

**BEFORE THE AIR RESOURCES BOARD**

**COMMENTS OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS (THE  
ALLIANCE) AND THE  
ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS (AIAM)**

**NOTICE OF PUBLIC HEARING TO CONSIDER TECHNICAL STATUS AND  
PROPOSED REVISIONS TO MALFUNCTION AND DIAGNOSTIC SYSTEM  
REQUIREMENTS AND ASSOCIATED ENFORCEMENT PROVISIONS FOR 2004  
AND SUBSEQUENT MODEL YEAR PASSENGER CARS, LIGHT-DUTY TRUCKS,  
AND MEDIUM-DUTY VEHICLES AND ENGINES (OBD II)**

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## Before The Air Resources Board

### Comments Of The Alliance Of Automobile Manufacturers (The Alliance) And The Association of International Automobile Manufacturers (AIAM)

#### Notice Of Public Hearing to Consider Technical Status and Proposed Revisions to Malfunction and Diagnostic System Requirements and Associated Enforcement Provisions for 2004 And Subsequent Model Year Passenger Cars, Light-Duty Trucks, And Medium-Duty Vehicles and Engines (OBD II)

##### I. Introduction

The Alliance of Automobile Manufacturers (the “Alliance”) and the Association of International Automobile Manufacturers (AIAM)<sup>1</sup> appreciates the opportunity to provide comments to the Air Resources Board concerning the proposed changes in the regulations relating to OBD II (On-Board Diagnostic) systems.<sup>2</sup>

Both the Alliance and AIAM provided extensive comments on earlier revisions of the proposed OBD II regulation. These comments, provided in letters dated August 21, 2001 and

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<sup>1</sup> The members of the Alliance of Automobile Manufacturers (“the Alliance”) are BMW Group of North America, Inc., DaimlerChrysler Corporation, Fiat Auto Research and Development U.S.A., Ford Motor Company, General Motors Corporation, Isuzu Motors America, Inc., Mazda North American Operations, Mitsubishi Motor Sales of America, Inc., Nissan North America, Inc., Porsche Cars North America, Inc., Toyota Motor North America, Inc., Volkswagen of America, Inc., and Volvo Cars of North America. The members of the Association of International Automobile Manufacturers (“AIAM”) are American Honda Motor Co., Inc., American Suzuki Motor Corporation, Daewoo Motor America, Hyundai Motor America, Isuzu Motors America, Inc., Kia Motors America, Inc., Mitsubishi Motor Sales of America, Inc., Nissan North America, Inc., Saab Cars USA, Inc., Subaru of America, Inc., and Toyota Motor Sales, U.S.A., Inc.

<sup>2</sup> *See* Notice of Public Hearing to Consider Technical Status and Proposed Revisions to Malfunction and Diagnostic System Requirements and Associated Enforcement Provisions for 2004 and Subsequent Model Year Passenger Cars, Light-duty Trucks, and Medium-duty Vehicles and Engines (OBD II) dated February 26, 2002 and the accompanying Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Technical Status and Revisions to Malfunction and Diagnostic System Requirements for 2004 and Subsequent Model Year Passenger Cars, Light-duty Trucks, and Medium-duty Vehicles and Engines (OBD II), released March 8, 2002.

September 7, 2001, provided technical and legal comments regarding the regulation. Many of the provisions in the earlier revision have been carried over into this proposed regulation. In addition, while specific wording changes were made to several provisions, the concerns that the Alliance and AIAM addressed in those earlier submittals remain with respect to the current proposal. The Alliance and AIAM are therefore attaching and resubmitting these earlier comments (Attachments A and B). These earlier comments form an integral part of the comments below.

## **II. General Overview**

At the outset, we note that these comments are being compiled at the same time that the rule is in a state of flux, because discussions are taking place between the industry and ARB in an effort to resolve differences with respect to the rulemaking language. Accordingly, some of the concerns outlined in these comments may be addressed at or before the Board hearing. Since the Alliance and AIAM cannot know in advance what issues will be resolved to ARB's and the industry's mutual satisfaction, these comments represent a comprehensive summary of all outstanding issues. We appreciate the ARB staff's willingness to work with us to resolve some issues, but we also note that there are important industry concerns that ARB has not been willing to address.

The proposed OBD II regulation represents a major change in the substantive requirements applicable to OBD II diagnostic systems. Further, the regulations represent an even greater change in the procedures that will be used to enforce the new requirements. The Alliance and AIAM are concerned that the regulation as proposed would result in a large number of recalls for vehicle classes which exhibit no excess emissions, potentially erroneous findings of

nonconformity, and foreshortened enforcement proceedings that will result in more, not fewer, disputes and contested hearings involving OBD II recalls.

As discussed in more detail below, the most significant concerns of the Alliance and AIAM may be summarized as follows:

As originally proposed, the regulations create a regime in which nonconformance determinations can potentially be made on the basis of (1) a nonstatistically representative sample of vehicles; (2) vehicles that have been operated in a unrepresentative manner, tampered with or abused by their owners; and (3) vehicles that have never been operated such that the enablement criteria used by the vehicle are actually encountered. *See* sections 1968.5 (b)(3)(D) and 1968.5 (b)(4). In essence, this testing regime contains no objective means for arriving at a sound determination regarding the compliance status of a group of vehicles.

As originally proposed, the procedural requirements used in exhaust emission recall matters have been discarded for no apparent reason in the OBD context. The new OBD II-only enforcement provisions establish a default time period of 90 days for the manufacturer to respond to a finding of nonconformance, with limited extensions solely at the discretion of the Executive Officer. *See* section 1968.5(b)(7). Recent contested recall cases for standard FTP exhaust emission cases have taken well beyond 90 days just to collect the relevant records that document the testing upon which the finding is based. In addition, the proposed regulation limits the evidence that can be presented by the manufacturer, requires pre-notification of any manufacturer-sponsored testing, strictly limits the manner in which the manufacturer obtains vehicles for testing and requires ARB approval of other methods of demonstrating compliance. *See Id.* These changes exceed ARB's authority in that the proposed regulations attempt to override existing California statutes establishing attorney-client privilege, establishing the



presumption of innocence, and barring the establishment of an irrebutable presumption that other manufacturer provided data cannot be probative.

Finally, upon finding that a vehicle class does not meet the OBD II exhaust threshold or ratio requirements there is now a requirement that ARB must order a recall. *See* section 1968.5(c)(3). There is no discretion available under the regulations. Thus, there is no consideration of whether a recall is even appropriate for the nonconformity. Based on our experience with the OBD II regulations we know now that for a large class of OBD nonconformities a recall is neither appropriate nor cost-effective. For many nonconformities the OBD II system may have no excess emissions, may result in an overt condition that is self-campaigning, or may be detected by a different part of the OBD system. ARB staff has in the past agreed with the manufacturer in many specific instances that a recall should not be required. If there are no excess emissions as a result of an OBD II defect, no recall should be required. Further, failing to provide ARB with discretion for this large class of nonconformities, and mandating that inappropriate and costly recalls will have to be conducted, will lead to wasted time and inconvenience for California vehicle owners.

### **III. Detailed Comments**

#### **Mandatory Recall, Section 1968.5 (b)(3)(A)**

The proposed regulation includes provisions for mandatory recalls in the event of nonconformity. *See* 13 CCR §1965(b)(3)(A)(proposed). This section requires the Executive Officer to order a recall for a broad range of instances of non-compliance.<sup>3</sup> This provision should be modified to eliminate the broad mandatory recall provision and to make recall decisions based on the facts in each separate case. This can be accomplished by simply changing

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<sup>3</sup> Listed in §1968.5(b)(3)(A)(i) – (vi).

“shall” to “may” in the regulatory language. This gives the Executive Officer all the discretion he would need to rectify non-compliance.

As an initial matter ARB lacks statutory authority to order a recall for OBD non-compliance. The existing statutory authority for recall is found in §43105 of the Health and Safety Code. This section provides that the Board may take corrective action including recall if a manufacturer has violated emission standards or test procedures, and has failed to take corrective action.<sup>4</sup> The OBD systems are diagnostic; they neither limit the level of emissions nor set the parameter for testing of these limits. They merely indicate to the vehicle owner when these (or other) limits may have been exceeded.

The California Legislature has defined “emission standards” in Health and Safety Code §39027 as “specified limitations on the discharge of air contaminants into the atmosphere.” The onboard diagnostic regulations cannot be brought within the scope of that definition. Nor can an attempt to characterize the OBD regulations as “emission standards” be reconciled with the Board’s long-standing interpretation of the statute. For example, if the OBD regulations were “emission standards,” then the Health and Safety Code would not permit the Executive Officer to waive compliance with them, as he has been authorized to do since the deficiency waiver regulations were added to the OBD rules in 1993. *Compare* Health and Safety Code §43102(a) (prohibiting, in the absence of express Legislative exemption, the certification of any motor vehicle for sale in California that does not comply with California “emission standards”) with 13 CCR §1968.1(m) (waivers for vehicles that do not comply with OBD regulations).

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<sup>4</sup> Health & Safety Code §43105.

The staff report supporting the rulemaking reasons that the OBD regulations should be defined as emission standards because they were so defined under federal law,<sup>5</sup> in the waiver decision under §209 of the Clean Air Act. Such reasoning appears to overlook the fact that EPA was applying the term “emission standard” as it is defined in the statute governing EPA’s authority, which is the federal Clean Air Act (*See*, 42 U.S.C. §7602(k)), and not as the term is defined by the California Legislature in the Health and Safety Code. In our view, ARB is neither required nor permitted to interpret the language of the Health and Safety Code in a manner inconsistent with the plain language of that statute, simply because a federal agency has interpreted the same or similar terms as used in a different, federal statute in a different manner.

The Staff Report also argues that the Board has recall under the general power granted in the Health and Safety Code §39600, which states that the Board shall do such acts as may be necessary for the proper execution of the powers and duties granted it.<sup>6</sup> We disagree with this interpretation because the legislature has provided specific language when “corrective action” is permitted,<sup>7</sup> and this should not be superceded by general language in the same legislation. However, even if this were true, nowhere in the report is there any explanation or support of a proposition that a mandatory recall provision is needed to execute the Board’s duty.

Even if ARB had authority to issue mandatory recall regulations, it has not satisfied the test for “necessity” or “cost effectiveness” that apply under the Government and Health and Safety Codes.<sup>8</sup> As stated above, we find no sound rationalization in the Staff Report that a

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<sup>5</sup> *See* pp. 70-73 of Staff Report

<sup>6</sup> Staff Report, p.73.

<sup>7</sup> Health and Safety Code §43105.

<sup>8</sup> Health & Safety Code §43103.

mandatory (versus discretionary) recall provision is needed to implement effectively this OBD regulation. Nor do we find any cost effectiveness analysis for a mandatory recall provision. Thus, we believe the rules are deficient. (Further, it is difficult to understand why it is necessary or better to require the Executive Officer to recall in every instance specified in the proposed regulation, rather than giving him the authority to fashion an appropriate corrective action in an instant case.)

There are numerous instances where a recall would not be necessary or cost effective, but would be required under this rule. Generally instances where a problem would be resolved by “self-campaigning” would be an instance when recall may not be appropriate. An example of this would be an OBD system that failed to identify a faulty idle air control valve, and this idle air control malfunction disabled the catalyst monitor. If the idle air control malfunction caused a severe drivability problem, e.g. stalling, vehicle owners would fix this malfunction quickly because they would be concerned about safety. Under the regulations, the Executive Officer would be required to order a recall in this situation. Such a recall would be completely unnecessary and therefore cannot be cost effective.

Another example would be a catalyst monitor for a ULEV II that failed to detect deterioration until emissions exceeded three times the standard. If the only fix for this monitor required resizing the catalyst this would be an extremely expensive recall, e.g. \$1000 per vehicle. This is so expensive that the recall may not be cost effective due to the stringent initial emission standards, the minimal increase in emissions, and the high cost.

If there existed discretionary authority with regard to a recall the Executive Officer could still choose to perform a recall but only if it were judged appropriate. There are other general instances, such as when a monitor fails in some obscure situation that rarely happens in use, or

when a requirement is narrowly missed where recall may not be an appropriate remedy. ARB has not demonstrated that a mandatory recall (versus discretionary recall authority) is needed and is cost effective in these instances and therefore these provisions fail to meet the legal requirements for necessity and cost effectiveness.

