengthened the regulatory language allowing the Executive Officer to review and cancel added lead time approvals if evidence shows that granting of the added lead time has placed the aftermarket at a competitive disadvantage.

26. Comment: The ARB should reconsider its proposed 15-day changes to title 13, CCR, section 1969(d)(3). Automakers have known that aftermarket reprogramming was going to be a requirement since 1994. They either didn't believe in the regulatory resolve to make it happen, or did not communicate the need within their own ranks. In either case, there is no excuse for systems that do not comply by model year 2005. To allow otherwise just makes the reprogramming job that much more difficult for the aftermarket. (ETI)

Agency Response: Section 1969(d)(3) deals with initialization procedures for computers with immobilizer anti-theft devices. It is for these procedures that additional lead time, conditioned by Executive Officer approval, was provided. To the extent that the commenter is referring to compliance with SAE J2534 as required by title 13, CCR, section 1969(f)(3)(A), the regulation continues to require implementation of reprogramming methods specified by those procedures with the 2004 model year.

27. Comment: The auto industry agrees that reinitialization information is needed by non-dealer service facilities. However, it is also of paramount importance to maintain vehicle security and prevent an increase in theft on any existing or future vehicle. This concern will not disappear with the 2004 model year. Therefore, as a safeguard, it is recommended that the allowance for ARB Executive Officer approval of "alternative means" for compliance be extended indefinitely. Since an alternative means must be approved by the Executive Officer, the ARB can assure that it is acceptable to non-dealer service facilities.

Therefore, extending the allowance would not be an impediment to non-dealer shops, but doing so would provide manufacturers the ability to request, and the ARB to approve, acceptable alternatives, as they may be needed in the future. If it turns out alternatives are not needed in the future, then having the ability to approve them is still not an impediment. (Alliance/AIAM)

Agency Response: The utilization of an approved alternative means for providing initialization procedures to a covered person beyond the proposed lead time through the 2007 (previously 2004) model year would defeat the purpose of the original provision which is to provide initialization procedures in the same manner as provided to franchised dealerships. All alternatives are considered to be potential compromises that inconvenience covered persons to some degree and thus, are not ideal. Nonetheless, the ARB will monitor the effectiveness of the initialization procedures released by motor vehicle manufacturers and can consider future amendments to the regulation to address aftermarket and/or motor vehicle manufacturers' concerns.

(b) ECU Remanufacturer Issues

28. Comment: The aftermarket continues to believe that SB1146 requires that manufacturers provide aftermarket parts remanufacturers with the ability to reinitialize on-board computers in their facilities so that they can bench test ECUs that must work with integral anti-theft systems. The aftermarket is pleased that the Board has directed the staff to work with both the aftermarket and the vehicle manufacturers to resolve this issue and to ensure that there continues to be competition in the availability of rebuilt ECU's. The aftermarket hopes that this process will begin as soon as possible since more and more vehicles are being equipped with the integral anti-theft systems every year. (CATF) (MEMA)

Agency Response: At the conclusion of the December 13, 2001, Board hearing, the ARB staff was directed to report back within one year to discuss the progress in working with motor vehicle manufacturers and ECU remanufacturers in determining if a method(s) exists that will allow the remanufacturers to bench test rebuilt on-board computers without compromising vehicle security. Also, the staff is required to report back within one year on the progress of motor vehicle manufacturers in providing initialization procedures as necessary for emission-related repair work pursuant to the provisions in the regulation. Resolution 01-55 also specifies these directives. As such, the staff has already begun work with motor vehicle manufacturers and aftermarket representatives to investigate possible solutions for the concerns expressed by the aftermarket.

29. Comment: The regulation does not allow remanufacturers of ECUs to reinitialize such units so that they can be tested after being rebuilt. Withholding the ability to reinitialize the system from remanufacturers makes no sense in that thousands of service facilities throughout the state are able to reinitialize ECUs so that they can be tested when they are on vehicles. Why is there any need to prevent

remanufacturers from doing the same thing when they remanufacture the ECUs?
(Conlon, Frantz, Phelan and Pires, LLP)

Agency Response: As covered persons, ECU remanufacturers would be entitled to the same ECU initialization procedures that are to be provided to service technicians under section 1969(d)(3) for the installation of new control units. However, neither the statute nor the regulation provide ECU remanufacturers with the additional information they have requested to bypass vehicle anti-theft immobilizer systems when testing rebuilt units in the laboratory. ECU remanufacturers are effectively asking for special procedures, information, and equipment necessary to accomplish this. Based on motor vehicle manufacturers' concerns over anti-theft system integrity and the language of SB1146, the ARB determined that these special procedures should not be required. However, the Board has recognized that remanufacturers may be adversely affected by not being able to obtain initialization information, and subsequently directed staff report back later this year to determine if such information can safely be made available.

30. Comment: One of the primary reasons for SB1146 was to provide independent remanufacturers the same ability to remanufacture vehicle parts as the vehicle manufacturers and their suppliers. There is nothing in the bill which singles out ECUs and dictates that they cannot be rebuilt. Providing this information to ECU remanufacturers is merely fulfilling the purpose of the statute. (Conlon, Frantz, Phelan and Pires, LLP)
31. Comment: By not allowing remanufacturers to repair and replace ECUs, competition in the market is basically reduced, thus undermining the objectives of the legislation. (ATOC)
32. Comment: Remanufacturers of on-board computer systems can provide consumers with greater choice and lower cost for emission-related repairs. However, under the ARB's proposal such entities would not be provided with ready access to the information needed to reinitialize on-board computers. This is not consistent with the findings or statutory provisions of SB1146 and could lead to higher costs and greater inconvenience for California motorists. Section 43105.5(a)(6) (added to the HSC by SB1146) requires the ARB to adopt regulations that require a motor vehicle manufacturer to "[p]rovide to *all covered persons* information regarding initialization procedures..." (emphasis added). SB1146 defines "covered person" to include any person engaged in the manufacture or remanufacture of emission-related parts, which includes remanufacturers of on-board computers. (MEMA)

Agency Response to Comments #30-32: In the ISOR and at the December 13, 2001, hearing, the ARB staff's position has been that the language of SB1146, taken as a whole, and its supporting legislative history do not validate the commenters' arguments. In HSC section 43105.5(a)(5), the Legislature specifically noted a special concern that on-board computers systems be treated

differently from other emission-related parts. The Legislature carried over this concern in the language used in HSC section 43105.5(a)(6). There, with regard to motor vehicle manufacturers having to provide initialization procedures information to covered persons, the Legislature distinguished the circumstances under which such information had to be provided. As to on-board computers, motor vehicle manufacturers must provide the information if necessary to properly install the computer. For other emission-related parts, the manufacturers must provide the initialization information if necessary to repair or replace the part.

Clearly, the circumstances in which motor vehicle manufacturers must provide initialization information for computers is more limited than for other emission-related parts. The statute makes no mention, as the commenters suggest, that initialization information must be provided for the remanufacture of on-board computers. Indeed, any such obligation to provide such information for remanufacturing or rebuilding of computers was omitted from the final bill that was signed into law by the Governor. As noted at the hearing, early iterations of the legislation clearly denoted that initialization information should be provided for rebuilding of on-board computers. As amended on June 14, 1999, the proposed legislation required motor vehicle manufacturers to:

Provide information regarding initialization procedures for dealing with immobilizer circuits or other lock-out devices necessary for properly repairing, rebuilding, installing, or otherwise reinitializing vehicle onboard computers that employ integral vehicle security systems.

This bill signed by the Governor on September 20, 2000 expressly omitted reference to rebuilding, requiring motor vehicle manufacturers to:

Provide to all covered persons information regarding initialization procedures relating to immobilizer circuits or other lockout devices to reinitialize vehicle on board computers that employ integral vehicle security systems if necessary to repair or replace an emission-related part or if necessary for the proper installation of vehicle on board computers that employ integral vehicle security.

It is a maxim of statutory construction that a legislative body intends to delete reference to an item that was omitted from a prior version of a bill. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language." I.N.S. v. Cardoza-Fonseca, 107 S.Ct. 1207, 107 S.Ct. 107, citing Nachman Corp. v. Pension Benefit Guaranty Corporation, 446 U.S. 359, 392- 393, 100 S.Ct. 1723, 1741-1742, 64 L.Ed.2d 354 (1980) (Stewart, J., dissenting); cf. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200, 95 S.Ct. 392, 401, 42 L.Ed.2d 378 (1974); Russello v. United States, 464 U.S., at 23, 104 S.Ct., at 300.

