State of California
AIR RESOURCES BOARD

Addendum to the Final Statement of Reasons for Rulemaking

ADOPTION OF THE "LEV III" AMENDMENTS TO THE CALIFORNIA GREENHOUSE GAS AND CRITERIA POLLUTANT EXHAUST AND EVAPORATIVE EMISSION STANDARDS AND TEST PROCEDURES AND TO THE ON-BOARD DIAGNOSTIC SYSTEM REQUIREMENTS FOR PASSENGER CARS, LIGHT-DUTY TRUCKS, AND MEDIUM-DUTY VEHICLES, AND TO THE EVAPORATIVE EMISSION REQUIREMENTS FOR HEAVY-DUTY VEHICLES

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Agenda Item: 12-1-2
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I. Background

On June 25, 2012, the Air Resources Board (ARB or Board) submitted the Final Statement of Reasons (FSOR) for the " Adoption of the "LEV III" Amendments to the California Greenhouse Gas and Criteria Pollutant and Evaporative Emission Standards and Test Procedures and to the On-Board Diagnostic System Requirements for Passenger Cars, Light-duty Trucks and Medium-duty Vehicles, and to the Evaporative Emission Requirements for Heavy-duty Vehicles" to the Office of Administrative Law (OAL) for its review and approval. In the course of its review, OAL questioned several regulatory changes that it interpreted as being potentially impermissibly retroactive, and identified a single incorrect reference to an incorporated test procedure. Each of these issues is addressed in turn below.

A. RETROACTIVITY

ARB understands there to be two types of retroactivity that regulatory text might present: a prohibited "primary" retroactive effect, and an allowable "secondary" retroactive effect. "Primary" retroactivity is altering "the *past* legal consequences of past actions." (20th Century Ins. Co. v. Garamendi, (1994) 8 Cal. 4th 216, 281, original italics, citing Bowen v. Georgetown Univ. Hosp., (1988) 488 U.S. 204, 219). "Secondary" retroactivity is altering "the *future* legal consequences of past transactions." (20th Century Ins. Co. v. Garamendi, (1994) 8 Cal. 4th 216, 281, original italics, citing Nat'l Med. Enterprises, Inc. v. Sullivan, (9th Cir. 1992) 957 F.2d 664, 671). "Secondary" retroactivity is "an entirely lawful consequence of rulemaking and hence does not itself offend any law, including the United States and California Constitutions and their respective due process clauses." (20th Century Ins. Co. v. Garamendi, (1994) 8 Cal. 4th 216, 281-282).

In fact, ARB has, with OAL approval, exercised this "entirely lawful consequence" several times in the last few years, primarily in response to the economic downturn that began in 2008. Rulemakings in which ARB provided relief shortly before or even during the compliance year include our Truck and Bus rule (OAL Regulatory Action No. 2011-1028-04s), the In-Use Off-Road rule (OAL Regulatory Action No. 2011-1028-03s), and the Transport Refrigeration Unit rule (OAL Regulatory Action No. 2011-0204-06s). These rulemaking amendments were noticed before the compliance year had begun but were formally adopted after it had begun. ARB has also provided some compliance relief for new motor vehicle manufacturers having to comply with on-board diagnostic (OBD) requirements under both the light-and medium duty-vehicle OBD II regulation and the heavy-duty OBD regulation. Some of these OBD amendments were not noticed or adopted until the first model-year affected by the amendments was already underway. Like the amendments at issue here, these prior ARB rulemakings address real world, future consequences of past transactions as allowed, without changing the past legal consequences of past actions, as would be arguably prohibited.

As explained in Section II below, all regulatory changes OAL identified as potentially impermissibly retroactive have at most a "secondary" retroactive effect and so are permissible.

II. Retroactivity

Subdivision 1961(b)(1)(B)(1)(c):

c. The applicable emission standards to be used in the above equations are as follows:

Model Year	*Emission Category*	*Emission Standard Value*	
		All PCs; LDTs 0-3750 lbs. LVW	*LDTs 3751-5750 lbs. LVW*
2001 <u>through 2014</u> ~~and subsequent~~ (§1960.5 "AB 965" vehicles only)	All	Federal Emission Standard to which Vehicle is Certified	Federal Emission Standard to which Vehicle is Certified
2001 - 2003 (§1960.1(f)(2))	Tier 1	0.25	0.32
2001 - 2006 model year vehicles certified to the "LEV I" standards in §1960.1(g)(1) (For TLEVs, 2001 - 2003 model years only)	TLEVs	0.125	0.160
	LEVs	0.075	0.100
	ULEVs	0.040	0.050

Model Year	Emission Category	All PCs; LDTs 0-3750 lbs. LVW	LDTs 3751 lbs. LVW - 8500 lbs. GVW
2004 through 2014 ~~and subsequent~~ model year vehicles certified to the "LEV II" standards in §1961(a)(1)	LEVs	0.075	0.075
	ULEVs	0.040	0.040
	SULEVs	0.01	0.01
2004 through 2014 ~~and subsequent~~ model year vehicles certified to the optional 150,000 mile "LEV II" standards for PCs and LDTs in 1961(a)(1)	LEVs	0.064	0.064
	ULEVs	0.034	0.034
	SULEVs	0.0085	0.0085

These amendments correct a long standing discrepancy between the regulations and the test procedures for emission credits earned by vehicles certifying to optional 150,000 mile emission standards that can be applied by a manufacturer when calculating compliance with the fleet average non-methane organic gas (NMOG) requirements listed in section 1961(b)(1)(A). The emission standard values in section E.2.1.2 of the "California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles," last amended September 27, 2010, are correct in that they are expressed in three decimal places. The emission standard values in section subdivision 1961(b)(1)(B)(1)(c) of the California Code of Regulations are in error in that they are expressed in two decimal places. These amendments do not change the emission standards to which these vehicles certify. Rather, they change the credits those vehicles earn towards the fleet average NMOG requirement. These amendments would not require any manufacturer to make changes to any 2013 model year vehicle, or any previous model year vehicle, already produced. This means that the aforementioned changes affecting model year 2013 vehicles only modify the value of credits a manufacturer may earn for vehicles meeting the optional emission standards, but would not require a manufacturer to make changes to the vehicle itself. Consequently, there are only future legal consequences (treatment of credits) for past acts (production), but no past legal consequences for those past acts.

The Board has further determined that no alternative considered by the agency would be more effective in carrying out the purpose for which regulatory action was proposed or would be as effective and less burdensome to affected private persons than the action taken by the Board.