Further, even if there were adequate legal authority for a mandatory recall provision in the OBD regulation, inclusion of such a provision is not good public policy. First, these regulations are technology forcing. Neither ARB nor the individual vehicle manufacturers know exactly what is going to happen as these regulations are implemented. There are about 60,000 lines of code and about 15,000 calibration parameters for each OBD software set. Since there are about 10 opportunities for error, on average, for each line of code, there are about 615,000 opportunities for error for each software set. If you assume some of these are not critical, you can round down to about 500,000 per software set. A large manufacturer has about 200 OBD software sets per year. That means it has about 100 million opportunities for an OBD defect each year. Even if the software were 99.999 percent accurate, there would still exist many software defects. Determining now that a recall is the only appropriate remedy for broad categories of non-compliance in the face of these facts is not in the public interest. It eliminates the ability of the Executive Officer and the Board to fashion a reasonable, cost effective corrective action in these instances.

Also, the mandatory recall requirement makes no provision for instances when a manufacturer has already initiated a corrective action. Thus manufacturers may be very circumspect in implementing voluntary corrective action (no matter how praiseworthy) if ARB is required to order a recall later in the particular instance. Further, the provision will actually make the process more contentious. If a manufacturer is faced with a mandatory recall decision

that is not needed, not beneficial, and very expensive, it may very well turn to the only option it has available to avoid this unnecessary expense, *i.e.*, litigation. Stated more simply, inappropriate recall orders will increase the likelihood of litigation.

For all of these reasons ARB should allow itself the flexibility to fashion the appropriate remedy for each instance of non-compliance on a case-by-case basis, and should change the “shall” language to “may” in this section. This would also be consistent with ARB’s practice over the past three decades, where the Board has maintained a policy of allowing the Executive Officer to exercise discretion in determining whether recall is the appropriate remedy. There is simply no adequate justification for reversing that long-standing policy now. Specific wording is offered below in the portion of the comments discussing the need to consider the emissions impact of a nonconformity in deciding whether a recall is warranted.

#### **Enforcement Testing – Statistically Representative Testing, Section 1968.5 (b)**

Section 1968.5 (b) includes vehicle selection and testing procedures for enforcement testing but no requirement that the test sample used to determine the compliance status of a group of vehicles be statistically representative. The proposed requirements merely include minimum quantities of vehicles that must be procured with no explicit statistical representativeness requirement. *See* 13 CCR 1968.5(b)(3)(B). The need to procure and test a statistically representative sample of vehicles is critical to the factual basis needed to support a finding of nonconformity. If the test sample is not statistically representative of the recall class it is not possible to make a technically sound inference about the behavior of the vehicles as a whole.

Prior experience with OBD II enforcement testing has indicated that the results of such testing are highly dependent on the specific vehicle, driver, and driving patterns encountered.

Different road conditions, weather, and driving habits all affect the ability of an OBD II monitor to detect a malfunction. If the testing is not conducted in a representative manner it will simply not be possible to ensure that the results will be representative of the class of vehicles operated statewide.

The need for a statistically sound test sample is especially important under the proposed enforcement regulations. The limited test vehicle sample is simply driven on-road, subject to the vagaries of traffic, climate, driver operation, and other factors.

Given the mandatory nature of a recall upon a finding of nonconformity, it is incumbent on ARB to ensure that the test sample be representative of the vehicle class as a whole. The Alliance and AIAM therefore propose the following change to the proposed regulation to address this concern:

*Manufacturers' Issue and the Alliance and AIAM Recommendation*

It is technically and legally important that any enforcement testing be statistically representative of the motor vehicle class for which the testing results will be used.

***Proposed regulatory language – The following sentence should be added to the end of sections 1968.5 (b)(3)(C)(i), (ii), and (iii): "The test sample group shall be chosen to ensure to the extent reasonably possible that the data taken from the selected vehicles will permit an accurate inference of the performance of the motor vehicle class as a whole."***

***Proposed regulatory language – The following sentence should be added to the end of section 1968.5 (b)(7)(E)(i): "For any determination requiring statistical inference, the Executive Officer shall base his or her determination upon the data from the test sample"***

*available to the Executive Officer that is most likely to represent an equal-probability sample of all vehicles in the motor vehicle class."*

**Emission Exceedance in Determining the Need for Recalls, Section 13 CCR §1968.5(c)(3)(A)**

Under the proposed requirements, recalls are mandatory for many OBD nonconformities. See 13 CCR §1968.5(c)(3)(A). It is apparently the intent of the proposed regulations to make the emissions performance of a group of vehicles completely irrelevant to a recall decision, and to abolish defenses based on emissions performance. The proposed regulation would need to meet several statutory requirements that do not appear to have been addressed to date. The change in the current regulation that the staff is now considering must be shown to be “necessary,” in order to satisfy the requirements of the Health & Safety Code and the Government Code.<sup>9</sup> The requirement for “necessity” applies not only to new regulatory programs, but also to changes or amendments in current regulations, like those outlined in the staff’s preliminary draft amendments. See Gov’t Code §§ 11342.600, 11349.1. Under criteria established by the Office of Administrative Law (“OAL”), in order to comply with the “necessity” standard of section 11349.1 of the Government Code, an agency must explain “why *each provision* of the adopted regulation is required to carry out the described purpose of the provision.” 1 CCR § 10(b)(2) (emphasis added). The explanation must generally be supported by “facts, studies or expert opinion” that demonstrate the need for the regulation. *Id.*

In addition, under the Health & Safety Code, a regulation must be not only necessary but also “cost effective.” See Health & Safety Code § 43013(a). While the Board within limits has

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<sup>9</sup>See, e.g., Gov’t Code § 11432.2 (no regulation is valid unless “reasonably necessary” to carry out a statutory function); § 11349.1 (Office of Administrative Law to review regulations to determine “necessity”).



discretion in determining whether a given proposal is cost-effective, it must at a minimum have a basis for predicting (i) how much a given regulation will cost private parties and public agencies, and (ii) what benefits the proposal will provide. The need to consider cost-effectiveness is particularly important in this rulemaking, in light of the position taken by the ARB staff at the July 2001 workshop. It was suggested there that the Executive Officer should order a recall for what might be considered a “nonconforming” OBD system even if there was no substantial evidence of any significant emissions problem; further, it was claimed that any other rule would destroy the effectiveness of the entire OBD program and the effectiveness of the OBD program as a part of Smog Check.

We do not agree with such a dire prediction. We also note that thousands of Californians could be inconvenienced by a recall in order to repair a system that would never find any significant number of emissions failures, and that such a recall would therefore never provide any direct benefit to the public. It is important to note that a recall not only adversely affects a manufacturer, but also inconveniences vehicle owners. Recalls are intended to remedy significant emissions-related problems in a vehicle’s design or performance as cost-effectively as possible, not to deter violations of the Board’s emissions-related regulations. ARB has not provided any substantial evidence that the mandatory recall provision is necessary or cost-effective. Based on prior administrative practice and interpretation it is doubtful that ARB can lawfully invoke the drastic remedy of recall if there is no exceedance of an applicable emission standard. ARB has in the past avoided taking any action that would require it to justify recalls when there are no excess emissions. As early as the first rulemaking to establish recall

procedures in California, ARB stated, “The Board obviously has no interest in recalling vehicles which do not have a significant emissions impact.”<sup>10</sup>

The issue of statutory authority to compel recalls in the absence of excess emissions arose again in the 1988-89 enforcement rulemaking. In that rulemaking, the staff originally proposed that the Executive Officer be empowered to order recalls based upon the failure of emissions-related components, even if the relevant vehicles were still meeting the emissions standards at the time of the recall. The industry raised statutory objections to that proposal. The staff then modified its original proposal to address concerns about statutory authority by (i) creating a regulatory presumption that if components were failing, emissions would exceed the applicable standards under what became 13 CCR § 2123(b), and (ii) making that presumption rebuttable under 13 CCR § 2147. This same approach was followed in the current OBD recall regulations, which expressly make emissions impact relevant to the recall decision. *See* 13 CCR § 1968.1(i)(5).

The history of prior rulemakings in this area – including especially the OBD II rulemaking that produced 13 CCR § 1968.1(i)(5), which makes emissions impact relevant to the recall issue – would require the ARB staff to explain why ARB should now take a different approach to the issue of statutory authority to require recalls under the Health & Safety Code now. *See Brewer v. Patell*, 20 Cal. App. 4th 1017, 1022 (1993); *accord, Vaessen v. Woods*, 35 Cal. 3d 749, 761-62 (1984); *California Welfare Rights Ord. v. Brian*, 11 Cal. 3d 237, 234, *appl. denied*, 419 U.S. 959 (1974). A “long continued” administrative position “with no ill results and no exception to [the administrative] interpretation by the legislature” cannot readily be cast aside.

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<sup>10</sup> Final Summary and Statement of Reasons for Proposed Rulemaking (Scheduled for Consideration Dec. 8, 1982) at 10.

*Colonial Mut. Compensation Ins. Co. v. Mitchell*, 140 Cal. App. 651, 657 (1934); *see also Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (“An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored”), *cert. denied*, 403 U.S. 923 (1971) and *Hotel & Motel Ass’n v. Industrial Welfare Comm’n*, 25 Cal. 2d 200 (citing *Greater Boston Television Corp* with approval.).

During the July 2001 workshop, the staff also suggested that elimination of emissions impact as a factor relevant to recall was required under the federal Clean Air Act. We do not believe that such a position can be squared with EPA’s own interpretation of the statute. To its credit, EPA recognized when it promulgated the federal OBD regulations that it would be contrary to sound public policy – and unnecessary under the Clean Air Act – to require a recall if relatively few vehicles in the potential recall class would experience both a failure mode in the emissions control system and a failure by the OBD system to detect that underlying failure mode. EPA noted, for example, that it would target its in-use enforcement efforts in the OBD area on “in-use vehicles *with emissions exceeding the applicable standards.*” 58 Fed. Reg. 9486, 9474 col. 1 (Feb. 19, 1993) (emphasis added); *see also* 56 Fed. Reg. 48,272, 48,282 col. 1 (“EPA would target in-use vehicles *with high emissions* and unilluminated MILs for further investigation of OBD system performance.”) (emphasis added). EPA stated:

“As one of the purposes of OBD is to identify random failures of emission control components which cause elevated emissions, EPA expects manufacturers to design OBD systems which detect isolated failures. However, it should be remembered that the [Clean Air] Act requires that recall determinations be based on a failure to conform by a substantial number of vehicles in the class or category.... [T]he OBD system ... would be the subject of ... recall ... only if the determination were made that the “failure to identify” would occur on a substantial number of vehicles.... [I]t is not EPA’s intent to require recall of an OBD system if it fails to detect those problems that are so rare that they have an inconsequential emission impact on the in-use fleet.”

56 Fed. Reg. at 48,282 col. 2 (emphasis added). As EPA also indicated in the documents supporting the final OBD rule, requiring a manufacturer to install an OBD system designed to catch what it considered to be “rare problems” would “likely be an inefficient use of resources.” 1993 *Response to Public Comments* at 18.<sup>11</sup>

In the Alliance and AIAM submittal in September 2001 (included as Attachment B to these comments), several examples of the types of recalls that would not be cost-effective to pursue were offered. This work has been refined and extended based on additional work by a consultant, Sierra Research, retained by the Alliance and AIAM. The Sierra Research results are included as Appendix A to these comments. The recent results confirm that for the vast majority of OBD recalls one could envision occurring, no exceedance of the emission standards would occur because so few of the vehicles would have defects in their emission control system. Further, even when comparing the emissions that would occur as compared to a “perfect” OBD II system, the incremental emissions are miniscule. These tiny emissions increases are simply not cost-effective to attempt to capture, and doing so will unnecessarily inconvenience California drivers. The ARB staff has also suggested that one reason why emissions impacts should not be considered was because those impacts are too hard to predict. Yet, using ARB’s own emission inventory models, estimating emissions impacts in this area would be no more difficult than, for

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<sup>11</sup> For that reason, EPA stated in its final rule that two or more vehicles in a test sample had to exhibit the same failure to detect a given malfunction, before a recall could be required under the Clean Air Act. *See* 58 Fed. Reg. at 9474 col. 2; *Id.* 9481 col. 1. In this respect it is noteworthy that the Agency chose not to rely on the suggestion in one Senate report, sometimes cited by ARB staff in discussing that issue, that recalls might be appropriate in the absence of excess emissions. (The significance of documents other than the Joint Statement of Managers for the 1990 Amendments as authoritative legislative history has been questioned. *See* Remarks of Rep. Dingell, 136 Cong. Rec. E 3714 (Nov. 2, 1990); *see also* Remarks of Rep. Lent, *id.* at E 3695 (“In the few instances in which it was necessary, [the House sponsors of the 1990 Amendments]

example, in preparing a SIP analysis or in considering proof offered under section 2147 in connection with malfunctioning exhaust or evaporative emission control systems. Considering the sophistication and complexity of ARB's modeling efforts in this regard, the failure to recognize this obvious and long-standing capability to clarify the actual air quality impact of a particular recall is surprising. Just such an exercise was conducted in a recent administrative hearing to assess the need for a recall based on an alleged OBD II system nonconformity. In that case, it was demonstrated to the satisfaction of the presiding hearing officer, using these same ARB analytical models, that there were no excess emissions for the useful life of the vehicles.<sup>12</sup>

Further, all of the proposed provisions that state that the average emissions of the test class can't be considered in determining the compliance status and required remedial action for a vehicle class should be deleted. This includes the definition in sections 1968.5(a)(3)(G) and 1968.5(c)(4)(C). This change is consistent with the Alliance and AIAM position that mandatory recalls are not authorized under Health & Safety Code section 432015 and fundamental due

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also negotiated and agreed upon [a] statement of the managers to accompany the legislation. As a result, the authoritative legislative history is sparse.”.)

