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Gray Davis
Governor

Mail-Out #MSO 2001-04

March 14, 2001

TO: All Manufacturers of Passenger Cars, Light-Duty Trucks and Medium-Duty Vehicles
All Independent Service Repair Facilities
All Manufacturers of Aftermarket Parts
All Other Interested Parties

SUBJECT: PROPOSED REGULATIONS FOR THE CALIFORNIA MOTOR VEHICLE SERVICE INFORMATION RULEMAKING

In a Board Hearing scheduled for December 2001, staff will propose regulations for the implementation of Senate Bill 1146. The regulations will require motor vehicle manufacturers to make available emission-related service information, and information that will ensure wide availability of diagnostic scan tools, reprogramming equipment and emission-related replacement components. The regulations will specify the type of information required for disclosure, the manner by which this information is to be made available, and enforcement actions for non-compliance.

Staff is conducting a public workshop to discuss its preliminary proposals (attached), and to receive input from motor vehicle manufacturers, aftermarket companies, the service industry and other interested parties regarding key aspects of the bill. The workshop will be held at the date, time, and location below:

Date: Wednesday, April 18, 2001
Time: 9:00 a.m. to 1:00 p.m.
Location: Annex IV Auditorium
9530 Telstar Avenue
El Monte, California

If necessary, interested parties may contact staff to set up an additional individual meeting. If you wish to schedule such a meeting, please contact Mr. Dean Hermano, at (626) 459-4487.

Interested parties unable to participate in this workshop, or those wishing to supply additional information, are encouraged to submit written comments. Such written

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Website: <http://www.arb.ca.gov>.

California Environmental Protection Agency

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comments should be sent to Mr. Allen Lyons, Chief, New Vehicle/Engine Programs Branch, Air Resources Board, 9528 Telstar Avenue, El Monte, CA 91731.

If any party wishes the information submitted with respect to the workshop to be treated as confidential by staff, it should be clearly marked as "confidential" and be on pages which are easily detachable from other non-confidential information. California guidelines (sections 91000-91022, Title 17, California Code of Regulations, and Health and Safety Code section 39660(e)) will be followed in the handling of confidential information. Affected parties should justify confidential treatment of any information not specifically mentioned in these guidelines.

To request special accommodations for persons with disabilities, please contact Mr. Dean Hermano no later than April 4, 2001. Additionally, to obtain this document in an alternative format, please contact the Air Resources Board ADA Coordinator at (916) 323-4916 or (800) 700-8326 (Telecommunications Device for the Deaf or TDD).

Questions regarding this meeting, or issues that you wish to be discussed, should be directed to Mr. Allen Lyons, Chief, New Vehicle/Engine Programs Branch, at (626) 575-6918, or Mr. Dean Hermano, Staff Engineer, at (626) 459-4487, or by e-mail at dhermano@arb.ca.gov.

Sincerely,

/s/

R. B. Summerfield, Chief
Mobile Source Operations Division

- Attachment 1: Background and Discussion Regarding Implementation of SB1146
- Attachment 2: Proposed Regulatory Language for Requirements of SB1146, Title 13, CCR, Section 1969
- Attachment 3: Proposed Administrative Procedures for Review of Executive Officer Determinations, Title 17, CCR, Sections 60060.1 through 60060.34

Attachment 1

Background and Discussion Regarding Implementation of SB1146

Background

Motor vehicles of today are more complex than ever. The adoption of increasingly stringent emission standards has resulted in advanced emission control systems such as three-way catalytic converters, precise closed-loop fueling strategies, exhaust gas recirculation, and enhanced evaporative emission controls. With these components and systems, new cars and trucks sold today are up to 96 percent cleaner than those sold 10 years ago.¹ However, continued performance at these low emission levels depends on the proper operation of the emission control systems built into the vehicles. Emission-related malfunctions can cause vehicle emission levels to greatly exceed certification standards. Since the 1994 model year, the ARB has relied on second generation on-board diagnostic systems, known as OBD II systems, to provide for quick detection and repair of emission-related problems.