The commenter's suggest that because motor vehicle manufacturers must provide the information identified in section 43105.5(a)(6) to all covered persons, the information that must be provided under that section must conform to that universe. In other words, since remanufacturers are covered persons, the initialization information that must be provided under subdivision (a)(6) must include information that would be specifically useful to remanufacturers in bench testing computers. Although, there is no dispute that the term covered persons, includes remanufacturers, the scope of that term does not dictate the nature of the information that must be provided pursuant to the language of that section. Rather, as explained above, the nature of the information that must be provided under subdivision (a)(6) is dictated by the express terms of that section. And, the subdivision cannot reasonably be read to provide remanufacturers with initialization information that would permit bench testing.

The reasonable construction of the subdivision is that motor vehicle manufacturers must provide initialization information to all covered persons demonstrating a need for such information to repair or replace emission-related parts or to install an on-board computer.

In determining that the Legislature intended to limit access to initialization information under title 13, CCR, section 1969(d)(3), the ARB recognized the underlying need of motor vehicle manufacturers for motor vehicle theft security. However, the Board also recognized the concomitant need of on-board computer remanufacturers for access to initialization information that would allow them to remain a viable business. Accordingly, the Board directed staff to continue to work with both the motor vehicle and aftermarket industries on the issues surrounding access to initialization procedures for remanufacturers and to report back to it within one year with its findings.

33. Comment: Some motor vehicle manufacturers have over the years contracted with aftermarket part remanufacturers of ECU units. Such remanufacturers have been provided with the ability to bench test remanufactured units. Given this, all ECU remanufacturers should be allowed to be able to purchase and access the same initialization procedure information. Motor vehicle manufacturers believe that making this information available to all remanufacturers would compromise vehicle security, but it is likely that they would mandate the same security procedures and precautions that are currently in place with the existing remanufacturing companies they work with. These are not companies that have two employees and start up overnight. These are companies that are multimillion-dollar companies with hundreds of employees. They're not going to risk putting the company in bankruptcy or going to jail. And they're going to answer to the profits and losses, the balance sheet. (ATOC)

Agency Response: To the extent that motor vehicle manufacturers have shared sensitive anti-theft system design information with suppliers or companies that remanufacture ECUs, they have done so voluntarily as a business decision, and have been free to ensure the security of the information as they see fit. Nothing

in the regulation prohibits or discourages such relationships, or the expansion of these relationships to include other companies. If the ARB were to require such business relationships with all other covered persons involved with the remanufacture of ECUs, the number of people that have access to the information would be greatly multiplied, which would by itself increase the risk of misuse of the information. Further, the ARB would have to regulate such relationships to ensure against unreasonable licensing requirements and discrimination. Notwithstanding, the staff, as directed by the Board, will continue to work with both motor vehicle manufacturers and the aftermarket industries towards finding a possible solution that will allow remanufacturers to initialize computers on a workbench without compromising the integrity of anti-theft strategies.

34. Comment: The immobilizer issue is a nonproblem with a potentially very dangerous solution. The potential danger lies in the solution offered up by aftermarket and ECU remanufacturers for the availability of a “black box”, which could increase the possibility of leakage of this security information to unscrupulous people. It also could lead to the issue of tampering. (GM)

Agency Response: The ARB is similarly concerned that the information requested by ECU remanufacturers to bypass immobilizer circuitry for testing purposes could be misused and lead to higher rates of vehicle theft. The language of SB1146 seems to reflect this concern, specifically recognizing the rights of motor vehicle manufacturers to require original equipment ECUs and limiting the aftermarket industry rights to initialization information to address only installation of such ECUs. As a result, the regulation only requires the release of initialization procedures as necessary to install an electronic control module into a vehicle, or to repair and replace some other emission-related part. The ARB though is still cognizant of the interest of remanufacturers to obtain this information and will continue to look for possible solutions that balance the needs of the aftermarket and motor vehicle manufacturers.

35. Comment: There are requirements in Europe for anti-theft systems. Many of our vehicles use the same system that we use in Europe. A requirement for additional information on how to initialize the systems would put us out of compliance with European requirements due to the lessened security of the system. So you would have a whole host of vehicles in Europe that would all of a sudden no longer comply with European requirements. (Ford)

36. Comment: Another thing is the requirements that NHTSA has for marking the vehicle identification number (VIN) on specific part numbers. If you have an anti-theft system, you don't have to put the VIN information on parts. So that would jeopardize compliance with that also. (Ford)

Agency Response to Comments #34-36: See the agency's responses to previous comments in this subsection. The ARB understands that if motor vehicle manufacturers' anti-theft strategies were to be compromised, they could

fall out of compliance with European and federal requirements for theft deterrence. For this reason and reasons previously stated, the regulation limits access to initialization information as it relates to ECUs.

37. Comment: The aftermarket says they need the off-board capability to reinitialize immobilizers. However, there are other solutions the aftermarket computer remanufacturing industry can pursue to resolve this concern. For example, they could modify their test bench with the anti-theft hardware and wiring harness to replicate the setup on a vehicle. They could then perform the reinitialization right there on the workbench every time they work on a computer. They do not need the capability to bypass the anti-theft system. They will find a solution that will work for them. They're not going to go out of business. (Ford)

Agency Response: The ARB is investigating whether Ford's proposal would present a viable solution to the remanufacturer initialization issue. Staff has heard similar proposals from other motor vehicle manufacturers as well, but still is uncertain whether such methods would work for the majority of other automobile manufacturers' immobilizer systems. As directed by the Board, the ARB staff is continuing to work with affected parties on this issue, and plans to report back to the Board by the end of 2002 on its findings for a solution that can aid ECU remanufacturers in bench testing remanufactured ECUs without jeopardizing integrated immobilizer anti-theft strategies.

38. Comment: ECU remanufacturers must have access to the ability to reinitialize the system in the factory so that they can properly test the ECU prior to being shipped back to the service bay for installation. The remanufacturer has no desire to see or use the codes, only to do what is necessary to test the unit. Since car companies also are in the business of remanufacturing ECU's and selling into the aftermarket, they must also get around this problem. We understand that many of them use a black box whereby the person performing the initialization does not see the codes but can fully and cost-effectively test the unit in the factory. The board appears to have little option but to comply with both the language and the intention of the statute providing for access to reinitialization capability for remanufacturers. (CATF)

39. Comment: Vehicle security is an important issue and there is a need to protect the integrity of vehicle anti-theft systems. We also understand the motor vehicle manufacturers' concerns about divulging sensitive code to the aftermarket. However, there are some manufacturer-authorized remanufacturers that utilize a black box that permits the anti-theft system to be efficiently initialized without disclosing any of the codes. This is a solution that should be acceptable to all parties. Remanufacturers are willing to submit to certain criteria as previously proposed to staff, such as confidentiality agreements, and demonstration to the manufacturers that we are bona fide remanufacturers. It is encouraged that any solutions by the motor vehicle manufacturers be presented so that the remanufacturers can work together with them rather than against them. (Blue Streak Electronics)

40. Comment: The staff's decision not to include the requirements for the disclosure of initialization information to remanufacturers is correct. As to the claim that this leaves the use of so-called black boxes to only authorized ECU manufacturers and remanufacturers, the use of such boxes is not very extensive. Some manufacturers don't currently authorize ECU remanufacturing at all simply because there's no business case to support it due to the low volume of ECU replacements. Most manufacturers do not provide black box systems for their ECU manufacturers or remanufacturers. (AIAM)

41. Comment: In Ford's case, black boxes are not used. Ford's remanufacturer is also the computer supplier. They own the technology to remanufacture the ECU. So computers that are replaced at the dealer are returned back to the computer supplier. They have developed a test bench that they use to check out the proper function of that computer. Ford does not provide any information to them to bypass the anti-theft system. And that technology is owned by them. (Ford)

Agency Response to Comments #38-41: The aftermarket has stated that motor vehicle manufacturers can avoid the direct release of sensitive anti-theft system information by designing and providing a "black box," which would be connected to the computer to circumvent the anti-theft control logic. However, the concept has been a concern for the ARB and motor vehicle manufacturers. As stated in the ISOR, staff believes that the required use of black boxes may subject a motor vehicle manufacturer's security provisions to abuse. The main issue with this type of technology is the fact that the box can be tampered with or reverse engineered to determine a motor vehicle manufacturer's algorithm or other process for authorizing initialization of the ECU.

The ARB understands that difficulties in testing remanufactured ECUs can arise from the integration of immobilizer anti-theft strategies into such computers. Yet considering the above security concerns and the language of SB1146, the ARB has not included such a requirement on motor vehicle manufacturers in the regulation. However, as directed by the Board, the staff will continue to work with all affected parties to determine if there is a way to better facilitate laboratory testing of remanufactured ECUs without compromising the integrity or effectiveness of the anti-theft systems.