<sup>12</sup> The staff report contains a lengthy attempt to justify the exclusion of the “no excess emissions” defense, based on the notion that such a defense is impossible to present. The Alliance and AIAM agree that proving that a vehicle class still meets the applicable emission standards despite an OBD nonconformity is difficult, and may not be possible in some cases. But there is no question that it can be done, as demonstrated in a recent contested recall case. In that case, the Hearing Officer made the following finding: “Accordingly, it is competently and credibly established [that] Toyota’s automotive engineering is such that the robust nature of the recall class, not to mention the failure to establish the functional failure of the evaporative monitor, will not exceed Board atmospheric emission standards” (Proposed Decision in ARB Case No. 519, at p. 31). The proposed decision demonstrates conclusively that the no-excess-emissions defense is a valid, question of fact that can be proved in the proper circumstances. This result is also dictated under Section 43105, which contains no restrictions on the defense to a recall order that may be presented by a manufacturer, as well as under fundamental principles of due process.

process. It is also necessary if the mandatory recall concept is to be eliminated and the Executive Officer's discretionary authority restored.

*Manufacturers' Issue AAM and AIAM Recommendation:*

It is important that any recall be made contingent on a demonstration that there is an actual exceedance of an exhaust or evaporative emission standard by the motor vehicle class. If there is no emissions exceedance a recall is not necessary and not cost-effective. Those proposed provisions that state that the average emissions of the test class can't be considered in determining the compliance status and required remedial action for a vehicle class should be deleted, including sections 1968.5(a)(3)(G) and 1968(c)(4)(C).

*Proposed regulatory language – The following sentence should be added to the beginning of sections 1968.5 (c)(3)(A) and (B): "Unless the manufacturer demonstrates that the nonconformity will not cause average emissions from the motor vehicle class as a whole to exceed the applicable exhaust or evaporative emissions standards during useful life," and the word "shall" which appears later in the first sentence of these sections should be changed to "may."*

*In addition, the word "shall" which appears later in the first sentence of these sections should be changed to "may."*

*Those portions of sections 1968.5(a)(3)(G) and 1968(c)(4)(C), that state that the average emissions of the test class can't be considered in determining the compliance status and required remedial action for a vehicle class, should be deleted.*

## **Burden of Proof, Presumptions & Inferences – Sections 1968.5(c)(6)(C) and (c)(7)(B)**

In its adjudicative hearing procedures governing exhaust emission recalls and other challenges to decisions of the Executive Officer, ARB has incorporated the well-established principle that the agency, as the party seeking to impose remedial or punitive action, has the initial burden of proof. *See* 17 CCR section 60055.32(d). However, the OBD II enforcement regulation raises additional specific, unique issues concerning what effect should be given to regulatory requirements applicable to the Executive Officer in making his or her final compliance determination, as well as a number of provisions concerning evidence and presumptions, in the context of a subsequent public hearing requested by a manufacturer to challenge an ordered remedial action (including recall) or an administrative proceeding to determine the administrative imposition of penalties.

In our discussions with ARB staff during the workshop process, we discussed the use of additional data and evidence gathered outside the time limits and other parameters specified in the proposed regulations. We understand the staff's position to be that the regulations in proposed sections 1968.2 and 1968.5 were not intended to limit or restrict the admissibility or weight to be given to any data or other evidence in proceedings before the Board or before an administrative law judge; rather, we understand the staff to agree that such questions should be handled by the Board or the administrative law judge.

To ensure there is no misunderstanding regarding the intent of the proposed regulations clarifications should be provided to the provisions in sections 1968.5(c)(6)(C) and (c)(7)(B) (as revised in the April 19, 2002 version), pertaining to penalties sought to be imposed in an administrative proceeding and hearings conducted in the event a manufacturer challenges any ordered remedial action, as set forth below. In general, the requested revisions: a) confirm that

the Executive Officer has the burden of proof; b) make it clear that the administrative law judge (ALJ) has “de novo” authority to make his or her decision, and is not bound by a previous determination of the Executive Officer, or by any evidentiary presumptions or inferences otherwise binding on the Executive Officer; c) state that the ALJ’s decision must be based on a preponderance of the evidence; d) state that the mandatory recall provisions applicable to the Executive Officer are not applicable to or binding on the ALJ; and e) state that attorney work product offered on behalf of a party by its attorney and any prior-generated information is to be admitted into evidence. These clarifications follow accepted precepts of administrative law. They would apply equally to the Executive Officer and manufacturers. They are intended to preserve the fundamental responsibility of the administrative tribunal to conduct a full, neutral, and independent investigation into the matter presented and to provide the Board with a sound recommended decision that is based on both fact and law.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

The proposed regulations are unclear as to the ARB’s burden of proof with respect to proving that a recall is warranted. We recommend that the regulations be clarified to clearly specify that in accordance with existing California law ARB has the burden of persuasion on all issues related to an OBD recall and that any administrative hearing shall hear evidence de novo in determining whether a recall is required.

**Proposed regulatory language – The following changes should be made to section 1968.5(c)(5)(C), pertaining to hearings to determine administrative civil penalties, as follows:**

***(C)(i) For cases in which the ARB elects to seek monetary penalties pursuant to authority granted under the Health and Safety Code, the Executive Officer shall issue a notice to the manufacturer that he or she will be filing a complaint in the***



*appropriate administrative or civil court forum seeking penalties against the manufacturer for violations of title 13, CCR section 1968.2. The notice must include a description of the test group(s), OBD II group(s), or subgroup(s) thereof, that have been determined to have a nonconforming OBD II system and set forth the factual bases for the determination.*

*(ii) In any such proceeding convened in an administrative tribunal, the Executive Officer shall have the burden of producing evidence and the burden of persuasion on all elements of the prima facie case to establish liability for monetary penalties. Notwithstanding any other requirement to the contrary, the presiding officer shall be an administrative law judge from the Office of Administrative Law. The presiding officer shall determine de novo all questions of law and fact, and the appropriate size of the monetary penalty, if any. The presiding officer's decision shall be based on the preponderance of evidence. Any evidentiary presumptions or inferences applicable to the Executive Officer in determining compliance with section 1962.2, as imposed under that section or this section, shall not apply to or be binding on the administrative tribunal. No evidence initially prepared as work product under the supervision of an attorney, if offered by the attorney for a party, shall be excluded in any such proceeding solely on the ground that it was or is attorney work product. No evidence shall be excluded solely on the ground that it was not presented to the Executive Officer prior to his or her determination of nonconformity.*

Change numbering of section 1968.5(c)(6)(B) to 1968.5(c)(6)(C) and add the following new section 1968.5(c)(6)(B), pertaining to public hearings requested by a manufacturer to contest ordered remedial action, as follows:

(B)(i) Notwithstanding the provisions of title 17, CCR section 60055.17(a)(1), administrative hearings conducted pursuant to a request filed under section (c)(7)(A) above shall be referred to the Office of Administrative Hearings, which shall follow the procedures established in title 17, CCR sections 60055 et seq.

(ii) In any such proceeding, the Executive Officer shall have the burden of producing evidence and the burden of persuasion on all elements of the prima facie case to establish liability for monetary penalties. The presiding officer shall determine de novo whether remedial action is necessary, and the nature and scope of such action. The presiding officer's decision shall be based on the preponderance of evidence. Any evidentiary presumptions or inferences applicable to the Executive Officer in determining compliance with section 1962.2 or ordering remedial action under this section shall not be applicable to or binding on the administrative tribunal. Any provisions in section 1968.2 or this section applicable to the Executive Officer that require or limit the discretion of the Executive Officer in determining whether to order remedial action, or that pertain to the scope of such action, shall not apply to or be binding on the administrative tribunal. No evidence initially prepared as work product under the supervision of an attorney, if offered by the attorney for a party, shall be excluded in any such proceeding solely on the ground that it was or is attorney work product. No other

*evidence shall be excluded solely on the ground that it was not presented to the Executive Officer prior to his or her determination of nonconformity.*

**Conformity Determinations and Evidence – Section 1968.5(b)(7)**

ARB has proposed a 90-day period in which a manufacturer may contest the finding of an OBD II nonconformity by submitting data to the Executive Officer in order for the data to be considered in connection with a compliance determination. *See* 13 CCR 1968.5(b)(7). This limitation on the time permitted to respond to a finding of nonconformity effectively prevents a manufacturer from performing the type of testing program needed to verify the ARB's findings. Unless the manufacturer has an adequate description of the testing or other analysis that led to the finding of nonconformity it will not be possible to verify the ARB's results. This means that no particular time limit is appropriate unless it is tied to the release of all the records related to the finding.

In response to an ARB staff request we have previously provided an estimate of the time that would be needed to conduct testing of the type necessary for confirming the results from an ARB OBD test program used to support a finding of nonconformity. We estimated that a final report on a test program of this type would take about nine months to complete, on average, *after the time when all the necessary information about the ARB staff's own prior testing became available*. This allows time to analyze the staff's data, develop a test program, and meet with the staff to discuss the testing, if necessary; to conduct the testing; to analyze the additional data produced in the testing; and to prepare a report. It also takes account of the fact that the personnel who would work on such a test program have other important OBD-related responsibilities for current and future model-year programs. Additionally, in some cases

manufacturers may need the assistance of outside consultants and other organizations to help design or conduct the testing.

One reason why testing in the past has sometimes required more time is that complete information about the data collected by the ARB staff has not always been immediately available. The proposed regulations also do not contain a specific time limit under which ARB is to provide the manufacturer with all of the records related to the finding of nonconformity. It should also be noted that the time estimated here is an average estimate that covers a very broad range of circumstances and differently situated manufacturers.

We have provided proposed language below to ensure that a manufacturer is provided all of the records related to the finding of nonconformity, that the time allowed to submit additional information in response to a finding of nonconformity starts when the records are released, and the provisions are not meant to limit access to records that would otherwise be available under the California Public Records Act (CPRA). Finally, it is also our understanding based on discussions with ARB counsel that the investigatory exception in the CPRA is not intended to apply to records related to an investigation of a manufacturer's OBD system when those records are requested by the manufacturer whose system is the subject of the finding of nonconformity.

A separate issue that had been presented by proposed section 1968.5(b)(7)(C) is the requirement that a manufacturer provide ARB with notice if it plans to conduct testing to challenge the finding of nonconformity. The originally proposed requirements also require ARB review and approval of alternate methods used by a manufacturer to demonstrate compliance with the requirements and require any vehicle procurement to be conducted in accordance with the procedure used by ARB. These requirements directly impinge on the manufacturer's right to conduct testing under the attorney-client privilege and on the manufacturer's right to present

evidence that is probative and that exonerates the vehicles at issue. We understand based on discussions with ARB staff that these requirements will be removed. Proposed language to correct these sections is also provided below.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

The proposed regulations place no requirement on the release of records to the manufacturer related to the finding of nonconformity. However, the regulations do require that the manufacturer respond to such a finding within a 90-day period, in many cases an insufficient time to conduct a confirmatory test program. We recommend that the ARB modify the regulations to begin the manufacturers time period for responding to a finding of nonconformity such that the time does not begin until all the records have been released. We also recommend increasing the time to respond once the records have been released. The proposed changes also seek to preserve a manufacturer's right to conduct testing under the attorney-client privilege and to present any evidence that tends to exonerate the vehicles at issue.