OBD II systems are incorporated into vehicle on-board computers to monitor the performance of virtually every component and system that can affect emissions. The OBD II system alerts the vehicle operator of the occurrence of a malfunction, and stores diagnostic information in the on-board computer for later retrieval and use by a service technician. Through the rapid identification and repair of emission-related problems, the lifetime emissions from motor vehicles can be minimized. However, because emission levels are not reduced until the vehicle is successfully repaired, it is critical that service technicians have access to the information and diagnostic tools necessary to effectively utilize OBD II system information, and to carry out necessary repair work for identified problems. This is especially true for independent service providers which have been estimated to perform up to 80 percent of all automotive repairs.²

In response to concerns from the aftermarket regarding the availability of emission-related service information and diagnostic tools, Governor Gray Davis signed Senate Bill (SB) 1146 into law on September 30, 2000. The intent of the bill is to aid independent service providers in the repair of emission-related malfunctions by ensuring that adequate information and diagnostic tools are available for use. The bill addresses service information availability in three specific ways:

1. Motor vehicle manufacturers will be required to make available all emission-related diagnostic and service literature (e.g., service manuals and technical service bulletins) in an easily accessible format at reasonable costs. Access to this information on the Internet is specifically required.
2. Motor vehicle manufacturers must make available to the aftermarket the same diagnostic tools that franchised dealerships have access to. Further, specific information that can be used to design and market more affordable service and reprogramming equipment must be provided.

¹ Based on a comparison of Tier 1 and Super Ultra-Low Vehicle (SULEV) emission standards.

² Federal Register: August 9, 1995 (Volume 60, Number 135), pg. 40475.

3. Motor vehicle manufacturers must make available basic OBD II system design information to help service technicians understand OBD II system operation, and better ensure that aftermarket parts manufacturers will be able to produce emission-related equipment parts that are OBD II compatible, and effective in controlling emissions.

Similar Federal Regulations

The United States Environmental Protection Agency (U.S. EPA) promulgated similar regulations for the availability of service information in 1995³. Amendments to the regulations to further improve service information availability are expected later this year. To promote consistency, it is staff's intent to harmonize its regulations with those of the U.S. EPA where possible.

Applicability of the Regulation

In accordance with SB1146, the staff is proposing that these service information requirements apply to all 1994 and later model year vehicles certified to California's OBD II requirements.⁴

Access to Service Information

The staff is proposing that manufacturers provide all emission-related service information (including training materials) that are, or have been, provided to franchised dealerships. The information must be made available over the Internet as specifically required by the bill. Minimum website performance requirements are under consideration by the staff to ensure that access to information will not be limited by unreasonably long web page download times, confusing search engines, complicated subpage structures, etc. Various levels of access (e.g., one-time use versus frequent use) would be required under the staff's proposal to ensure that access is not limited by inflexible pricing and registration structures. The staff invites interested parties to provide comments and suggestions regarding web page performance requirements at the workshop. The staff requests comments regarding the length of time that service information should remain available on-line once posted.

In addition to service information access via the Internet, the staff is proposing that manufacturers also provide off-line electronic access to service information. The staff envisions that manufacturers can most easily meet this requirement by selling the contents of its website on CD-ROM. The end user could still view the information with a web browser or other software, but could do so without being hindered by problems such as speed and dependability that can accompany Internet usage. Off-line electronic access would probably be preferred by service technicians that frequently use information for particular makes of vehicles. Other formats for off-line electronic service information would be acceptable provided the information can be viewed with a personal computer using commonly available software (e.g., Adobe Acrobat). The staff

³ Part 86, Code of Federal Regulations, Section 86.094-38.

⁴ Title 13, California Code of Regulations, Section 1968.1.

invites interested parties to comment as to whether other forms of distribution should be considered to ensure that all “covered persons” have adequate access to information.