42. Comment: The aftermarket is claiming that the legislation was really intended to require manufacturers to provide the ability for computer remanufacturers to bypass or disable anti-theft systems off board the vehicle while the computer's being checked out on a test bench during the remanufacturing process. I disagree. They never asked for this during negotiations that took place while the legislation was being considered. I attended those meetings. Had they asked for it, we would never have agreed. Providing off-board reinitialization capability would render vehicle security systems to be totally ineffective. We would somehow have to give them the strategy information to bypass the system. This information could be misused with disastrous consequences. A simple car thief

tool could be developed to bypass or disable a vehicle's anti-theft system. Knowing what the anti-theft module needs to see, the tool could feed the vehicle the proper response so that it thinks a valid ignition key is being used. (Ford)

Agency Response: The aftermarket industry interprets the language of SB1146 differently from the ARB as it relates to remanufacturers, and therefore concludes that remanufacturers are implicitly entitled to the information when the bill was finalized. Although the staff does not place any import to the views of one stakeholder in the drafting of the legislation, the staff agrees with motor vehicle manufacturers that there are legitimate security issues involving the release of initialization information, and the aftermarket's request for special information or a "black box" was not accommodated in the drafting of the regulation. However, as stated earlier, the ARB will continue to work with the affected parties to work towards a solution that will make immobilizer-equipped ECUs easier to test after remanufacturing without jeopardizing anti-theft system integrity.

43. Comment: According to the language in HSC, sections 43105.5(a)(5) and (a)(6), SB1146 permits manufacturers to withhold information on immobilizer circuits that would be needed for any other purposes outside of (1) having to "repair and replace" emission related parts (other than power control modules (PCMs) themselves), and (2) the ability to replace ("install") manufacturer-supplied "on-board" computers. Based on this clear statutory language, there is no valid argument that the ARB enjoys authority to promulgate regulations in order to enable the aftermarket to perform remanufacturing of PCMs. (Alliance/AIAM)

Agency Response: The ARB has a similar interpretation of the statutory language in that there is a unique difference in how ECUs and other emission-related parts are handled when it involves initialization information. With respect to ECUs, such information must only be made available when a computer is installed. In the case of other emission-related parts, it is required when needed after the repair or replacement of those parts. Given this and the fact that HSC 43105.5(a)(5) allows motor vehicle manufacturers to use encryption codes on ECUs, the staff concluded that remanufacturers are not entitled to special information for the purposes of testing remanufactured computers. However, the Board has directed the ARB to determine if there is a way to maintain the security provided by SB1146 while still giving the aftermarket, including remanufacturers, maximum access to initialization information.

TRADE SECRETS

44. Comment: HSC section 43105.5(a) provides that the regulation shall require disclosure of information only to the extent that such disclosure is not "limited or prohibited by federal law". Section 43105.5(b), which provides for the protection of trade secrets, must be read in light of the general limitation of HSC section 43105.5(a). Accordingly, the regulation, as it applies to trade secrets, cannot violate the Commerce Clause, Art. I, Section 8, Clause 3 of the U.S. Constitution. (Alliance/AIAM)

45. Comment: The regulation implementing HSC section 43105.5(b) would require motor vehicle manufacturers to go to state court to obtain prior judicial approval for each and every trade secret they wish to withhold. Such a provision would violate the Commerce Clause by creating burdens on interstate commerce that are disproportionate to their putative local benefits. (Alliance/AIAM)
46. Comment: Because the intellectual-property market is inherently national, it must be governed by a unified national and international regulatory regime. (Alliance/AIAM)
47. Comment: The California Legislature was definitely aware of, and responded to, the important considerations presented by the dormant Commerce Clause as it relates to the regulation of trade secrets used in interstate commerce in the manufacture of automobiles. As early as May 1999, automobile manufacturers furnished the Senate with an extensive analysis of dormant Commerce Clause issues implicated by attempts to regulate or expropriate intellectual property used in interstate commerce. These dormant Commerce Clause concerns were part of the reason for the provision stating at the very outset that the regulation the ARB will promulgate shall require disclosure of information *only* “to the extent” that such disclosure is not “limited or prohibited by federal law.” One of the “federal law” provisions that the Legislature had preeminently in mind in crafting this provision was the Constitution’s dormant Commerce Clause. (Alliance/AIAM)
48. Comment: The burdens that the staff’s proposal would impose on motor vehicle manufacturers seeking to protect trade secret information from disclosure are, in my view, substantial. Likewise, the protections provided for trade secret information appear to be weak. For instance, the regulation requires manufacturers to disclose legitimate trade secret information if disclosure of such information is deemed necessary to “mitigate anticompetitive effects.” (GM)
49. Comment: The regulation violates the Commerce Clause in that it imposes upon motor vehicle manufacturers an affirmative duty to obtain prior approval from a California Court for each and every trade secret subject to disclosure they seek to withhold. If adopted, the requirement would substantially undermine the ability of motor vehicle manufacturers to protect the integrity of their trade secrets not only in California, but also on a nationwide basis. The law would effectively require that trade secrets created and protected under the laws of other states either be “registered” with California courts or else be disclosed to competing firms and thereby destroyed. (Alliance/AIAM)
50. Comment: The regulation further violates the Commerce Clause because they will have a sweeping and unlawful extraterritorial effect. Manufacturer trade secrets are protected under the law not only of California, but also of all 50 states. Because trade secret information is fungible, once information is revealed in California, the disclosure is irreversible and the information become available for use everywhere. (Alliance/AIAM)

51. Comment: The regulation violates the dormant Commerce Clause under the balancing test created by the U.S. Supreme Court (See Pike v. Bruce Church, Inc. (1970) 397 U.S. 137) because the burdens on interstate commerce clearly outweigh any putative benefits. (Alliance/AIAM)
52. Comment: Nothing in section 209(b) of the Clean Air Act authorizes actions that violate the dormant Commerce Clause. (Alliance/AIAM)
53. Comment: The regulation forcing disclosure of trade secrets in order to mitigate anti-competitive effects also violates the dormant Commerce Clause. (Alliance/AIAM)

Agency Response to Comments #44-53: The ARB respectfully disagrees with the commenters' interpretation of the legislative scheme of SB1146. In section 43105.5(a) of the HSC, the Legislature directed the ARB "to adopt regulations to do all of the following to the extent not limited or prohibited by federal law...." The section lists seven specific directives that the ARB should follow in adopting the regulation consistent with the general caveat regarding federal law. The plain meaning of the terms used in sections 43105.5(a) and (b) requires that the latter section be read independently of the former. As indicated above, section 43105.5(a) sets forth the Legislature's specific instructions to the ARB in adopting regulations to implement the directives of that section. The caveat regarding consistency with federal law is specific in its reference to drafting regulations specific to the directives of subdivision (a). In contrast, section 43105.5(b) sets forth a specific judicial process for dealing with any information required to be disclosed after a final regulation has been adopted. There is nothing in section 43105.5(b) to indicate that the Legislature authorized the ARB to determine either the constitutionality of this provision or whether it is prohibited or limited by federal law. Indeed, the ARB is prohibited from making such determinations under the California Constitution. Art. III, section 3.5 of the California Constitution states:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

- (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
- (b) To declare a statute unconstitutional;
- (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Commenters' assertions that the regulations violate the Commerce Clause of the U.S. Constitution are in essence a challenge to the governing statute itself and

specifically subdivision (b). Accordingly, pursuant to the aforementioned provisions of the California Constitution, the ARB cannot through its regulations, either explicitly or implicitly, find that the directives of the Legislature are unenforceable. As a state administrative agency, the ARB is required to do such acts as may be necessary for the proper execution of the powers and duties granted to, and imposed upon it by the division 26 of the HSC and other provisions of law. (HSC section 39600).

The commenters statements regarding the ARB's duty to determine the constitutionality of the statute are misplaced. Clearly, the ARB is not attempting "to wage war against the Constitution", as the commenter's insinuate. Meredith Corporation v. Federal Communications Commission (1987) 809 F.2d 863, cited by the commenters is inapposite to the facts of this rulemaking. There, in an enforcement proceeding, the Commission refused to consider the petitioner's challenge regarding the constitutionality of its fairness doctrine. The court ruled that the FCC had a duty to consider the challenge when it involved its own "generated policy that the Commission itself believe[d to be] unconstitutional." (Id., at 874, emphasis added.) This case is clearly distinguishable from the circumstances here. First, the ARB has made no declaration as to the constitutionality of the regulation or the underlying statute, SB1146. Second, as stated, the constitutional challenge is effectively directed at the authorizing statute, itself, an issue which the California Constitution clearly prohibits the ARB from addressing in the first instance.

In adopting title 13, CCR, section 1969(i), the ARB adopted a regulation that implements and is consistent with the directives of HSC section 43105(b). As required by the subdivision, the regulation places the initial burden on motor vehicle manufacturers to demonstrate to a California court that information should not be disclosed because it is a trade secret under the California law. It is only after a finding by the court that the information is, in fact, a trade secret that a covered person is required under the statute to come forth and present evidence that the information is necessary to mitigate anti-competitive effects. For the ARB to adopt a regulation requiring a different procedural process would have been contrary to the specific directives of the statute and, in effect, finding those directives to be unenforceable, without a prior ruling from an appellate court. Such an act by the ARB would have been in violation of the State Constitution. (Id.)