**Proposed regulatory language – The following changes should be made to section 1968.5(b)(7) pertaining to the manufacturer's opportunity to respond to a finding of nonconformity, as follows:**

**Section 1968.5(b)(7)(A) and (B):**

*(7) Executive Officer Notification to the Manufacturer Regarding Determination of Nonconformance*

*(A) Upon making the determination of nonconformance in section (b)(6) above, the Executive Officer shall notify the manufacturer in writing.*

*(B) The Executive Officer shall include in the notice:*

- (i) A description of each class of the motor vehicle class covered by the determination;
- (ii) A factual basis for the determination, including a summary of the test results relied for the determination;
- (iii) A statement that the Executive Officer shall upon the request of the manufacturer provide the manufacturer, consistent with the California Public Records Act, Government Code section 6250 et seq., with all records related to the Executive Officer's determination. Such records shall be provided to the manufacturer no less than 90 days in advance of the date by which the manufacturer is allowed to respond in accordance with section (b)(7)(B)(iv).
- (iv) A provision allowing the manufacturer no less than 90 days from the date of issuance of the notice and provision of all relevant records to the manufacturer to provide the Executive Officer with any information contesting the findings set forth in the notice, and
- (v) A statement that if a final determination is made that the motor vehicle class is equipped with a nonconforming OBD II system, the manufacturer may be subject to appropriate remedial action, including recall and monetary penalties.

*Section 1968.5(b)(7)(C):*

- (C) Within the time period set by the Executive Officer in section (b)(7)(B)(ii) and any extensions of time granted under section (b)(7)(H), the manufacturer may provide the Executive Officer with any test results, data, or other information that may rebut or mitigate the results of the ARB testing.

- (i) *If the manufacturer elects to conduct additional testing of vehicles or engines and submit the results of such testing to the Executive Officer, the manufacturer shall also submit a detailed description of the procurement and test procedures used by the manufacturer in conducting such testing.*
- (ii) *If the manufacturer objects to the size of the test sample group or the method used to procure vehicles in the test sample group used by the Executive Officer pursuant to section (b)(3)(B)(iii) or (b)(3)(C)(iii), the manufacturer may set forth what it considers to be the appropriate size and procurement method and the reasons therefore.*
- (iii) *If the manufacturer elects to present evidence to overcome the presumption of nonconformance in section (b)(6)(C)(ii) above, the manufacturer may demonstrate that the vehicles comply with in-use monitor performance ratio requirements of title 13, CCR section 1968.2(d)(3.2) by:*
- a. *Presenting evidence in accord with the procurement and testing requirements of sections (b)(3) and (4), or*
  - b. *Any other evidence that provides an equivalent level of proof that vehicles operated in California comply with the in-use monitor performance ratio.*
- (D) *The requirements of paragraph (C) shall not be construed to abridge a manufacturer's right to assert any privilege or right provided under California law.*
- (E) *Any information provided by the manufacturer after the time established by the Executive Officer for submission shall be considered by the Executive Officer if the manufacturer could not reasonably have foreseen the need for the information or*

could not reasonably have generated the information during the time period provided.

(F) *After receipt of any information submitted by the manufacturer, the Executive Officer shall consider all information submitted by the manufacturer and may conduct any additional testing that he or she believes is necessary.*

(G) Final Determination:

(i) *Within 60 days after completing any additional testing that the Executive Officer deemed necessary under section (b)(7)(F) above, the Executive Officer shall notify the manufacturer of his or her final determination regarding the finding of nonconformity of the OBD II system in the motor vehicle class. The determination shall be made after considering all of the information collected and received, including all information that has been received from the manufacturer.*

(ii) *The notice must include a description of each test group(s), OBD II group(s), or subgroups thereof, that has been determined to have a nonconforming OBD II system and set forth the factual bases for the determination.*

(G) Extensions: The Executive Officer may for good cause extend the time requirements set forth in section (b)(7). In granting additional time to a manufacturer, the Executive Officer shall consider, among other things, any documentation submitted by the manufacturer regarding the time that it reasonably believes is necessary to conduct its own testing, why such information could not have been more expeditiously presented, and what effect any delay caused by granting the extension may have on effective enforcement and the health and welfare of the State.



### **Monitoring Conditions for On-Road Testing, section 1968.5(c)(3)(A)**

In proposed section 1968.5(c)(3)(A), which defines the requirements for mandatory ordered recall, there are three provisions relating to on-road testing that require only that test vehicles be driven so as to “reasonably encounter” all monitoring conditions disclosed in the manufacturer’s certification testing. The problem with this terminology is the use of the modifier “reasonably”, which apparently is being used to allow at least some degree of testing where all of the manufacturer’s disclosed conditions are not met. For example, this might be used to include test results on drives where a temperature or vehicle speed monitoring condition was not met.

The Alliance and AIAM are concerned that this terminology is too vague and that it will lead to testing that has no usefulness for determining compliance. There are no criteria in the regulation to guide the Executive Officer in determining which monitoring conditions can “reasonably” be ignored, as opposed to those that it would be “unreasonable” to ignore, and indeed we don’t think such criteria can be drafted. All monitoring conditions are included for some purpose, whether to help detect malfunctions or avoid false MILs. For most monitors, the OBD II regulation assigns to manufacturers the responsibility of determining monitoring conditions; the terminology in question is inconsistent with and undermines that basic regulatory approach.

The risk of obtaining results that cannot be used for compliance purposes is readily apparent. Manufacturers carefully design their monitors to comply with the regulation under strictly defined conditions, and will do their own pre-certification and production vehicle compliance testing based on such conditions. Yet this provision would apparently allow the Executive Officer to ignore one or more such conditions in his or her in-use testing. The result, in effect, is that ARB will be testing a different vehicle than the one that was certified; under

such conditions, no valid inferences or conclusions can be made regarding compliance for a certified vehicle. Test results based on drives where all monitoring conditions are not met would not be tests of the actual monitor, as designed by the manufacturer and certified by ARB, and thus could not be used as the basis for any compliance determination or recall order.

*Manufacturers Issue and the Alliance and AIAM Recommendation:*

Enforcement testing should include operation of the vehicle so as to encounter the OBD II system's enablement criteria. This correction will assure that there is a proper match between ARB on-road testing and the OBD II monitor as designed by the manufacturer and as certified by ARB. With this revision, ARB remains free to conduct its testing without having to meet any undisclosed monitoring conditions.

**Proposed regulatory language: To remedy this problem, the Alliance and AIAM recommends that the term “reasonably” in sections 1968.5(c)(3)(A)(ii), (iv) and (v), be deleted and replaced with the phrase “the extent possible (e.g., without regard to hidden flags)” as follows: “When the vehicle is tested on-road and driven so as to the extent possible (e.g., without regard to hidden flags) encounter all monitoring conditions disclosed in the manufacturer’s certification application...”**

**Technical Feasibility**

This OBD rulemaking package is a technology-forcing regulation—that is, it calls upon manufacturers to achieve and implement a number of technological accomplishments in the future that have not been implemented to date. This necessarily involves some degree of forecasting about what will be possible in the future, and when. Throughout the development of these rules, both ARB staff and manufacturers have had to make good-faith projections about the availability of future technologies.

The Alliance and AIAM have particular concerns about the technological feasibility of certain aspects of these rules, and our specific concerns are described below. It must be noted, however, that neither vehicle manufacturers nor ARB staff possess a crystal ball that enables us to foresee the future. It is possible that some requirement in these rules may end up presenting a technological obstacle not foreseen by either ARB or the manufacturers. Accordingly, Alliance and AIAM members reserve the right to seek relief in the future from any requirement of these rules that may turn out to be technologically infeasible, whether or not we have highlighted that particular issue in these comments.

We have identified several specific features of the proposed regulation that make it infeasible, or at least highly questionable whether manufacturers will be able to fully comply with the proposed regulation. These features include the inadequate lead-time due to the 2004 model year start date, the strict liability features of the regulation that make recalls mandatory despite the best efforts of the manufacturer and the extremely low thresholds for MIL illumination and emission controls system repair.

### **Feasibility - Repairs, Malfunction Thresholds, and Sensitivity**

As OBD II has begun to be implemented in the state I/M programs, recent articles have expressed a concern about the cost effectiveness of OBD II related repairs (e.g. USA TODAY, November 27, 2001, WARD'S Engine and Vehicle Technology Update, February 1, 2002). These articles refer to several instances of OBD II related repairs that resulted in little or no emission benefit. To address these concerns, EPA has recently formed a work group with vehicle manufacturers to investigate the possibilities for improving the cost effectiveness for OBD II related repairs. The following three issues are being considered by the EPA work group and should be considered by the ARB:

**(1) Malfunction Thresholds - Section 1968.2 (e)**

Section 1968.2 (e) contains many OBD II thresholds that are a function of the emission standards, e.g., 1.5 times the applicable standards. Vehicle manufacturers have major concerns about the monitoring thresholds for LEV II vehicles. The current and proposed OBD regulations require monitors sensitive enough to detect emission changes of as small as 0.015 g/mile HC – levels difficult to detect even in a laboratory. We are concerned that once drivers recognize the high cost and small benefits associated with “Check Engine” lights, they will begin to ignore these lights. Such a response would greatly reduce the OBD system’s benefits.

Furthermore, ARB has not demonstrated the technological feasibility of the specific numerical thresholds nor demonstrated that the proposed thresholds *are* cost-effective as required by Health and Safety Code section 43013. Under Health and Safety Code section 43013 ARB may adopt standards only when those standards have been found to be “necessary, cost-effective, and technologically feasible.” As further evidence of the requirement to adopt cost-effective regulations, Government Code Section 11346.9(a)(4) requires agencies to make a determination that “no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation.”

In proposing the emission threshold requirements that are tied to very low emission standards ARB has not addressed whether the thresholds will allow reliable repairs and cost-effective emission reductions while not increasing false MILs. As the numerical standards decrease the magnitude of any excess emissions also decreases, while the difficulty in performing the repair increases, as does the cost per gram of emission reduction achieved.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

It is our understanding that ARB staff has agreed to allow in-use enforcement thresholds of 3.0 times the standards for the first 2 years of implementation for the new monitors required by this regulation, and 2.0 times the standard for the 2004 and 2005 model years for the other monitors. Nonetheless, the Alliance and AIAM recommend that the emission thresholds be linked to the ULEV I emission standards or that the thresholds be an appropriate additive standard (set numerical value above the standard) instead of a multiplicative standard. This would address concerns about both feasibility and cost effectiveness for OBD II-related I/M repairs. In addition, ARB should review manufacturers' progress in meeting these requirements, as part of the next biennial review of the OBD II regulation, and modify the requirements as needed to address any issues with feasibility that are identified.

**Proposed regulatory language – ARB's recent modification to the originally proposed requirements is an improvement. However, the proposed requirements should be further modified to set the emission thresholds specified in section 1968.2(e) to base them on the ULEV I emission standards or specify that the thresholds be an appropriate additive standard (set numerical value above the standard).**

**(2) MIL Illumination for Comprehensive Components, Section 1968.2 (e)(16.4.2)**

The proposed regulation requires illumination of the MIL if the component or system, when malfunctioning, could cause vehicle emissions to increase by 15 percent or more of the FTP standard, or if it is used as part of the diagnostic strategy for any other monitored system or component. As emission standards get lower and lower, 15 percent of the standard becomes an extremely small amount, which reduces the cost effectiveness for OBD II related I/M repairs.

*Manufacturers' Issues and the Alliance and AIAM Recommendation:*

It is our understanding that ARB Staff has agreed to increase this threshold from 15 to 25 percent of the FTP standard for SULEVs. Nonetheless, the Alliance and AIAM continue to recommend that the 25 percent requirement apply to all vehicles, which would improve the cost effectiveness of OBD II related I/M repairs. (The MIL would still be illuminated if the component were used as part of the diagnostic strategy for another component, regardless of emission impact.)

**Proposed regulatory language ? The following change should be made to modify Section 1968.2 (e)(16.4.2) to read, “MIL illumination is not required in conjunction with storing a confirmed fault code if the component or system, when malfunctioning, could not cause vehicle emissions to increase by 25 percent or more of the FTP standard and is not used as part of the diagnostic strategy for any other monitored system or component.”**

**(3) Statistical MIL Illumination Protocols – Sensitivity to Intermittent Malfunctions, Section 1968.2 (d)(2.2.3)**

Under this provision ARB may permit the use of alternative statistical MIL illumination protocols. However, except for evaporative system malfunctions, strategies requiring on average more than six driving cycles for MIL illumination may not be accepted. In order to accurately detect an intermittent malfunction it is important that a significant number of driving cycles be monitored before a decision is made as to the cause of the fault. The larger the number of trips that are monitored the more precise is the OBD system’s diagnosis and the more likely it becomes that the actual fault causing the problem is accurately identified and corrected.