On-Board Diagnostic System Descriptions

SB1146 requires manufacturers to publish general descriptions of the design and operation of on-board diagnostic systems. This information will help service technicians to better understand the circumstances under which malfunctions are detected, and also will provide manufacturers of emission-related replacement parts with information which can be used to better ensure that replacement parts are compatible with OBD II systems. As part of this description, the regulations will require motor vehicle manufacturers to provide information necessary to understand and interpret data accessible to generic scan tools under mode 6 of SAE J1979.⁵ The regulations do not require motor vehicle manufacturers to include specific trade secret algorithms, software code, and calibration data into the system descriptions. The staff expects that manufacturers will be able to organize and format OBD II descriptions in such a manner that the requirements of the regulations can be met without compromising trade secret information.

Diagnostic Tools and Reprogramming Equipment

Besides offering for sale diagnostic tools that are provided to dealerships, the regulation will require manufacturers to make available information that will allow aftermarket tool manufacturers to incorporate into their tools the same functionality. Many manufacturers currently provide such information for diagnostic purposes to aftermarket tool providers to satisfy a similar requirement found in the OBD II regulation (subsection (k)(2.1), Title 13, CCR, 1968.1).

Regarding on-board computer reprogramming functionality, the staff is proposing to address the statute’s requirements for reprogramming information by requiring manufacturers to use a standardized programming interface specified by SAE J2534, “Recommended Practice for Microsoft Windows 32-Bit Application Programming Interface for Pass-Through Vehicle Reprogramming.” Use of this recommended practice by motor vehicle manufacturers will allow independent service providers to program vehicles to factory specifications using commonly available personal computing diagnostic tools. The staff is proposing that vehicle reprogramming be compatible with SAE J2534 for 2004 and later model year vehicles.

Information and Diagnostic Tool Costs

The regulation will require that all covered information and diagnostic tools be offered for sale at a “fair, reasonable, and nondiscriminatory price.” The staff believes that the intent of the SB1146 is to ensure that the price motor vehicle manufacturers charge for information and diagnostic tools is fair and reasonable to all interested parties and that the price should not advantage franchised dealers over the aftermarket industry. To this end, ARB staff’s proposed regulatory approach is to define factors that will permit manufacturers to recover costs associated with providing required information and

⁵ Title 13, California Code of Regulations, Section 1968.1(k)(2.0).

diagnostic tools, but not to the point that the providing of information is a source of profit. The staff is proposing that the following factors be used in evaluating whether set prices are fair, reasonable, and non-discriminatory.

- The net cost to the motor vehicle manufacturers' franchised dealerships for similar information obtained from motor vehicle manufacturers after considering any discounts, rebates or other incentive programs;
- The cost to the motor vehicle manufacturer for preparing and distributing the information, excluding any research and development costs incurred in designing, implementing, upgrading or altering the onboard computer and its software or any other vehicle component. Amortized capital costs may be included;
- The price charged by other motor vehicle manufacturers for similar information;
- The price charged by the motor vehicle manufacturer for similar information immediately prior to January 1, 2000;
- The means by which the information is distributed;
- The extent the information is used in general and by specific users, which includes the number of users, and the frequency, duration, and volume of use; and
- Inflation.

The staff welcomes comments and suggestions regarding these and other possible regulatory criteria to be used to ensure that prices are fair, reasonable, and non-discriminatory.

Implementation Dates

The staff is proposing that manufacturers make all required information, including OBD II system general descriptions and diagnostic tools, available no later than 90 days after the effective date of these regulations for vehicle models produced on or before that date. For vehicle models going into production after the effective date of the regulations, the information would need to be available within 90 days from the start of production or concurrently with its availability to franchised dealerships, whichever occurs first.