In contending that that the federal law circumscription of subdivision (a) applies to subdivision (b), the Alliance/AIAM would like for the ARB, in the first instance, to determine whether the Legislature's express directives are constitutional or otherwise in violation of federal law. At this time, the ARB cannot make any such finding. Specifically, to date, no federal or state court has directly addressed the constitutional question of violations of the Commerce Clause in the special context of service information and the special provisions that apply to California under the Clean Air Act (CAA). Without clear decisional law from the courts, the

ARB is hesitant to draft regulations, as the commenters would like, that directly conflict with the Legislature's express directives.

To the extent that governing statutes and regulations of the ARB have been reviewed in respect to the commerce clause, decisions of the courts have found no constitutional infirmity. The commenters' acknowledge that the regulation would clearly fall under the preemption set forth in section 209(a) of the CAA [42 U.S.C. §7543(a)] if they had been prescribed by any state other than California. (*Alliance/AIAM, Response to Notice of Public Hearing to Consider Adoption of Regulations for the Availability of California Motor Vehicle Service Information, Legal Analysis*, December 5, 2001, p. 6.) They further agree that the provisions of section 209(b) [42 U.S.C. §7543(b)] provide California with the right to seek waivers from the section 209(a) preemption. But, they assert that the provisions of section 209(b) do not provide an "escape hatch" from the dormant Commerce Clause. In making such a claim, they fail to cite any authority that directly supports their contention; indeed, it is contrary to the one California court that has ruled on the question. (See *People v. Wilmshurst* (1999) 68 Cal.App.4th 1332, 1345, in which the court dismissed an allegation of a Commerce Clause violation, finding that Congress in adopting the section 209(b) waiver of preemption for California had made an "expression of unambiguous intent" to lift any limitation imposed by the Commerce Clause; see also the following cases cited by the *Wilmshurst* court: *New York v. United States* (1992) 505 U.S. 144, 171; *Motor and Equipment Mfrs. Ass'n, Inc. v. EPA* (1979 D.C. Cir.) 627 F.2d 1095, 1009-1011; and *Merrion v. Jicarilla Apache Tribe* (1982) 455 U.S. 130.)

To the extent that the commenters may be arguing that CAA section 202(m) [42 U.S.C. §7521(m)] and the Federal Service Information Rule preempt the regulation implementing subdivision (b), that argument must fail. It is clear that Congress did not intend to occupy the total field as it relates to California in adopting the CAA. (See CAA sections 209(b) and 116 ["nothing in this Act shall preclude or deny; the right of any State...to adopt or enforce (1) any standard or limitation respecting emissions or air pollutants or (2) any requirement respecting control or abatement of air pollution...."]. Courts have been reluctant to infer preemption where both the federal and state legislative schemes reflect a policy favoring the same goal. (*Chevron U.S.A., Inc. v. Hammond* (1982) 726 F.2d 483, 497.) Similarly, as reported in 13 Cal Jur 3d (Rev) Part 1 483, "the mere existence of federal legislation in a particular field of interstate commerce does not necessarily invalidate state laws dealing with the same matter." According to the reported case summaries, "such state statutes are not suspended unless Congress has manifested an intention to occupy the entire field, thereby excluding all state control." (*Id.*, citing *H.P. Welch Co. v. New Hampshire* (1939) 306 U.S. 79.)

Under the balancing test set forward in *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, the putative local benefits as set forth in the legislative findings in SB1146 clearly outweigh potential harm that has been identified by the commenters. The Legislature stated, "...to prevent unnecessary pollution, it is in

the best interest of the state to ensure the ability of California motorists to obtain service, repair, of faulty emission related components; the withholding of essential service, repair and parts information and tools from independent automotive repair technicians and independent aftermarket parts manufacturers may result in improper and needlessly costly repairs that could also endanger the public and result in anti-competitive effects harmful to the interests of the state.” Indeed, the commenters have failed to identify any detailed evidence of the costs that their members will be subject to or other evidence of significant burdens. Moreover, the regulation implementing subdivision (b) is quite limited in scope. The regulation performs two basic functions: establish a process for the parties to work out trade secret disputes informally prior to filing litigation, and provide notice to the parties of their respective burdens of going forward in seeking judicial declaratory relief. The provisions to encourage the parties to resolve disputes informally should limit the amount of formal litigation between the parties and thereby costs. As to the regulatory provisions providing notice to the parties’ of their respective burdens of going forward in a declaratory relief hearing, the provisions merely follow the plain language of subdivision (b) of the governing statute. As stated in more detail in the agency’s response to Comment #54, the ARB’s interpretation is consistent with well-established state and federal law on this issue. Thus, it does not appear that the regulation itself would impose any special burden on the motor vehicle manufacturers. Also, please see the agency’s response to Comments #70-72 as to the limited financial burden expected to be encountered by motor vehicle manufacturers. To the extent that having to go could impose some type of burden, it should be minimized by the informal dispute resolution process referred to above. On balance, the benefits of the regulation would seem to outweigh any burdens that have been identified.

As to the Alliance/AIAM comments that the regulation’s extraterritorial effects would per se violate the Commerce Clause, this issue is a matter of first impression. The Legislature and the ARB in crafting the definition of “covered person” specifically limited applicability of the regulation to persons who service, repair, or manufacture tools and parts for California motor vehicles. Regarding their claims that having California courts rule on trade secret information would have an impermissible extraterritorial effect, the commenters ignore the well-established history of having state courts rule on such questions. As stated above, the courts have possessed such jurisdictional authority for years. (See Civil Code section 3426 et seq.; Evidence Code 1060 et seq.) Specifically, as to California-certified motor vehicles manufactured by the commenters’ membership, the ARB and California courts have had responsibility under the California Public Records Act, Government Code section 6250 et seq., to make determinations regarding asserted trade secrets for over two decades. To the best of the ARB’s knowledge, never before have manufacturers asserted that such review by California agencies and courts is prohibited under the Commerce Clause.

54. Comment: The ARB has improperly interpreted section 43105(b) to require motor vehicle manufacturers to obtain prior judicial approval before withholding trade

secrets. Contrary to the ARB's interpretation, that section places the burden on a covered person who seeks disclosure to petition the court. The statute, correctly interpreted, would authorize manufacturers to withhold trade secret information unless and until a challenging party successfully sues to establish that the information is not a protected trade secret. (Alliance/AIAM)

Agency Response: The regulation effectively codifies the two-step judicial process set forth by the Legislature in subdivision (b). First, motor vehicle manufacturers have the burden of demonstrating to the court, on a case-by-case basis, whether information that it seeks not to disclose is a trade secret. Second and only after a trade secret determination has been made, a covered person seeking disclosure of the information may request that the court, nonetheless, provide the information under proper security precautions imposed by the court. Having the initial burden, it makes sense that the party seeking to protect information as a trade secret should be the party to seek declaratory relief. This allocation of the parties' burdens and the requirement that the holders of trade secrets have the duty of seeking relief before a court is consistent with both federal and California law. (See HSC section 25111(c); Cal. Evid. Code section 1060 et seq. [owner of a trade secret shall file a motion for a protective order]; title 17, CCR, section 91022(e)(2) [upon determining that information is not confidential and subject to disclosure, under the California Public Records Act, the ARB will release the information unless a court of competent jurisdiction rules otherwise]; see also Federal Rules of Civil Procedure, Rule 26, 28 U.S.C.; Recall Regs, 40 C.F.R. section 85.1807(n)(1); Raymond Handling Concepts Corp. v. Superior Court (1995) 39 Cal.App.4th 584, 590 [45 Cal.Rptr.2d 885].)

55. Comment: The law of all 50 states presumes that trade-secret protection is available when claimed and places the burden of demonstrating the contrary on those who would change the status quo. Because the regulation would reverse that presumption without any good reason, it runs afoul of the "necessity" prerequisite to regulation under the California Administrative Procedure Act. (APA). (See Government Code §11349.1(a)(1).) (Alliance/AIAM)

Agency Response: The commenters make the above claim failing to cite any legal authority. As stated in the agency's response to Comment #54, both federal and state laws have routinely placed the burden of demonstrating a trade secret on the party claiming the privilege. Common sense, indeed, dictates such an apportionment of the burden in that it is the holder of the contested information who has the requisite knowledge for demonstrating that the information is, in fact, a trade secret.