Intermittent malfunctions are undoubtedly the cause of some of the cases where the MIL was illuminated but there was no apparent emission benefit from the repair, i.e., the MIL was on

but the malfunction was not present when emissions were measured prior to the repair. It is frustrating for both the repair technician and the motorist if the cause of the malfunction cannot be determined when the vehicle is brought in for repair, because of its intermittent nature. It would be more effective to wait until the malfunction was persistent to illuminate the MIL, so it would be easier for the technician to determine the cause when the vehicle was brought in for repair. It is also likely that average run lengths of more than six driving cycles will be needed to meet the monitoring requirements for LEV IIs, ULEV IIs, and SULEV IIs.

The very limited emissions that occur during the longer diagnosis period are more than offset by the benefits of more accurate diagnosis and the reduction in customer and technician problems with identifying and correcting intermittent faults.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

We recommend that the ARB increase this limitation to ten driving cycles, which would allow greater benefit from the statistical protocol. This would also ensure that the malfunction is persistent before illuminating the MIL, which would reduce frustration for the repair technician / motorist and improve the cost effectiveness of OBD II-related I/M repairs.

**Proposed regulatory language – The following changes should be made to modify section 1968.2 (d)(2.2.3) to read “Except as otherwise provided in section (e) for evaporative system malfunctions, strategies requiring on average more than ten driving cycles for MIL illumination may not be accepted.”**

**Detailed Comments on Specific Sections of the Proposed Regulation**

**Standardization Requirements, Section 1968.2 (f)(3.1)**

The proposed requirement prohibits the use of SAE J1850 "Class B Data Communications Network Interface", May 2001, on any 2008 or subsequent model year vehicle.

Manufacturers are moving toward the new CAN protocol as soon as possible taking into account that they want to minimize disruptions to their product plans. SAE J1850 is included in some of our member companies' product plans beyond the 2007 model year. While manufacturers typically change a vehicle's appearance or add new customer-desired features periodically (e.g., 3 to 7 years from vehicle's first introduction), powertrains and electrical and electronic systems do not get changed as often. As a result, the prohibition of SAE J1850 in the 2008 model year will cause these manufacturers to hastily phase-out of SAE J1850, thereby expending resources needlessly and increasing the risks for noncompliance. Prohibiting the use of J1850 in the 2008 model year penalizes those manufacturers that were leading the industry with diagnostics and flash reprogramming.

Extending the use of SAE J1850 one additional year (i.e., prohibit its use on any 2009 and subsequent model year vehicle) would have little effect, if any, on the equipment and tool manufacturers, I/M facilities and service facilities. They will still have to accommodate SAE J1850 for many years, because many new vehicles today still use SAE J1850, and vehicles last a long time in California. It is our understanding that the Equipment and Tool Institute (ETI) does not see any harm in extending the current SAE J1850 protocol for longer time periods. Most tool company development costs have been realized and tools will need to have multiple interfaces in order to handle previous model years. It is much better to deal with a stable older protocol than force manufacturers to hastily move to the new CAN protocol.

The one additional year should also not have a significant impact on ARB's goal of having a faster data communication protocol in place one year sooner because most companies and most new vehicles will have the new CAN protocol. It is only a few vehicles that are causing manufacturers to needlessly expend their resources. For example, one of our member



companies estimates that extending the use of SAE J1850 one additional year would add about 24,000 vehicles in the 2008 model year.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

Manufacturers are requesting only one additional year of use of SAE J1850. There is no need to prohibit the use of SAE J1850 because all of our members are phasing in CAN as soon as possible. Delays in implementing CAN result from specific implementation and schedule issues, not from any desire to delay a move to the new CAN protocol. Therefore, the elimination of the use of SAE J1850 will occur as expeditiously as possible, adding the proposed prohibition adds little and is unnecessary.

**Proposed regulatory language: The Alliance and AIAM recommend extending use of SAE J1850 for one additional year (i.e., prohibit its use in the 2009 model year). Based on this recommendation, Section 1968.2(f)(3.1) should state "... This protocol may not be used on any 2009 or subsequent model year vehicle."**

**Alternate Standardization Requirements for Engine-Certified Medium-Duty Vehicles (MDVs), Section 1968.2 (f)(7)**

ARB has proposed to eliminate the option for 2004 and later model year engine dynamometer-certified MDVs to meet the SAE J1939 communication protocol. Instead, ARB proposed to allow MDVs to use the protocol that is ultimately adopted for heavy-duty vehicles (HDVs), even though OBD II regulations have not yet been adopted or even proposed by ARB, and the timetable for such regulations is unclear.

Until ARB adopts requirements for HDV OBD II, manufacturers need certainty that SAE J1939 will be allowed by ARB as an acceptable communication protocol for engine-certified MDVs. For 2004 through 2006 model year MDV planned product offering, manufacturers must

decide now which communication protocol to use. And assuming ARB does not adopt HDV OBD II requirements within the next year or so, this uncertainty will also impact 2007 model year planning.

SAE J1939 is more commonly used by heavy-duty manufacturers who provide engines and transmissions for specialty vehicles (e.g., street sweepers, motor homes) that are 8,500 to 14,000 pounds GVWR, as opposed to SAE J1850 or ISO 9141. These vehicles are usually serviced at heavy-duty vehicle OEM locations or at the heavy-duty engine manufacturer service locations that use SAE J1939 compatible tools. Since specialty vehicles typically encounter rougher duty cycles than passenger cars, they use SAE J1939 diagnostic connectors because they are more robust than SAE J1962 connectors. The medium- and heavy-duty industry voluntarily standardized on a common diagnostic connector and service tool interface. It does not seem appropriate to penalize this effort by requiring the redesign of products, service infrastructure and tools as a result of the uncertainty presented by ARB's proposal.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

Until ARB adopts requirements for HDV OBD II, manufacturers need certainty that SAE J1939 will be allowed by ARB as an acceptable communication protocol for engine-certified MDVs.

**Proposed regulatory language: The Alliance and AIAM recommends that ARB add a paragraph (C) to 1968.2 (f)(7) to read as follows: "With Executive Officer approval, 2004 through 2007 model year medium-duty vehicles certified on the engine dynamometer may alternately employ the communication protocol established in SAE J1939, "Recommended Practice for a Serial Control and Communications Vehicle Network", April 2000, to satisfy the standardization requirements specified in Sections (f)(2) through (f)(4) above."**

– **Additional Issues**

**Lead-time for New Software, Section 1968.2 (b)**

The proposed section 1968.2 (b) states that 2004 and subsequent model year vehicles shall meet all applicable requirements of this regulation. As discussed above, in the comment concerning technical feasibility, manufacturers do not have any remaining lead-time to develop new software for many of these new requirements. The model year 2004 OBD II designs have been finalized for many vehicles because the model year begins in just eight months for early 2004 model year vehicles.

*Manufacturers Issue and the Alliance and AIAM Recommendation:*

It is simply too late to make software modifications for model year 2004 vehicles to meet the new requirements.

***Proposed regulatory language: We understand that the ARB staff has acknowledged the need to develop new software for some of the new requirements in this regulation and has agreed to provide a one-year delay until model year 2005 for vehicles that require new software or hardware. This provision will be provided in section 1968.2(e)(18.8). The Alliance and AIAM agree with this change.***

**Designed for “Actual Life,” Section 1968.2 (d)(1.3)**

Under ARB’s proposed section 1968.2 (d)(1.3) the OBD system is required to be “designed to operate ... for the actual life of the vehicle.” Section 1968.2 (c)(1) defines “actual life” as “the entire period that a vehicle is operated on public roads in California up to the time a vehicle is retired from use.” It is unprecedented to impose an emission requirement for the entire period in which a vehicle would be operated on the road, regardless of how old the vehicle is.

Manufacturers know of no method for ensuring that the OBD II systems will continue to operate for as long as an owner chooses to operate the vehicle.

It is not possible to design for an infinite life. When we recently discussed this with the ARB staff, we were informed that the intent of the “actual life” requirement was not to extend enforcement beyond useful life. Instead, the intent was to clarify that the OBD system was intended to operate beyond useful life. Thus, no scheduled maintenance is allowed and the OBD system may not be programmed or designed to deactivate based on age and/or mileage of the vehicle. The staff noted that section 1968.5 (b)(3)(A)(iv) (which prohibits ARB from conducting enforcement testing on a vehicle class whose average mileage exceeds the useful life) and (b)(3)(D)(i) (which excludes vehicles with odometer readings beyond the useful life from emission threshold testing) provides further confirmation that ARB did not intend to extend enforcement beyond useful life.

Given the limited experience with OBD II systems as compared to the 40 years some of the vehicles will be operated it is not possible to fully ensure that the system will continue to operate. Manufacturers design the software so that it does not deteriorate or otherwise deactivate based on time or mileage and the OBD system monitors itself for malfunctions that disable the system. The OBD II system would therefore be expected to continue operating, if repaired and maintained as it ages. Again, however, there is no way to ensure that any design will function for an infinite life.

During discussion last week, ARB staff clarified their position on the practical significance of the term “actual life” used in the proposed regulations. As we understand the situation, the intent of the proposed regulatory text is not to enforce any performance or design standard for vehicles that are beyond their useful lives, with one exception. That exception

would pertain to instances in which the OBD system was designed to terminate monitoring based on age or mileage after the useful life when that condition was not identified until after the end of useful life.

*Manufacturers' Issues and the Alliance and AIAM Recommendation:*

We understand that the ARB Staff has agreed to add a sentence to Section 1968.2 (d)(1.3) to clarify that they do not intended to extend enforcement liability beyond the vehicle's full useful life, except where a vehicle has been programmed or otherwise designed so that the OBD II system deactivates based on age and/or mileage of the vehicle.

**Proposed regulatory language: The following sentence should be added to the end of section 1968.2(d)(1)(1.3): "This section is not intended to alter existing law and enforcement practice regarding a manufacturer's liability for a vehicle beyond its useful life, except where a vehicle has been programmed or otherwise designed so that an OBD II system deactivates based on age and/or mileage of the vehicle."**

#### **Fault Code and Freeze Frame Storage Protocol, Section 1968.2 (d)(2.2.2)**

The proposed requirements states, "if a malfunction is not detected before the end of the next driving cycle in which monitoring occurs ... the corresponding pending fault code and "freeze frame" conditions set according to section (d)(2.2.1) shall be erased at the end of the driving cycle." The issue here is that erasing the freeze frame conditions in this fashion could confuse service technicians.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

The requirement to erase the "freeze frame" conditions will result in confusion among the service technicians.

*Proposed regulatory language: We understand that ARB staff did not intend to include the freeze frame and recommend that the sentence read, “If a malfunction is not detected before the end of the next driving cycle in which monitoring occurs ... the corresponding pending fault code shall be erased and “freeze frame” conditions set according to section (d)(2.2.1) may be erased at the end of the driving cycle.”*

#### **Extinguishing the MIL, Section 1968.2 (d)(2.3)**

This section requires, except as otherwise provided in sections (e)(3.4.5) and (e)(6.4.6) for misfire and fuel system malfunctions, that the MIL may be extinguished only after three driving cycles during which the malfunction is no longer present. This requirement is also not appropriate for evaporative system monitors due to the specific diagnostic techniques associated with finding evaporative emission leaks.

*Manufacturers’ Issues and the Alliance and AIAM Recommendation:*

This exception should also apply to evaporative system malfunctions, i.e., section (e)(4.4.2).