Trade Secret Disclosure

SB1146 contains provisions for manufacturers to withhold trade secret information that would otherwise have to be disclosed. The staff is proposing regulatory text to guide the process of resolving trade secret disclosure issues.

The staff's proposal would permit manufacturers to initially withhold information that it believes to be trade secret. At the time of initial posting of non-trade secret information for the vehicle model(s) in question, the motor vehicle manufacturer would be required to identify the information it has withheld as trade secret. Covered persons that believe availability of the information is necessary to "mitigate anticompetitive effects" may request the motor vehicle manufacturer in writing to make the information available. The motor vehicle manufacturer would then have 14 days in which to respond to the

request, and the parties would have an additional 7 days in which to attempt to resolve the information request informally. If resolution cannot be reached within the 21 day period, the motor vehicle manufacturer would be required to petition the California superior court to obtain an exemption from disclosure.

Compliance Review Procedures

Under the staff's proposal, the Executive Officer may review a manufacturer's compliance with these regulations. The review may be prompted by ARB surveys of information made available via the internet or by other distribution sources, or it may be initiated upon receipt of a request for review from a covered person. The motor vehicle manufacturer will have an opportunity to respond to initial allegations of noncompliance from the Executive Officer or a covered person. If the Executive Officer, after reviewing all of the evidence, finds that the motor vehicle manufacturer is not in compliance with the governing statute or the regulation, he or she will issue a notice to comply to the motor vehicle manufacturer that it immediately remedy the non-compliance. The motor vehicle manufacturer would then be required to either submit within 30 days a compliance plan for Executive Officer approval, or request an administrative hearing to contest the basis or scope of the notice.

The Executive Officer will review any compliance plan that is submitted and will accept those plans that demonstrate that the motor vehicle manufacturer will come into compliance within 45 days, or such longer term that the Executive Officer approves, from the date of submission of the plan. If the plan is rejected by the Executive Officer, the motor vehicle manufacturer would be required to revise the plan, or request that the determination be reviewed by an independent hearing officer.

Covered persons may also request an administrative hearing for review of a decision by the Executive Officer that a manufacturer has not failed to comply with the requirements of the regulation. In addition, if a covered person believes that the Executive Officer has accepted a manufacturer's compliance plan that will not bring the motor vehicle manufacturer into compliance within the required time period, the covered person may invoke the administrative hearing process for review of that decision. The procedures for administrative hearings are outlined below.

Administrative Hearing Procedures

Health and Safety Code section 43105.5(f) provides that the ARB shall establish an administrative hearing procedure for the review of Executive Officer determinations regarding compliance with the provisions of SB1146 and the implementing regulations. To that end, the ARB is proposing that procedures be adopted for such review. The procedures would be located at Title 17, California Code of Regulations section 60060.1 through 60060.34. The proposed procedures would provide the parties with notice and the opportunity to have Executive Officer determinations reviewed in a full, fair, and expeditious manner by a neutral hearing officer.

In most instances, the hearing officer's review would be limited to the written record that was before the Executive Officer at the time that he or she made its determination regarding compliance. Thus, in general, the availability of discovery would be limited.

After considering the record and submitted arguments by the parties, the hearing officer would issue a written decision and order. The administrative review procedures would require that the decision set forth findings in support of all legal conclusions reached. The hearing officer's decision would be the final decision of the ARB. The final decision, however, would be subject to judicial review by the superior court upon petition by an aggrieved party. Likewise, the ARB would be able to seek enforcement of a final order in the superior court. The ARB staff invites interested parties to provide comments and suggestions on the proposed administrative review process.

Non-Compliance Penalties

Included in ARB's draft regulations is text that would allow for the imposition of fines not to exceed \$25,000 per violation per day that the violation exists. The regulation also would allow the hearing officer to order the Executive Officer to suspend approval of pending certification applications from the motor vehicle manufacturer until the violations have been corrected. The ARB staff invites interested parties to provide comments and suggestions on the proposed non-compliance penalties.