56. Comment: By requiring manufacturers to initiate suit in California courts upon request for information from a covered person, the regulation would significantly increase the costs to manufacturers in protecting trade secret information. Such costs would adversely affect innovation, research and development of on-board computer systems and emission control parts. It is not necessary to subject manufacturers to these additional costs in that manufacturers already have little

incentive to withhold non-proprietary information, as the regulation would impose sizable fines on manufacturers that fail to comply. (Alliance/AIAM)

Agency Response: The commenters partially answer their own comment when they say that motor vehicle manufacturers will have little incentive to withhold non-proprietary information. Thus, it is anticipated that disputes over whether information is required to be disclosed or not should be limited because of the disincentive to shield nonproprietary information. Further, the adopted regulation was drafted to encourage motor vehicle manufacturers and requesting covered persons to engage in informal discussions so they can better understand each party's position and to attempt to reach accord outside of having to go to court. This too should reduce the unidentified costs to which the commenters refer. The commenters' claim that the costs motor vehicle manufacturers are expected to incur would adversely affect innovation, research and development of on-board computer systems and emission control parts is unsupported. To the contrary, in adopting the Uniform Trade Secret Act (Civil Code section 3426 et seq.) and specifically applying that law to trade secret claims arising under HSC section 43105.5(b), California, as other states, clearly seek to protect and encourage commercial invention and innovation. (See Kewanee Oil Company v. Bicron Corporation (1974) 416 U.S. 470, 481.). The commenters provide no estimate of expected costs or other support for their assertion, and the argument is speculative. To the extent that this comment is intended to support the claim that the regulation causes undue burden on the manufacturers for the purpose of showing a violation under the Commerce Clause balancing test, see the agency's response to Comments #44-53 above.

57. Comment: Under the regulation, motor vehicle manufacturers would be forced to seek approval from a California court for each and every trade secret potentially covered by the regulation that they seek to withhold from disclosure. The regulation would force manufacturers to litigate in California's courts the validity of any trade secret information potentially subject to disclosure, regardless of where those trade secrets were created or have been maintained. (GM)

58. Comment Trade secrets are protected against disclosure or unauthorized use under the law of the state in which they are created and held. (Alliance/AIAM)

Agency Response to Comments #57-58: To the extent that the above comments allege that the HSC section 34105.5(b) and the adopted regulation violates the Commerce Clause, see the agency's response to Comments #44-53 above. As to the question of which state law should apply in determining a trade secret claim, that question is best left for the courts to decide. It is undisputed that where diversity lies, the parties can elect to proceed in federal court. In determining the choice of law issue, it should be pointed out that the motor vehicle manufacturers have voluntarily elected to certify motor vehicles for sale in California and to engage in the business of selling motor vehicles in the state. They have, consequently, established significant contacts within the state and come within state court's jurisdiction.

Although not timely raised, the commenters have belatedly raised arguments that the regulation implementing subdivision (b) violates the Full Faith and Credit Clause of the United States Constitution. Again, as with their contentions of a Commerce Clause, they are attacking the governing statute itself and not the implementing regulation. As previously explained, the ARB is without authority to decide such questions. (See California Constitution Art. III, section 3.5.) Moreover, the predicate of the commenters' arguments that the courts in California will not properly consider all relevant information in making trade secret determinations, including the rulings in other state jurisdictions, is speculative and without foundation.

The ARB respectfully disagrees that the courts must protect "each and every" trade secret potentially covered by the regulation. The regulation sets forth no such requirement. If a covered person seeks information that a motor vehicle manufacturer considers to be a trade secret, the manufacturer may seek protection in the courts to shield the requested information from disclosure. There is no requirement that manufacturer must preemptively seek a court's declaration of all its trade secrets. As just stated, the option arises only after a covered person has made a request for the information, and after the parties have had a reasonable opportunity to informally resolve the matter.

59. Comment: The ARB should not rely on communications between Senator Burton and the ARB that suggest that the ARB depart from the plain language of SB 1146, which places the burden of proof on the person seeking disclosure of trade secret information. (Alliance/AIAM)

Agency Response: The ARB agrees with the commenters. The ARB did not rely on the letter from Senator Burton, dated August 21, 2001 in interpreting Health and Safety Code section 43105.5(b).

60. Comment: The regulation should be revised to give the parties more flexibility to resolve trade secret matters informally. Specifically, the provisions in section (l)(3)(D) should be revised to not require the motor vehicle manufacturer to provide the information determined not to be a trade secret within two days to the affected covered person and to make the information available to other covered persons within seven days. Rather, the parties to the dispute should be allowed to mutually agree on an appropriate time for disclosure. The Alliance and AIAM therefore suggest that the following language (indicated by bold italics) be added to the ARB's subsection (i)(3) of title 13, CCR, section 1969: (Alliance/AIAM)

(D) If the parties can informally resolve the matter, the motor vehicle manufacturer shall within 2 days, ***or some other time mutually agreed upon by the parties***, provide the requesting covered person with all of the information that is subject to disclosure consistent with that agreement. The motor vehicle manufacturer shall also within ***no later than 7 days after the date that the information is provided to the requesting covered person***,

make such information available for purchase to other covered persons consistent with the requirements of this regulation.

61. Comment: The trade secret procedures do not establish realistic response guidelines. Specifically, the short deadlines provided in title 13, CCR, section 1969(i)(3)(A) and (B), impose significant cost on motor vehicle manufacturers. To meet these response times, full-time staff would have to be devoted to the review of aftermarket requests. (Alliance/AIAM)

Agency Response to Comments #60-61: The first comment, which was received in response to the 15-Day Notice, is directed at an effectively nonsubstantive change to the text. Although the text was modified from 48 hours to 2 days, it does not change the intent or substance of the regulation. The staff believes that the response times given in the regulation for both the justification of information considered to be a trade secret (14 days) and the subsequent release of information not disclosed due to an oversight (2 days) are sufficient for the interested parties to work out contested issues and have the information made available. The two-day period in title 13, CCR, section 1969(i)(3)(A) reasonably addresses a covered person's need for the information in order to quickly complete a repair on a vehicle. The 14-day period in title 13, CCR, section 1969(i)(3)(B) balances the need for a motor vehicle manufacturer to justify its claim of a trade secret with, again, the need for a covered person to obtain such information in a timely manner. The staff believes that lengthening the time in either case increases the chances of an owner being disenchanted with how long his or her vehicle is being left at a repair shop.

The intent and purpose of the adopted regulation is to make service information readily available to covered persons. In most, if not all instances, covered persons have requested the information out of a direct and immediate need. The ARB believes that other covered persons may be in similar positions. Moreover, once it is determined that information is subject to disclosure, the right of access to the information is not limited to the covered person who made the initial request. As indicated, other covered persons may have a direct interest in and need for the information; they should not be subject to any form of unnecessary delay, especially delay stemming from an agreement between parties who may or may not be representatives of their interests.

PRICING AND RETURN ON INVESTMENT

62. Comment: The cost of information will continue to be a major issue for our industry. Unless both information and tools are affordable to the small businesses that comprise our industry, the specific information availability requirements in this regulation will be worthless. We urge that CARB put the necessary enforcement resources in place to ensure that its regulation -- and, in particular, the reasonable cost requirements -- are properly met by the car companies. We further are concerned about provisions and proposals that

provide vehicle manufacturers with the ability to restrict access to information and tools they consider trade secrets. (CATF)

63. Comment: My concern today is the process by which you'll determine or someone will determine the price for the information that we'll have to pay to gain access to the information we don't have right now. Almost everybody in the smog program, by law, has to have some sort of information process in place. During this new process, when we have access to the information on the Internet, I suspect that a lot of that information's going to be duplicated by the information we're already paying for. So I think it might be prudent that whoever looks at that process understand that an awful lot of the information we're going to end up paying for twice, which is something maybe nobody's talked about yet. (Auto – CA)

64. Comment: Cost controls on information and tools and also multiple sources for available and affordable remanufactured emissions parts and ECU's are vital to provide affordable and timely repair of the consumers' vital daily transportation. (ASCC)

Agency Response to Comments #62-64: The Legislature fully realized in drafting SB1146 that the affordability of service information is instrumental in determining whether or not service information is effectively available to covered persons. For that reason, HSC section 43105.5(a)(7) specifies that, "All information required to be provided to covered persons...shall be provided, for fair, reasonable, and nondiscriminatory compensation, in a format that is readily accessible to all covered persons, as determined by the state board."

The regulation defines "fair, reasonable, and nondiscriminatory price" using nine criteria. These criteria balance the need of the motor vehicle manufacturer to receive equitable compensation for making service information available, including reprogramming and diagnostic tools, against the need of the aftermarket for affordable information. Under the balancing process, motor vehicle manufacturers will not be able to charge prices that significantly disenfranchise covered persons from obtaining that information at a competitive rate. Furthermore, the term "nondiscriminatory" is also defined in the context of creating a competitive economic environment between dealerships and covered persons.

While the ARB believes that motor vehicle manufacturers will adhere to the pricing provisions in good faith, it will continue to monitor and investigate claims that price rates are not fair and reasonable. Lastly, covered persons that believe a motor vehicle manufacturer's pricing is in violation of the regulation can request that the ARB conduct an audit and review compliance.