*Proposed regulatory language: We understand that the ARB staff has agreed to revise section (d)(2.3) so that it begins, “Except as otherwise provided in sections (e)(3.4.5), (e)(6.4.6), and (e)(4.4.2), for misfire, fuel system, and evaporative system malfunctions,…”*

#### **Rate-Based Monitor Requirement, Section 1968.2 (d)(3.2)**

The proposed requirements in section 1968.2(d)(3.2) will require specific monitoring frequency ratio requirements that would apply to the following monitors:

Items		Rate Requirement		
		0.260	0.520	0.336
Cold Start Related Monitors	Secondary Air	R, C		
	Cold Start Strategy	R		
	Other Emission Control Devices	R		
	CCM Output	R		
Evap.	0.020" Leak	R, C		
	0.040" Leak		R	
	Purge		R	
Others	Catalyst			R, C
	Primary O2S			R, C
	Secondary O2S			R
	EGR			R, C
	VVT			R, C
	PCV			R
	ECT Sensor			R
	A/C			R
	DOR			R
	PM Trap			R
	CCM Input, Rationality			R
CCM Output, Functional			R	

R = Rate Requirement

C = Counter Requirement

It is also our understanding that ARB determined these ratios based on a malfunction detection rate required to ensure MIL illumination within two weeks for 90 percent of vehicles driven in-use (two weeks/50 percent of vehicles for the 0.020" evaporative. monitor).

The Alliance and AIAM have a number of issues and concerns with ARB's proposal:

Appropriateness of "two week/90 percent" provisions: In discussions with ARB staff, manufacturers have identified concerns with the significance ARB places on the two-week/90 percent criteria in the context of air quality. In particular, in our earlier submittals in this rulemaking we noted that the air quality impact of a two week/90 percent requirement were very small. There simply are not sufficient emissions that occur in the small percentage of vehicles with an emission control system defect. The short two-week period in which 90 percent of the vehicles must detect defects greatly increases the technical difficulty and compliance jeopardy of manufacturers with no compensating air quality impact.

In response to this concern, ARB states on page 56 of the Staff Report:

*“[T]he emission benefit is only one of the factors that must be considered in determining how often monitors should run. Additional factors were considered in determining the appropriateness of the proposed in-use performance ratio, including the typical capability of current monitoring strategies, the effectiveness of the requirement in assuring all vehicles achieve some acceptable level of monitoring in-use, and the impact on the service and repair industry as well as vehicles owners.”*

As an initial matter it should be noted that there are significant concerns with the manner in which the frequency ratios were developed. The ratios were developed by examining data from EPA’s driving pattern study (often referred to as the “Tri-City Study”) and data from a “29 car study” that was performed by ARB. Sierra Research reviewed this data and the results of their review are in Appendix A to these comments. The Sierra Research review indicated that there were significant issues with the manner in which the predicted frequency ratio was calculated. These problems included a nonrandom sample (sometimes called a “grab sample” technique) of vehicles and drivers, and use of a single value for monitor decisions although there is often a significant difference between the time required for a “pass” determination and that required for a “fail” determination. Thus, it is not at all clear what ratios can be expected when the OBD II frequency monitoring requirement becomes effective.


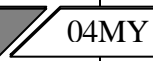
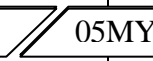

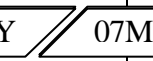



It should be noted that the overall purpose of the OBD and other mobile source emission control programs administered by ARB is to reduce emissions and improve air quality. Consistent with the statutory purpose established for the ARB, air quality should be the parameter for setting the target for MIL illumination. *See* Health and Safety Code section 39000 and 39003 (establishing ARB to reduce air pollution). Nonetheless, it is our understanding that ARB still desires to invoke the rate monitor requirement in the earliest possible timeframe. Accordingly, industry will not object to this requirement if the other issues discussed below are



addressed and if ARB commits to review the appropriateness of the 2-week criteria and the accuracy of the rate values at the next OBD biennial review.

Interim Certification Requirement: ARB's proposal includes a stringent monitoring ratio for certification as well as a less stringent enforcement standard. A relaxed enforcement provision without the equivalent certification standard does not afford sufficient relief since manufacturers do not have sufficient lead-time to gather data needed to confirm assurance at the time of certification that the monitors meet the minimum certification requirement.

Expansion of Rate Requirement: ARB has proposed requirements for monitoring frequency beyond just the five major monitors that ARB proposed at the workshop. The Alliance and AIAM do not object to this requirement provided that manufacturers are given sufficient lead-time. As with any new requirement, industry must be given time to confirm compliance by gathering data and have sufficient lead-time to implement any required changes before introducing to the market. Since these items are new with this Mail Out, manufacturers cannot implement test programs to collect field data until the 2007 MY. Allowing time for the data collection, analysis and possible hardware and software revisions and implementation, it would be extremely difficult for manufacturers to implement the ratio requirements proposed by ARB staff before the 2007 MY.

	2002CY	2003CY	2004CY	2005CY	2006CY	2007CY
Std. Production						
Data Collection						
Data Analysis						
Logic Revision & Implementation*						

\* If necessary

Numerical Rate Values for Cold Start and Evap: ARB has proposed a 0.260 rate value for cold start monitors and 0.020” leak. ARB states that this rate is based upon MIL illumination for 50 percent of the vehicles within a two-week period. ARB changed the requirement from 90 percent to 50 percent of vehicles to account for the uncertainty caused by the larger impact of driving habits and ambient temperatures on cold start monitors as well as the limitations of the Tri-City database from which these values were calculated. In the case of purge and 0.040” leak, ARB doubled the rate value based upon the less restrictive monitor condition for these monitors.

The Alliance and AIAM appreciate the difficulty in calculating monitor enablement rate values from the Tri-City Database, and also agree that cold starts are particularly difficult due to the limitation of that database. For this reason, industry agrees with the change in the percentile requirement from 90 percent to 50 percent for cold start monitor. However, the Alliance and AIAM believe that this uncertainty is independent of the target frequency and that the rate values for all cold start related monitors should be calculated based on one time per two weeks (three weeks for 0.020” leak) target. We conclude that the relative stringency of the monitor conditions should not be relevant at all (since the rates are minimum values).

“Escape Clause”: As the proposed regulation is written, there are no exceptions to the rate requirement for rationality checks for Comprehensive Component Monitoring (CCM) input components. However, industry is concerned that there may be some items for which it is technically infeasible to meet the rate requirement (e.g., fuel level sensor).

*Manufacturers' Issues and the Alliance and AIAM Recommendations:*

Manufacturers have significant reservations concerning the rate-based requirements. As the requirements will begin in model year 2005, and the actual ratio that monitors will execute at

is extremely difficult to predict based on an analysis of the Tri-City study data, any requirements for ratio test values should be delayed.

**Proposed regulatory language: We understand that the ARB staff has agreed to modify the rate-based monitor requirements as follows to address the manufacturers' concerns discussed above:**

- **ARB will adopt a monitoring frequency ratio of 0.1 for certification during first two years of a vehicle's implementation (i.e., vehicles implemented in 2005 MY would meet 0.1 through the 2006 MY, vehicles implemented in 2006 would meet 0.1 through 2007, vehicle's implemented in 2007 would meet 0.1 through 2008). ARB will also modify the determination of nonconformance accordingly.**
- **ARB will eliminate mandatory recall for the first two years of a vehicle's implementation.**
- **ARB will reopen the regulation at a later date and reconsider the final ratios based on manufacturers' data. ARB's proposed ratios (0.260, 0.520, and 0.336) would be put in regulation as final ratios for the time being.**
- **ARB will implement an escape clause in the regulation for monitors that run less frequently because of technical issues (i.e. PM trap monitor can only run after a regeneration event, Thermostat monitor on large vans will require longer to run, etc.).**

**Implementation Phase-In Schedule for Rate-Based Performance Ratios/Counter Software, Section 1968.2 (d)(3.2)**

As proposed, nearly all of a manufacturers' monitoring strategies are required to meet new monitor performance criteria, with onboard counter software implemented for six monitors, under the following implementation schedule: 50/75/100 percent of all vehicles in the 2005/2006/2007 model years.

Manufacturers need a balanced phase-in schedule in order to implement the necessary changes needed to meet new monitoring requirements. This is typically done over a three-year cycle; approximately a third of the vehicle line is updated in a given model year, and the other

two-thirds of the vehicles are left alone. Manufacturers are staffed to handle this type of work cycle. Manufacturers are not staffed to change over 50 percent of their vehicle line in a single year.

ARB's proposed monitor performance ratios, if ultimately justified and adopted, will likely require many manufacturers to make significant changes or reinvent at least one or more of their monitoring strategies. Of particular concern are the ratios proposed for the evaporative system monitor, although manufacturers will not know the full impact of the ratios on other monitors until they have a chance to evaluate their performance against the new requirements. Also, implementation of the monitor counter software will require manufacturers to update, validate, debug and release a new version of a vehicle's software.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

The above OBD II redesign work necessary to meet ARB's proposed requirements represents significant efforts and simply cannot be undertaken on 50 percent of a manufacturers product line in a single model year.

**Proposed regulatory language: We understand that ARB will modify the implementation phase-in percentages in the regulatory language, 1968.2 (d)(3.2) as follows: "...The requirements of section (d)(3.2) shall be phased-in as follows: 30 percent of all 2005 model year vehicles, 60 percent of all 2006 model year vehicles, and 100 percent of all 2007 and subsequent model year vehicles..."**

**Numerator Specifications, Section 1968.2 (d)(4.2.2)(A)**

Under the ARB's proposal for requirements applicable to the numerator used in calculating the monitor frequency a reference is made to section 1968.2 (d)(4.2.2)(F), which does not exist.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

Section 1968.2 (d)(4.2.2)(F) does not exist.

**Proposed regulatory language: We understand that the ARB staff has agreed to revise the sentence to reference section 1968.2 (d)(4.2.2)(E).**

**Incrementing the Ignition Cycle Counter, Section 1968.2 (d)(5.5.2)(B)**

Under the proposed regulation the ignition cycle counter shall be incremented within ten seconds if and only if the vehicle meets the engine start definition (see section (c)) for at least one second. This requirement is unclear and should be modified to ensure a manufacturer's responsibilities are clear.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

This requirement is unclear and should be clarified.

**Proposed regulatory language: We understand that the ARB staff has agreed to clarify this statement by including a tolerance, e.g., "two seconds, plus or minus one second" in the requirement.**

**Enforcement Testing – Equipment Retention, Section 1968.2 (d)(6.2)**

As written Section 1968.2 (d)(6.2) states that “ ... the manufacturer shall retain all test equipment (e.g., malfunction simulators, deteriorated threshold components, etc.) necessary to determine the malfunction criteria in section (e) for major monitors subject to OBD emission testing as defined in title 13, CCR section 1968.5.”

For full line manufacturers, it would take a huge warehouse to retain all of this equipment. In addition, since manufacturers would continue to use much of this equipment, it would be expensive and wasteful to have to have duplicate sets of equipment for everything, to

account for the remote chance that a particular application would be subject to enforcement testing. It would be much more practical for manufacturers to make this equipment available when needed rather than to retain it in a warehouse.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

The requirement should be revised so manufacturers are not required to maintain all equipment necessary to confirm the compliance status of the OBD II monitors. The equipment should be made available if necessary.

**Proposed regulatory language: We understand that the ARB staff has agreed to revise section (d)(6.2) to read "... the manufacturer shall make available all test equipment ...".**

**Monitoring Feasibility – Need for Review of Limits, Section 1968.2 (e)**

ARB has proposed many new monitoring requirements and enhancements to existing monitoring requirements. These new requirements include NOx Catalyst Monitoring, Section (e)(1.0), Diesel Catalyst Monitoring, Section (e)(1.5), Secondary Air System Monitoring, Section (e)(5), Variable Valve Timing System Monitoring, Section (e)(13), and Particulate Matter Trap Monitoring, Section (e)(15).

These proposed new requirements have not yet been demonstrated to be feasible on a full range of vehicle applications. Monitoring strategies for these new requirements are now being developed, and still need to be fully evaluated and proven out. There is no guarantee that the monitoring strategies that manufacturers are now developing will meet these new requirements. These efforts are further complicated by the stringency of the malfunction thresholds that ARB's proposal requires when considering the level of the LEV II program emission standards. We understand that ARB staff has agreed to address these items in the next biennial review of the OBD II requirements.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

Due to the risks that these technology-forcing requirements pose on manufacturers, ARB should review manufacturers progress in meeting these requirements, as part of the next biennial review of the OBD II regulation, and modify the requirements as needed to address any issues with feasibility that are identified. This review should be included in the Board Resolution that acts on the OBD II regulatory changes. We understand that ARB staff has agreed to address these issues in the next biennial review of the OBD II regulations.