65. Comment: The ARB should delete the factor regarding "the ability of an average covered person to afford the information" as one of the factors in determining fair, reasonable, and nondiscriminatory compensation. What is an "average covered

person"? What does "affordability" mean? To require the consideration of cost from a purchasers' standpoint would either result in numerous new entrants into the market to take advantage of what would essentially be an ARB-ordered subsidy, or the subsidization of some subset of existing participants to the disfavor of new entrants. Such a system is practically and administratively unworkable and nonsensical. (Alliance/AIAM)

Agency Response: The staff included the ability of an average covered person to afford information because information cannot be considered available if it is beyond the means of the majority of independent service providers. The factor is included to balance the interests of both a motor vehicle manufacturer and a covered person. Determining what constitutes an average covered person and how to quantify affordability will be difficult, but the ARB feels that the factor is warranted given that all of the other factors consider the effect of pricing only from the standpoint of the motor vehicle manufacturer. That said, in determining "fair, reasonable, and nondiscriminatory price," no factor will be considered individually, but in totality with the all other factors.

66. Comment: Setting a "fair, reasonable, and nondiscriminatory price" should not include consideration of U.S. EPA price caps. These caps are unlawful because they: 1) are not within the U.S. EPA's general authority under the Clean Air Act; 2) are not just and reasonable as a general rule; 3) have not been established after the opportunity for submission required under *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987); and 4) do not reflect the non-arbitrary application of relevant factors. (Alliance/AIAM)

67. Comment: The ARB should also not use price caps set by U.S. EPA as a factor in determining "fair, reasonable, and nondiscriminatory price" because U.S. EPA failed to provide supporting data for its findings and therefore the established price caps are arbitrary and capricious. (Alliance/AIAM)

68. Comment: The price caps proposed by U.S. EPA do not permit motor vehicle manufacturers to cover their costs and receive a reasonable return on capital invested. (Alliance/AIAM)

69. Comment: Any ARB delegation to U.S. EPA of authority to set the parameters of what constitutes a fair and reasonable price under California law would violate California's nondelegation doctrine. (Alliance/AIAM)

Agency Response to Comments #66-69: The ARB's consideration of any U.S. EPA factor or criterion for service information costs would only be considered after the U.S. EPA formally promulgated its pricing structure. As stated, no one factor is conclusive; the ARB will not consider U.S. EPA's pricing in isolation. The ARB will consider all listed factors in making its determination of whether a price charged is fair, reasonable, and nondiscriminatory. The weight that the ARB gives to the U.S. EPA factor will be dependent upon how well U.S. EPA is able to support its pricing structure with supporting data. If the ARB determines

that it is not properly supported and documented it will be weighed accordingly. If properly supported, consideration of U.S. EPA's pricing is appropriate in that it will help establish consistency under both the federal and state regulations. Such harmony should benefit both the motor vehicle manufacturers and aftermarket industry.

As stated, the U.S EPA's pricing structure has yet to be formally adopted and consequently the question of whether it is legal or justified has yet to be determined by any court. If not adopted or found to be unlawful by a court, the structure, the ARB would find the factor to be inapplicable and would not consider it. Regarding the contention that the U.S. EPA factor does not permit manufacturers to cover their costs and receive a reasonable return on investment, see Agency Responses to Comments #70-72.

70. Comment: The Due Process and Takings Clauses of the federal and California Constitutions require that where a state attempts to regulate specific prices, the affected company must be able to earn a "fair return " on the products whose prices are regulated. The regulation does not ensure that motor vehicle manufacturers will receive a fair return on their investments. (Alliance/AIAM)
71. Comment: Automobile manufacturers should be able to earn a fair return on their investments in service information even if they are able to earn returns on other lines of business. Ever since Justice Holmes' decision in Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U.S. 396 (1920), the United States Supreme Court has never doubted that a corporation cannot be compelled to carry on one line of business at a loss, on the assumption that those losses will be covered by other lines of business. (Alliance/AIAM)
72. Comment: Undercompensating motor vehicle manufacturers for providing required information would constitute a prohibited takings for the private purpose of allowing covered persons to make unwarranted profits. (Alliance/AIAM)

Agency Response to Comments #70-72: In enacting SB1146, the Legislature indicated a strong public policy that service information be provided to the aftermarket industry at a fair, reasonable, and nondiscriminatory cost. Specifically, in relevant part, the Legislature found and declared:

To prevent unnecessary pollution, it is in the best interests of this state to ensure that the ability of California motorists to obtain service, repair, or replacement of faulty emission-related components of their motor vehicles is not limited by the arbitrary withholding of service, repair, or parts information by motor vehicle manufacturers.

Essential service, repair, and parts information and tools for interfacing with a vehicle's on board diagnostic computer system may not be readily available to independent automotive repair technicians and

facilities. Accordingly, consumers may be restricted to having the service and repair of faulty emission-related components of a motor vehicle performed only by franchised dealerships, and consumers may be also forced to purchase replacement parts manufactured solely by or on behalf of the vehicle manufacturer. This restriction of consumer choice and options is contrary to the history of automotive repair, which saw the advent of independent repair technicians and facilities and independent aftermarket parts manufacturers as healthy market competitors to vehicle manufacturers and their dealerships.

The withholding of essential service, repair, and parts information and tools by vehicle manufacturers from independent automotive repair technicians and independent aftermarket parts manufacturers may result in improper and needlessly costly repairs that could also endanger the public and result in anticompetitive effects harmful to the best interests of the state.

It is the intent of the [legislation] to assure and stimulate competition in the service and repair of motor vehicles, including emissions systems, and in the availability of parts for those repairs. Further, it is the important policy of this state to encourage competition so that consumers have choices available to them in the service, repair, and parts used in the service or repair of motor vehicles. (SB1146 (1999-2000 Reg.Sess.) §1.)

In adopting a regulation to implement the foregoing legislative intent that service information and tools be provided at a fair, reasonable, and nondiscriminatory cost, the ARB established specific factors to balance the diverging interests of both the aftermarket industry and the motor vehicle manufacturers. To assure that service information and tools are not unnecessarily withheld from the aftermarket, the ARB determined that in balancing the parties' respective interests the ARB must make every effort to assure that provided information and tools are affordable. Common sense dictates that if not affordable, they are effectively not available, and the objectives of the legislation cannot be met.

The commenters' arguments regarding violations of the due process and takings clauses of the U.S. Constitution are not persuasive. The commenters rely principally on two types of cases involving utility rates and rent control. (See Duquesne Light Co. v. Barasch (1989) 488 U.S. 299; Federal Power Comm'n v. Hope Natural Gas Co. (1944) 320 U.S. 591; Jersey Central Power & Light v. FERC (D.C. Cir.) 810 F.2d 1168; A-1 Ambulance Service, Inc. v. County of Monterey (9th Cir. 1996) 90 F.3d 333; see also Kavanau v. Santa Monica Rent Control Board (1997) 16 Cal.4th 761; and Richardson v. City of Honolulu (D. Ha. 1992) 802 F.Supp. 326.) The cases are inapposite, and do not support a finding of a constitutional violation. The utility rate cases are all distinguishable in that they involve rate regulations that set the major, if not sole, source of revenues for the utilities. In contrast, the remuneration that the motor vehicle manufacturers

will receive from the preparation and distribution of service information and tools is not the sole, primary, or even a major source of revenue for the motor vehicle manufacturers. Indeed, the costs to the manufacturers for providing the service-related information required by SB1146 and the implementing regulation are a minute fraction of the revenues and net profits of the motor vehicle manufacturers.

These corporations have voluntarily elected to certify motor vehicles for sale in California and have in the course agreed to be regulated by California's broad-based and detailed regulatory scheme. With the enactment of SB1146, California has determined that the production and distribution of service information is part of the duties and responsibilities that motor vehicle manufacturers have elected to undertake in exchange for the right to sell their vehicles in California. As the U.S. Supreme Court stated in addressing a "takings" case, "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California (1993) 508 U.S. 602, 645 [113 S.Ct. 2264, 2291, citing FHA v. Darlington, Inc. (1958) 358 U.S. 84, 91 [91 S.Ct. 141, 146]. Here, to assure that motor vehicles that are certified for sale in California are serviced and repaired at a fair and reasonable price, the Legislature enacted SB 1164. This recent legislation must be looked at as an integral part of the legislative scheme that vehicles sold and operated in California are properly serviced and repaired and maintain low emission levels in use. The adopted regulation properly implements the Legislature's directives by balancing the conflicting interests of the motor vehicle manufacturing and the aftermarket industries in a fair and non-arbitrary manner.

Similarly, the landlord-tenant cases cited by the commenters have no direct applicability beyond setting forth helpful summaries of the U.S. and California Supreme Court's adopted principles on whether a "takings" has occurred under the Fifth Amendment of the U.S. Constitution. As stated in Kavanau:

"[a] governmental regulation effects a taking...if there is a permanent physical invasion of property, no matter how slight, or if the regulation deprives a property owner of all economically beneficial or productive use of land.... When a regulation does not result in a physical invasion and does not deprive the property owner of all economic use of the property, a reviewing court must evaluate the regulation in light of the factors the United States Supreme Court set forth: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with a distinct investment-backed expectations, and (3) the character of the governmental action."
(Kavanau 16 Cal.4th at 762)

In a leading case on takings, the U.S. Supreme Court made it clear that "a 'taking' may more readily be found when the interference with property can be

characterized as a physical invasion by government [citation] than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. “ Penn Central Transportation Company v. City of New York (1978) 438 U.S. 104, 124 [98 S.Ct. 2646, 2659]. Here, as evident from findings and declarations of the Legislature in enacting SB1146, the Legislature and ARB (in implementing the directives of SB1146) have attempted to balance the benefits and burdens of economic life that exist between the motor vehicle manufacturers, the aftermarket industry, and the motoring public.

There is no question that the service information regulation does not result in a physical invasion or instance where all economic use of the motor vehicle manufacturers’ business has been deprived. Thus, it is appropriate to look at the latter three factors identified by the Court in Penn Central and later by the California Supreme Court in Kavanau. It is clear that the economic impact of the above regulation will have little if any impact on the multibillion-dollar automobile manufacturing corporations. By their own estimates, motor vehicle manufacturers are expected to incur initial capital costs ranging from \$0.6 million to \$5 million in developing websites and the networks necessary to provide information under the regulation. It is anticipated that these costs should largely be offset under the regulation. As part of the determination of a fair, reasonable, and nondiscriminatory compensation, amortized capital costs are specifically considered. Manufacturers are also expected to incur annual administrative costs ranging between \$150,000 to \$450,000. These costs too should be largely, if not fully, recouped under the regulatory program.

However, if as a result of complying with this regulation, motor vehicle manufacturers were to incur a shortfall because of having to prepare and distribute information and tools to the aftermarket industry, such a loss must be considered a cost incurred for the privilege of selling motor vehicles in this state. As stated above, the providing of service information and tools to the aftermarket industry is now, as a result of SB1146, a required part – albeit a very small part -- of the automobile manufacturers’ business of selling motor vehicles in California. The providing of service information and tools is not a separate business entity, as the commenters would like us to believe. Accordingly, such losses, should they occur, would be relatively insignificant compared to the billions of dollars of annual revenues and recurrent profits those automobile manufacturers enjoy from selling their vehicles in California. The small cost that may be incurred should have little or no effect on the bottom line of these corporations.

The costs that may be incurred by the motor vehicle manufacturers do not involve “investment-backed expectations” that rise to the level required for a taking. As the Supreme Court stated in regard to land-use regulations, a taking might be found when the regulation has “severely interfered with an owner’s ‘distinct investment-backed expectations’.” (Kirby Forest Industries, Inc. v. United States (1984) 467 U.S. 1, 14 [104 S.Ct. 2187, 2196].) (Emphasis added.) The Court continued;

“The principle that underlies this doctrine is that, while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of “ ‘the advantage of living and doing business in a civilized community,’ ” [citations] some are so substantial and unforeseeable, and can so easily be identified and redistributed, that ‘justice and fairness’ require that they be borne by the public as a whole.” [citations] Id.

The costs that may be incurred by the motor vehicle manufacturers because of the implementing regulation would be neither substantial nor unforeseeable. As stated, the costs will be relatively insignificant. Further, since at least the enactment of section 202(m)(5) of the Clean Air Act Amendments of 1990, motor vehicle manufacturers have been on notice of their future responsibilities to provide service information to the aftermarket at a fair and reasonable price. [42 U.S.C. 7521(m)(5).] As expressed, in part, by Senator Gore during the debates that preceded adoption,

[W]e do not want to require [automobile manufacturers] to provide a lot of expensive manuals for free, but we do not want the kind of charges that make this a profit center. We want them to provide the information that will allow competition in the after market and allow small business operators to get in the repair business. (36 Cong. Rec. 3272 (1990).)

In enacting section 202(m)(5), Senator Gore’s comments were neither challenged nor contradicted. The U.S. EPA relied on the Senator’s comments when it promulgated regulations implementing section 202(m)(5) in 1995 and found that motor vehicle manufacturers must provide service information to the aftermarket industry at affordable prices. (See *Final Rule: Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines; Regulations Requiring Availability of Information for Use of On-Board Diagnostic Systems and Emission-Related Repairs on 1994 and Latter Model Year Light-Duty Vehicles and Light-Duty Trucks*, 40 CFR Parts 9 and 86, 60 Fed.Reg.40474 (August 1995). The promulgation of the federal rule provided motor vehicle manufacturers with further notice of their incumbent responsibilities to provide information at reasonable prices. Thus, the facts surrounding the adoption of this regulation do not support any basis for a finding that the motor vehicle manufacturers possess a reasonable investment-backed expectation regarding the distribution of service information and tools required under this regulation. (See Penn Central v. City of New York, 438 U.S. at 125 [98 S.Ct. at 2659].)

Finally, the Court has found that even where “investment-backed expectations” may exist, the law leans heavily against finding a taking if a strong public interest for adopting the regulations exists. (See Keystone Bituminous Coal Association v. DeBenedictis (1987) 480 U.S. 470, 485 [107 S.Ct. 1232, 1241].) Here, the Legislature unmistakably declared a strong public purpose for establishing the subject regulation (as noted in SB1146, above.)

To the extent that the commenters rely on City of Oakland v. Oakland Raiders (1985) 174 Cal.App.3d 414, to contend that the regulation imposes an improper takings for a private use, it too must be rejected. As stated, the regulation was adopted in the public interest. Although the regulation provides for the distribution of information and tools to private parties, the purpose of the regulation is to insure health, safety and welfare benefits to the state as a whole.

The commenters' reliance on Brooks-Scanlon v. Railroad Commission of Louisiana (1920) 251 U.S. 396 [40 S.Ct. 183] is similarly misplaced. First, in Brooks-Scanlon, the Court noted that "if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfill an obligation imposed by the charter even though fulfillment in that particular may cause a loss." (Id., 251 U.S. at 399 [40 S.Ct. at 184].) The ARB respectfully suggests that the certification process that is required under the state's comprehensive statutory and regulatory scheme for motor vehicles to be sold in California should reasonably be analogized to a railway charter. Accordingly, by electing to continue to sell cars in this state, the motor vehicle manufacturers have an obligation to meet the requirements that are associated with that privilege. And, as stated above, "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California, 508 U.S. at 645 [113 S.Ct. at 2291]; see also Ft. Smith Light & Traction Co. v. Bourland (1925) 267 U.S. 330, 332 [45 S.Ct. 249, 250], in which the Court distinguished Brooks-Scanlon, stating, "the Constitution does not confer upon the company the right to continue to enjoy the franchise and escape from the burdens incident to its use."

Second, the facts of Brooks-Scanlon and the instant case are clearly distinguishable. In Brooks-Scanlon, the plaintiff had distinct business operations, a railroad line and a sawmill and lumber business. The court held that the independent sawmill and lumber business could not be compelled to subsidize the railroad operations for the purpose of continued operations. Here, there is no evidence in the rulemaking record to suggest that service information and tool distribution operations of the motor vehicle manufacturers are separate and distinct from the motor vehicle manufacturing business. Indeed, common sense suggests that production and distribution of service information is an integral part of the manufacturers' business operations. (See City of New York v. U.S. (E.D. NY 1972) 337 F.Supp. 150; Cf. State ex rel. Daniel v. Broad River Power Co. (S.C. 1929) 153 S.E. 537, cert. granted Broad River Power Co. v. State of South Carolina (1930) 280 U.S. 551 [50 S.Ct. 162], cert. dismissed (1930) 281 U.S. 537 [50 S.Ct. 401], rehearing granted (1930) 282 U.S. 795 [51 S.Ct. 38], affm'd (1930) 282 U.S. 795 [51 S.Ct. 94].)

73. Comment: Confidential business information constitutes property that is protected from being taken without adequate compensation. (Alliance/AIAM)

Agency Response: Under the regulation, confidential business information will be considered and handled like other trade secrets. HSC sections 43105.5(b) and (c), set forth a specific judicial process for addressing trade secrets, including a requirement that, if disclosure is ordered, that the court “shall provide to the motor vehicle manufacturer “fair, reasonable, and nondiscriminatory [sic] compensation to the motor vehicle manufacturer...” The statute further provides that the “court shall provide for ‘reasonable licensing fees’” if dissemination of trade secret information is required.