**Proposed regulatory language – The Alliance and AIAM recommend that ARB should address the technical feasibility of the revised monitoring requirements during the next biennial review. This should be documented in the Board’s resolution acting on the proposed OBD II regulatory changes.**

**Misfire Fault Code and Freeze Frame Storage, Section 1968.2 (e)(3.4.2)(A)(iii)**

The proposed regulation states “the pending fault code and “freeze frame” conditions shall be erased at the end of the next driving cycle in which similar conditions to the engine conditions that occurred when the pending fault code was stored have been encountered without an exceedance of the specified percentage of misfire.” Erasing the freeze frame conditions in this fashion could confuse service technicians.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

It is our understanding that ARB staff did not intend to include the freeze frame requirement and that changes to correct this requirement will be made in the final regulation.

**Proposed regulatory language: We recommend that the sentence read, “The pending fault code shall be erased and “freeze frame” conditions may be erased at the end of the next**

*driving cycle in which similar conditions to the engine conditions that occurred when the pending fault code was stored have been encountered without an exceedance of the specified percentage of misfire.”*

**Fuel System Fault Code and Freeze Frame Storage, Section 1968.2 (e)(6.4.3)(A)(iii)**

The ARB’s proposed section states “The pending fault code and stored “freeze frame” conditions may be erased at the end of the next driving cycle in which similar conditions have been encountered without an exceedance of the specified fuel system malfunction criteria.” This section is not consistent with other parts of the regulation.

*Manufacturers’ Issue and the Alliance and AIAM Recommendation:*

We understand that the ARB staff intends to change this requirement to be consistent with other parts of the regulation.

*Proposed regulatory language: We recommend that the sentence read, “The pending fault code shall be erased and “freeze frame” conditions may be erased at the end of the next driving cycle in which similar conditions to the engine conditions that occurred when the pending fault code was stored have been encountered without an exceedance of the specified fuel system malfunction criteria.”*

**Continuous Monitoring of Oxygen Sensors, Section 1968.2 (e)(7)**

For 2006 and later model year LEV II vehicles, the ARB has proposed to require continuous monitoring of circuit continuity for primary oxygen sensors, and out-of-range values for both primary and secondary oxygen sensors. Continuous monitoring of these parameters is defined as a sampling rate of at least two samples per second. Some manufacturers do not have circuitry implemented in their Powertrain Control Module (PCM) that can directly monitor the



circuit continuity of the oxygen sensor. As an alternative, circuit continuity can be indirectly monitored by other monitoring strategies that continuously assess the sensor output activity during closed loop fuel control (i.e., a "lack of switching" monitor for the primary sensor). However, these alternate strategies cannot assess the oxygen sensor activity under conditions where open loop fuel operation is commanded. Nor would there be any benefit in detecting circuit continuity faults during open loop operation. Also, oxygen sensor switches occur at rates less than twice per second, which is the sampling rate required in the regulation for continuous monitoring.

In addition, monitoring for out-of-range values of the primary and secondary sensors pose a problem. Monitoring strategies can easily detect over-voltage conditions, but detecting under-voltage conditions for oxygen sensors may not be feasible in many cases. A sensor output of zero volts is a legitimate output value for a properly functioning oxygen sensor.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

Some manufacturers do not have circuitry implemented in their PCM that can directly monitor the circuit continuity of the oxygen sensor

***Proposed regulatory language: We understand that ARB will approve monitoring strategies with the limitations described above under the provisions of proposed Paragraph 1968.2 (e)(7.3.1)(C) which allows manufacturers to request Executive Officer approval to disable continuous monitoring when an oxygen sensor malfunction cannot be distinguished from other effects.***

**Comprehensive Component Malfunction Criteria, Section 1968.2 (e)(16.2.1)(A)**

ARB's proposed requirement states, "Rationality faults shall be separately detected and store different fault codes than the respective lack of circuit continuity and out of range

diagnostics. Additionally, input component lack of circuit continuity and out of range faults shall be separately detected and store different fault codes for each distinct malfunction (e.g., out-of-range low, out-of-range high, open circuit, etc.).” However, in some cases, new software will be required to separately detect and store different fault codes for each distinct malfunction. The manufacturers do not have enough lead-time to develop and implement this new software by the 2004 model year.

*Manufacturers’ Issue and the Alliance and AIAM Recommendation:*

New software will be required in some cases to meet the proposed monitoring requirements. It is already too late to develop and incorporate this new software in some models scheduled for production.

**Proposed regulatory language: We understand that the ARB staff has acknowledged the need to develop new software for this requirement and has agreed to provide an additional year, until model year 2005, if hardware or software changes are required. The Alliance and AIAM agree with such a change.**

**OBD II Monitoring Requirements for Fuel-Fired Heaters on ZEVs/PZEVs, Section 1968.2 (e)(17)**

In section (e)(17), "Other Emission Control or Source System Monitoring", ARB proposed to require manufacturers to submit a plan for OBD II monitoring of fuel-fired passenger compartment heaters if such equipment is used on a vehicle.

For EVs and PZEVs, ARB prohibits fuel-fired heaters from being operational at ambient temperatures above 40 degrees F. Temperatures below 40 degrees F are typically not encountered in most areas of California. Also, California's air quality concerns are typically not encountered during times when the ambient temperature is this low. In addition, most ZEVs will

not otherwise have the need for a Malfunction Indicator Light on the instrument panel. Thus, there is simply no need, cost justification or air quality benefit to requiring OBD II monitoring on fuel fired heaters used on ZEV and PZEV applications.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

There is no need for monitoring of fuel-fired heaters on ZEVs and PZEVs.

**Proposed regulatory language: We understand that the ARB staff will consider a manufacturer's OBD II compliance plan under section 1968.2(e)(17) for fuel-fired heaters to exempt them from OBD II monitoring requirements with ARB approval if all failure modes for the heater are designed to be emissions-safe.**

**Disabling for Low Battery or System Voltage, Section 1968.2 (e)(18.4)**

Under the proposed requirements this section states, "Manufacturers may disable monitoring systems that can be affected by vehicle battery or system voltage levels when the battery or system voltage is below 11.0 Volts. Manufacturers may request Executive Officer approval to utilize a voltage threshold higher than 11.0 Volts to disable system monitoring. The Executive Officer shall approve the request if the manufacturer submits data and/or an engineering evaluation that adequately demonstrates that monitoring at the voltages would be unreliable, that operation of a vehicle below the disablement criteria for extended periods of time is unlikely, and that the OBD II system monitors the battery or system voltage."

This new language is not consistent with a prior interpretation of Mail Out # 95-20 by the ARB staff. If the manufacturer demonstrates that operation of a vehicle below the disablement criteria for extended periods of time is unlikely, it should not be necessary for the OBD II system to monitor battery or system voltage.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

There should be no need to monitor battery or system voltage when the vehicles will not operate below the disablement criteria for low voltage for any significant length of time.

**Proposed regulatory language: We understand that the ARB staff has agreed to delete the requirement for the OBD II system to monitor battery or system voltage, if a manufacturer demonstrates that vehicles will not operate below the disablement criteria for extended periods of time.**

**Diagnostic Connector, Section 1968.2 (f)(2.3)**

Under the proposed requirements this section states, "Any pins in the connector that provide electrical power shall be properly fused to protect the integrity and usefulness of the connector for diagnostic purposes and may not exceed 18.0 Volts DC regardless of the nominal vehicle system or battery voltage (e.g., 12V, 24V, 42V, etc.)."

This proposed requirement, which says that pins providing electrical power shall not exceed 18.0 volts, is not consistent with the relevant standard, which has a limit of 20.0 volts.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

The electrical capability of the pins providing the electrical power should be consistent with the relevant standards.

**Proposed regulatory language: We understand that the ARB staff has agreed to change the requirement to be 20.0 volts, to be consistent with the relevant standard.**

**Communication Protocol, Section 1968.2 (f)(3.2)**

Under the ARB’s proposal this section states that ISO 9141-2 may not be used on any 2007 or subsequent model year vehicle. This is not consistent with other protocols. Some manufacturers had planned to continue using this protocol beyond the 2006 model year.

*Manufacturers’ Issue and the Alliance and AIAM Recommendation:*

ISO 9141-2 should be allowed through the 2007 model year consistent with some manufacturer’s plans and other protocols.

**Proposed regulatory language: We understand that the ARB staff has agreed to change this section to allow the ISO 9141-2 protocol to be used for the 2007 model year, consistent with other protocols.**

**Standard Data Stream Signals, Section 1968.2 (f)(4.2.2)**

ARB’s proposed requirement lists “manifold air pressure” which is not a defined term.

*Manufacturers’ Issue and the Alliance and AIAM Recommendation:*

The requirement should be revised to read “Manifold absolute pressure.”

**Proposed regulatory language: We understand that ARB staff has agreed that the correct term is “manifold absolute pressure.”**

**Fault Codes, Section 1968.2 (f)(4.4.2)**

The proposed requirement states: “The stored fault code shall, to the fullest extent possible, pinpoint the likely cause of the malfunction. Manufacturers shall use separate fault codes for every diagnostic where the diagnostic and repair procedure or likely cause of the failure is different. In general, rationality and functional diagnostics shall use different fault codes than the respective circuit continuity diagnostics. Additionally, input component circuit

continuity diagnostics shall use different fault codes for distinct malfunctions (e.g., out-of-range low, out-of-range high, open circuit, etc.).”

In some cases, new software will be required to separately detect and store different fault codes for each distinct malfunction. There is not enough lead-time to develop and implement this new software by the 2004 model year.

*Manufacturers’ Issue and the Alliance and AIAM Recommendation:*

Additional lead-time should be provided, beyond the 2004 model year, to implement this new regulation.

**Proposed regulatory language: We understand that the ARB staff has acknowledged the need to develop new software for this requirement and has agreed to negotiate phase-ins with manufacturers on a case-by-case basis.**

**Calibration Verification Number, Section 1968.2 (f)(4.7.4)**

The ARB proposal states, “For purposes of Inspection and Maintenance (I/M) testing, manufacturers shall make the CVN and CAL ID combination information available in a standardized electronic format that allows for off-board verification that the CVN is valid and appropriate for a specific vehicle and CAL ID.” Manufacturers cannot comply with this section for the 2004 model year, since the EPA work group has not yet developed a standardized electronic format.

*Manufacturers’ Issue and the Alliance and AIAM Recommendation:*

A standardized electronic format has not been developed by EPA, thus making it impossible to comply in model year 2004.

**Proposed regulatory language: We understand that the ARB staff has agreed to delay this requirement until the 2005 model year.**

**Confirmatory Testing – Certification Demonstration Vehicle, Section 1968.2 (g)(6.1)**

The proposed regulatory language states that confirmatory testing is limited to vehicles in the “OBD II group” represented by the demonstration vehicle. This could potentially include a wide variety of vehicle / powertrain combinations. Since this is a confirmation of the emission data from the certification demonstration vehicle, ARB should limit confirmatory testing to the same vehicle configuration.

*Manufacturers’ Issue and the Alliance and AIAM Recommendation:*

Confirmatory testing should be limited to certification data vehicles to prevent having to support a large number of different test vehicles.

**Proposed regulatory language: We understand that the ARB Staff has agreed to modify the limitations for ARB OBD certification confirmatory testing in section 1968.2 (g)(6.1) to read: "This confirmatory testing is limited to the vehicle configuration represented by the demonstration vehicle(s)."**

**Deficiencies, Section 1968.2 (i)**

Under the ARB proposal a manufacturer can request, and the Executive Officer may grant, a deficiency during the first 120 days after commencement of normal production. Some problems may not be discovered until six months after production, since some mandatory production vehicle testing may not be completed until then. Therefore, it would be reasonable to extend the time manufacturers would be allowed to request a deficiency to 180 days after start of production.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

The proposed time period in which a deficiency may be requested after the start of production should be increased.

**Proposed regulatory language: We understand that the ARB Staff has agreed to modify section 1968.2 (i)(6.1) to read: "Manufacturers may request that the Executive Officer grant a deficiency and amend a vehicle's certification to conform to the granting of the deficiencies during the first 180 days after commencement of normal production ... "**

### **Production Vehicle Testing – Start of Production, Section 1968.2 (j)**

The ARB requirements contain requirements that specify when production vehicle confirmation testing should be completed by. The requirements in sections 1968.2 (j)(1.2), (j)(2.1), and (j)(3.1) refer to “start of production” or “after production begins” for timing of production vehicle testing and/or reporting.

The terms "start" and "beginning of production" have different meanings for different manufacturers. Some manufacturers build a small number of “saleable” pilot vehicles, long before normal production. In addition, it may not be possible for vehicles that are built in offshore production facilities to be shipped and tested within the time allowed to submit the necessary reports to the ARB.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

The requirements should be clarified to define “start of production” and to allow time for vehicles to be shipped to the United States for production vehicle confirmation testing.