74. Comment: The regulation does not ensure that motor vehicle manufacturers will receive a fair return on their investments. Indeed, they may well require motor vehicle manufacturers to make service information available to independent service providers at prices lower than the rates they charge their own franchised dealerships. There is no provision permitting manufacturers to earn a reasonable return on the capital they invest in service information. (GM)

Agency Response: To the extent that commenter is raising a “takings” challenge, see the agency’s response to Comments #70-72. It is not the intent of the regulation that motor vehicle manufacturers charge their franchise dealerships more than the charge the independent service and repair industry. Under the regulation, the compensation that motor vehicle manufacturers are to receive for distribution of their materials to the aftermarket is a price that is “fair, reasonable, and nondiscriminatory.” This is ultimately determined on a case-by-case basis after considering a number of different factors, one of them being the price that the motor vehicle manufacturers charge their franchise dealerships for similar for the same information and tools. The regulation does not police the relationship between motor vehicle manufacturers and its franchised dealerships or regulate how the price charged to dealerships is arrived at.

75. Comment: Under the regulation, motor vehicle manufacturers may not be able to recover the full costs of providing service information and will not be able to consider research and development costs. (GM)(Alliance/AIAM)

76. Comment: The regulation should not focus only on “net cost,” while expressly excluding consideration of “research and development” costs. (Alliance/AIAM)

Agency Response to Comments #75-76: To the extent that commenter is raising a “takings” challenge, see the agency’s response to Comments #70-72. In determining what is a “fair, reasonable, and nondiscriminatory price”, one of the factors to be considered (in title 13, CCR, section 1969(c)(10)(B)) is “the net cost to the motor vehicle manufacturers’ franchised dealerships for similar information obtained from motor vehicle manufacturers, less any discounts, rebates or other incentive programs.” The intent of the provision is clear from the language itself - only the “real cost” of information is to be considered.

This factor provides that the motor vehicle manufacturer may consider its costs for preparing and distributing the information, but does not allow consideration of any research and development costs incurred in “designing and implementing, upgrading or altering the onboard computer and its software or any other vehicle part or component.” The regulation is clear that the exclusion explicitly applies only to research and development of motor vehicle parts and components, including the OBD II system. The ARB feels that the exclusion is appropriate because the costs associated with development of motor vehicle parts are typically recouped in the price of the motor vehicle itself. On their face, these costs are not directly related to the costs associated with providing service information, and therefore should not be borne by the aftermarket. Contrary to commenters’ observations, the factor does not exclude research and development costs associated with preparation and distribution of materials required to be provided by motor vehicle manufacturers under the regulation. This includes any technical costs associated with research and development of Internet services and tools. Indeed, the factor explicitly requires consideration of amortized capital costs for the preparation and distribution of service information and tools.

COMPLIANCE ENFORCEMENT

77. Comment: The regulation should not require commencement of an investigation based on every complaint from the aftermarket because such a delegation of “agenda setting authority” to private groups is unconstitutional. (Alliance/AIAM)
78. Comment: The Executive Officer should have discretion in deciding whether to begin an investigation, which should be reviewable only by the full Board or California courts. (Alliance/AIAM)
79. Comment: The regulation should not permit “covered persons” to seek judicial review of the Executive Officer’s decisions not to pursue enforcement actions in that the Board is without authority to adopt such a regulation and such a provision would improperly give Executive-type enforcement power to private groups. (Alliance/AIAM)

Agency Response to Comments #77-79: These comments are in response to an initial draft of the regulation that was made available at a public workshop in April 2001. This regulation was subsequently revised to address the issues raised. The commenters agree. (See Alliance/AIAM *Response to Notice of Public Hearing to Consider Adoption of Regulations for the Availability of California Motor Vehicle Service Information, Legal Analysis*, December 5, 2001, p. 5, in which commenters omit any reference to these issues in their discussion of “remaining issues left open.”)

80. Comment: Overly liberal intervention rights will needlessly burden ARB proceedings. Since the Executive Officer is in the best position to defend its own compliance determinations, covered persons should not be given full party status

at the administrative hearing stage. Additionally, they should not be entitled to seek discovery of trade secret information. (Alliance/AIAM)

Agency Response: The ARB believes that affected covered persons have a right to fully participate in any compliance hearing for which their rights to information or tools are at stake. As to an intervenor's right to discovery of trade secret information, it is anticipated that most all of these issues will be resolved under the processes set forth in HSC section 43105.5(b) and (c) and title 13, CCR, section 1969(i). If not, the procedures set forth at title 17, CCR, section 60060.25(e) allows a motor vehicle manufacturer to claim that specified information is privileged. The hearing officer is qualified to evaluate such claims and afford proper protections to the parties.

MISCELLANEOUS COMMENTS

81. Comment: While we support the concept of harmonization, it cannot be fully achieved since the U.S. EPA is still developing its requirements. We ask staff to be mindful, as they consider harmonization, of the statutory obligations in California under SB1146. (MEMA)

82. Comment: The regulation should not impose burdensome requirements that are intended to serve purposes already being met by parallel U.S. EPA regulations; otherwise the regulation would be duplicative under the APA. (Alliance/AIAM)

Agency Response to Comments #81-82: The ARB has attempted, wherever possible, to be consistent with the service information regulations proposed by the U.S. EPA. Doing so greatly lessens the likelihood that motor vehicle manufacturers will need to take separate approaches in order to comply with both agencies' requirements. In attempting to achieve harmonization, the ARB is especially mindful of the specific directives in HSC section 43105.5(a) that are presently not covered in the federal service information rule but are neither prohibited or limited by federal law. We are also cognizant of the distinct enforcement provisions required under SB1146 to assure that service information and tools be provided to the aftermarket. These differences though should not impose any undue burden on motor vehicle manufacturers.

83. Comment: HSC sections 43105.5(a) and (h) require that the regulation be consistent with federal copyright and patent law, which does not contemplate the forced licensing of federal patents and copyrights. (See Harper and Row, Publishers Inc. v. Nations Enters. (1985) 471 U.S. 539, 546-547; Hartford-Empire Co. v. United States (1945) 323 U.S. 386, 432-33; Cataphote Corp. v. DeSoto Chem Coatings, Inc., (1971 9th Cir.) 450 F.2d 769, 774.) (Alliance/AIAM)

84. Comment: To compel disclosure of federal patents and copyrights would violate the First Amendment of the U.S. Constitution. (See International Dairy Foods Ass'n v. Amestoy (1996 2nd Cir.) 92 Fed.3d 67.) (Alliance/AIAM)

Agency Response to Comments #83-84: In pursuing compliance with the regulation, the ARB is cognizant of the provisions of section 43105.5(a) and (h), as well as the constitutional and statutory provisions regarding copyright and patent protection. Motor vehicle manufacturers may seek judicial protection of patented and copyrighted materials consistent with federal law and the U.S. Constitution.

85. Comment: Although the regulation would likely have a significant economic impact, its beneficial effect on human health and safety would be small. I have not found anywhere in either the Initial Statement of Reasons or regulation any attempt by the staff to quantify the positive impact that the regulation may have on air quality. (GM)

Agency Response: In section V.(A.) of the ISOR, the ARB discusses the impact of the service information regulation on air quality. The staff stated that the proposal does not create new emission reductions, but rather aids in obtaining the emission reductions anticipated from the ARB's Low Emission Vehicle and OBD II regulatory programs. This is accomplished by ensuring that service information is readily available to conduct repairs correctly, completely, and efficiently after identification of an emission-related malfunction. Consequently, the chances that vehicles will maintain their certified emission levels during their operating lives is greatly enhanced. The Legislature specifically recognized that providing better access to information for the service and repair of motor vehicles will help prevent unnecessary pollution. (SB1146, section 1(b).)

86. Comment: The regulation makes the unsupported assumption that the increase in convenience and decrease in cost is significant enough that a motor vehicle owner is more likely to make repairs to malfunctioning emission-related equipment. In my professional judgment, only a few owners of cars out of warranty will choose to service their cars between required Inspection and Maintenance checks in response to an OBD systems alert. It is implausible to assume that any more than a handful of owners would respond to an OBD error code simply because the required repairs might be a little less expensive under the regulation. (GM)

Agency Response: Many vehicle owners do not realize that the "check engine" light represents an emission-related problem. Contrary to the opinion of the commenter, the ARB believes that most vehicle owners will eventually respond to the check engine light and seek to determine the nature of the problem and to have it corrected. To this end, the ARB believes that the service information regulation will encourage competition in the fields of vehicle repair and part manufacturing and will result in reduced costs for the consumer. Simple economics would say that more people will take advantage of lower cost service and products.

D. Nonsubstantive Changes

87. Comment: The service information regulation still includes "Draft" for J2534. I think that is an oversight because you are aware it was published with a February 2002 date. (GM)

Agency Response: The reference to the term "Draft" was an oversight and has been removed from the subject section of the regulation.