**Proposed regulatory language: We understand that the ARB Staff has agreed to make the following changes: Section 1968.2 (j)(1.2) should refer to the “start of normal production.” Section 1968.2 (j)(2.1) should refer to “after normal production begins.”**



*Section 1968.2 (j)(3.1) should require data collection and reporting “within six months from either the time of introduction into commerce or the start of normal production, whichever is later.”*

**Production Vehicle Testing – Verification / Reporting of In-use Monitoring Performance, Section 1968.2 (j)(3)**

Under the currently proposed regulatory language vehicle manufacturers would be required to collect and report in-use monitoring performance data on California production vehicles equipped with that software. Manufacturers would be required to collect data from a minimum of thirty vehicles for each emission test group and submit reports to ARB within 6 months.

This requirement would be a significant burden to all manufacturers. For some large volume manufacturers annual cost estimates exceed \$1 million. Engineering resources would be adversely impacted and the new vehicle testing requirement is inconsistent with the commitment of ARB staff to minimize up-front compliance requirements as part of the recent CAP 2000 certification rulemaking. Such a massive test program is neither necessary nor does it provide any significant air quality benefit.

For small volume manufacturers the difficulty in obtaining the required number of customer vehicles is problematic.

*Manufacturers’ Issue and the Alliance and AIAM Recommendation:*

As an alternative, ARB should revise the proposed text to allow approval of manufacturer plans for collecting and reporting of the data by larger groups subject to Executive Officer approval. The minimum sample size should also be reduced from thirty to a more manageable

size for each group. Small volume manufacturers should be exempt from the production vehicle testing requirement.

**Proposed regulatory language: We understand that ARB staff has agreed to change section 1968.2 (j)(3.1) and (3.2) to allow multiple test groups to be combined to collect representative data and to change Section (j)(3.3) to reduce the minimum sample to fifteen vehicles. We also recommend exempting small volume manufacturers from these testing requirements.**

**Definition of Motor Vehicle Class, Section 1968.5 (a)(3)(E)**

ARB has proposed to define "Motor Vehicle Class" as "A group or set of vehicles or engines...that have been determined by the Executive Officer to share common or similar hardware, software, OBD II monitoring strategy, or emission control strategy." Manufacturers are concerned that this definition is too broad, and ARB could improperly expand a non-conformance finding to other vehicles or model years.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

ARB has the burden of justifying a motor vehicle class beyond a single model year or vehicle model.

**Proposed regulatory language: We understand that ARB staff has acknowledged that the burden of proof is on the Executive Officer to justify expanding a non-conformance determination to other like-vehicles.**

**Enforcement Testing and Remedial Action - Useful Life Criteria, Section 1968.5 (b)(3)(D)**

For OBD II emissions testing, ARB proposed that test vehicles could be selected with age and mileage up to full useful life. For OBD II ratio testing and other OBD II testing, ARB could select individual test vehicles that exceeded the age/mileage useful life criteria.

Manufacturers believe that vehicles selected for OBD II emissions testing should meet the same vehicle selection criteria as is used for emissions enforcement testing. The large body of experience with this exhaust emission testing indicates that expanding the test vehicle sample group beyond the vehicle's useful life will result in conditions that are not under the control of the manufacturer. Such a requirement is not cost-effective nor is it necessary. In addition, there is a lack of any legal basis for testing vehicles that exceed the regulatory useful life. Consequently, test vehicles for OBD II emissions testing should be limited to within  $\frac{3}{4}$  useful life consistent with current emission test requirements.

In addition, all test vehicles for OBD II ratio testing and other OBD II enforcement testing should be within the useful life criteria. Because manufacturers certify that vehicles meet the OBD II requirements during their useful life but not beyond, ARB should not conduct enforcement testing on individual test vehicles that are beyond useful life.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

All test vehicles should be within their useful life. In addition, for OBD II emissions test, the vehicle should be within  $\frac{3}{4}$  useful life, consistent with exhaust emission tests.

**Proposed regulatory language: We understand that ARB will change the enforcement test vehicle selection criteria in the regulation as follows: Limit test vehicles for OBD II emissions testing to within  $\frac{3}{4}$  useful life and limit test vehicles for OBD II ratio and other OBD II testing to within useful life.**

**Enforcement Testing Vehicle Rejection Criteria for Tampering and Abuse, Section 1968.5(b)(3)(D)**

In the proposed regulation ARB states that vehicles considered for enforcement testing would be rejected for tampering, abuse, or collision damage only if there is a "reasonably apparent indication" of exposure to such conditions and only if such a condition were found during testing. *See* 13 CCR §1968.5(b)(3)(D).

Any vehicle that has been tampered or abused should be eliminated from enforcement testing. Allowing these vehicles to be included would result in a non-representative sample.<sup>13</sup> Manufacturers have no control over owners that abuse their vehicles or tamper with the emission control system. It is therefore not feasible or cost effective for a manufacturer to accommodate every possible form of tampering and abuse in the design of the vehicle or OBD system. ARB has recognized this situation in other enforcement testing provisions of its regulations, including standard exhaust emission testing, where it categorically rejects vehicles from its sample that have any indication of abuse.<sup>14</sup> The OBD enforcement testing regulation should include these same vehicle selection requirements as are used in standard emissions testing. This is especially critical in the OBD II testing context because under ARB's proposed testing protocol the sample vehicles need not be statistically representative, nor are the vehicles operated in a standardized test cycle.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

Manufacturers are concerned that a "reasonably apparent indication" does not provide sufficient assurance that such vehicles will not be selected (i.e., physical damage from tampering

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<sup>13</sup> *See*, 13 CCR 2137(b).

<sup>14</sup> *Id.*

or abuse may not be reasonably apparent although some other evidence may suggest such conditions may have occurred).

**Proposed regulatory language: We understand that ARB will modify the regulatory language in section 1968.5(b)(3)(D) accordingly to ensure that vehicles that are tampered, abused, or collision damaged are rejected from enforcement testing and not used in any test sample**

**Deteriorated or Defective Components - Enforcement Testing Procedures, 1968.5 (b)(4)(A)**

ARB had initially proposed that a manufacturer be responsible for designing the OBD system to operate and detect malfunctions without regard to whether the failure mode was reasonably foreseeable. While the goal of the OBD program is to ensure that in-use problems are detected and are properly remedied, the need to try to predict the conditions that might be encountered in the field applies not only to the manufacturer, but to ARB as well.

It would be inappropriate and inconsistent with the Health & Safety Code's requirement that rules be feasible for ARB to hold manufacturers responsible for failure modes that ARB has not itself identified to be of concern. If there was no certainty that such a failure mode was an intended target of the OBD regulation, a manufacturer cannot be expected to design a diagnostic system to identify it. And, if the manufacturer cannot be expected to have designed a diagnostic system that would have identified such a failure mode, or if there was no certainty that the relevant failure mode was a target of the regulation, the failure to detect that failure mode should not be considered a basis for a finding of in-use nonconformity with the OBD regulations, resulting in recalls or penalties.

If the manufacturers were to be held responsible for in-use failure modes that the ARB did not identify as relevant at the design stage, such a rule would not be appropriate as a matter

of policy. Further, such a requirement to design a diagnostic system in order to detect failure modes that were not identified at the time of design cannot meet the “feasibility” criterion of the California Health and Safety Code or the “clarity” requirements of the Government Code. We would note that in the case of field problems that are not covered by a given diagnostic system, manufacturers can and will improve the diagnostic performance of future systems, once ARB has defined the new failure mode of concern. The issue is whether a manufacturer should be liable for enforcement action with respect to failure modes that were not anticipated to be of concern before product release.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

It would not be appropriate for the Executive Officer to use components deteriorated or simulated to represent failure modes that were not reasonably foreseeable at the time of OBD system development.

**Proposed regulatory language: We understand that ARB Staff has agreed to modify Section 1968.5 (b)(4)(A) to read “The Executive Officer may not use components deteriorated or simulated to represent failure modes that could not have been foreseen to occur by the manufacturer (e.g., the use of leaded gasoline in an unleaded vehicle, etc.).**

**Factors for Determining Remedial Action and Monetary Penalties, Section 1968.5 (c)(3)(B) and (c)(4)**

The proposed regulation lists factors that may be considered in determining the magnitude of any penalty in the case of an OBD nonconformity. One of the proposed factors includes the consideration of a manufacturer’s “cooperation” or other activities during the course of an investigation. ARB staff indicated that this factor was to be used only to mitigate penalties.

As we have previously noted in our earlier submittals during this rulemaking, a rule that would permit the Executive Officer to seek penalties when a recall matter cannot be resolved

short of an ordered recall, and a public hearing to review the order, would violate the Due Process Clause by chilling the exercise of the manufacturer's right to contest a recall order. (*See* August 21, 2001 legal comments at 28-29.)

Another factor that is listed is "certification disclosure." This factor could be misconstrued and inadvertently encourage submission of detailed calibration information so as to avoid any hint of additional penalty based on an incomplete certification application. ARB staff indicated that this factor refers only to the materials currently required for submission under section 1968.2 (g).

The staff also indicated that the assessment of penalties in addition to recall would occur only in the case of recalls that were not voluntary. In such cases, penalties should only be allowed in extraordinary cases, when the Executive Officer proves to the satisfaction of an independent tribunal outside ARB that a request for a public hearing to contest a recall order was not filed or pursued in good faith. We believe that this should be clarified in the text of the regulations. As we noted in our August 21, 2001 legal comments, we do not believe there is any legal authority or general Board policy that would support penalties for a nonconformity addressed by remedial actions like recalls.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

After a non-conformance determination, ARB proposed weighing "manufacturer cooperation" and "certification disclosure" in determining the extent of the remedial action and monetary penalties. It is not appropriate to consider "manufacturer's cooperation" in determining the monetary penalty. Also, "certification disclosure" should be limited to what a manufacturer is required to disclose under 1968.2 (g). Finally, no penalty should be assessed for cases in which a recall has been performed, in the absence of "bad faith."

Proposed regulatory language:

We understand that ARB will modify the proposed language to remove "manufacturer cooperation" as a factor in section 1968.5 (c)(4)(H), and clarify that consideration of "certification disclosure" would be limited to what is required to be disclosed under section 1968.2 (g).

We also recommend that a phrase be added to section 1968.5(c)(4) that states, "Penalties shall not normally be assessed in cases in which a recall or other remedial action has been performed to correct the OBD II nonconformity absent a showing that the manufacturer did not act in good faith in contesting the remedial action."

Penalties for Failing to Comply with Ordered Recall, Section 1968.5 (e)

The proposed section authorizes penalties for failing to comply with the ordered recall requirements of Section 1968.5 (d). According to the ARB Staff Report, these OBD recall related penalties were intended to reference section 43016 of the Health & Safety Code. Referencing the entire Health and Safety Code does not specify which particular section concerning penalties the section was intended to reference. Section 43016 is the proper section because it addresses the penalties for activities for which no other section applies.

*Manufacturers' Issue and the Alliance and AIAM Recommendation:*

ARB should refer to section 43016 of the Health and Safety Code to clarify which penalty provision is being referenced.

Proposed regulatory language: We understand that ARB staff agreed to modify 1968.5 (e) to read: "In addition to the penalties that may be assessed by the Executive Officer pursuant to section (c) because of a manufacturer's failure to comply with the requirements of



*title 13, CCR section 1968.2, a manufacturer may be subject to penalties pursuant to Health & Safety Code section 43016 for failing to comply with the requirements of section (d)."*

**Applicability of Other California Law:**

The proposed regulation included language in several places which could be read as superceding other current California law (such as the Public Records Act and Attorney-Client Privilege). Discussion with CARB Staff indicates they did not intend to change or supercede other California law with that proposal.

*Manufacturers' Issue and AAM and AIAM Recommendation:*

In order to avoid any confusion on this issue, AAM and AIAM recommend adding a provision to the General Section of § 1968.5(a)(1) that makes it clear that these regulations are to be read consistent with other California law, and that they do not supercede other law.

**Proposed regulatory language: The Alliance and AIAM recommend the following provision be added to clarify the regulatory effect of the proposed regulations: § 1968.5(a)(1) ...“(C) Nothing in these regulations is intended to interfere with or supercede the requirements of the public Records Act, any provision of the Healthy and Safety Code or the privileges for work product or the attorney-client privilege existing under California Evidence Code or in administrative practice before the Board or the Office of Administrative Hearings.”**