**Attachment 2
Proposed Regulation Order**

Add Title 13, California Code of Regulations, Chapter 1 Motor Vehicle Pollution Control Devices, section 1969 to read as follows:

Article 2. Approval of Motor Vehicle Pollution Control Devices (New Vehicles)

§1969 Motor Vehicle Service Information – 1994 and Subsequent Model Passenger Cars, Light-Duty and Medium-Duty Vehicles

- (a) Applicability. This section shall apply to all California-certified 1994 and subsequent model-year passenger cars, light-duty vehicles and medium-duty vehicles equipped with on-board diagnostic systems pursuant to section 1968.1.

- (b) Definitions. The definitions in section 1900(b), Division 3, Chapter 9, Title 13 of the California Code of Regulations, apply with the following additions:
 - (1) “Access codes, recognition codes and encryption” mean any type, strategy, or means of encoding software, information, devices, or equipment that would prevent the access to, use of, or proper function of any emission-related part.
 - (2) “Bi-directional control” means the capability of a diagnostic tool to send messages on the data bus (if applicable) that temporarily override a module’s control over a sensor or actuator and give control to the diagnostic tool operator. Bi-directional controls do not create permanent changes to engine or component calibrations.
 - (3) “Covered person” means any person or entity engaged in the business of service or repair of motor vehicles who is licensed or registered with the Bureau of Automotive Repair to conduct that business, or who is engaged in the manufacture or remanufacture of emission-related motor vehicle parts for those motor vehicles.
 - (4) “Data stream information” means information that originates within the vehicle by a module or intelligent sensor (including, but not limited to, a sensor that contains and is controlled by its own module) and is transmitted between a network of modules and intelligent sensors connected in parallel with either one or two communications wires. The information is broadcast over communication wires for use by other modules such as chassis or transmission modules to conduct normal vehicle operation or for use by diagnostic tools. Data stream information does not include engine calibration-related information.
 - (5) “Emission-related motor vehicle information” means information regarding any of the following:
 - (A) Any original equipment system, component, or part that controls emissions.

- (B) Any original equipment system, component, or part associated with the powertrain system including, but not limited to, the fuel system and ignition system.
 - (C) Any original equipment system or component that is likely to impact emissions, including, but not limited to, the transmission system.
- (6) “Emission-related motor vehicle part” means any direct replacement automotive part or any automotive part certified by Executive Order that may affect emissions from a motor vehicle, including replacement parts, consolidated parts, rebuilt parts, remanufactured parts, add-on parts, modified parts and specialty parts.
- (7) “Enhanced data stream information” means data stream information that is specific for an original equipment manufacturer’s brand of tools and equipment.
- (8) “Enhanced diagnostic tool” means a diagnostic tool that is specific to the original equipment manufacturer’s vehicles.
- (9) “Fair, reasonable, and nondiscriminatory price”, for the purposes of section 1969, means a price that allows manufacturers to recover the cost of providing required information and diagnostic tools considering the following:
- (A) The net cost to the motor vehicle manufacturers’ franchised dealerships for similar information obtained from motor vehicle manufacturers, less any discounts, rebates or other incentive programs;
 - (B) The cost to the motor vehicle manufacturer for preparing and distributing the information, excluding any research and development costs incurred in designing and implementing, upgrading or altering the onboard computer and its software or any other vehicle part or component. Amortized capital costs may be included;
 - (C) The price charged by other motor vehicle manufacturers for similar information;
 - (D) The price charged by the motor vehicle manufacturer for similar information immediately prior to January 1, 2000;
 - (E) The means by which the information is distributed;
 - (F) The extent the information is used, which included the number of users, and frequency, duration, and volume of use; and
 - (G) Inflation.
- The Executive Officer has the authority to request information related to a motor vehicle manufacturer’s pricing methods in order to evaluate whether specified prices are fair and reasonable.
- (10) “Initialization” or “reinitialization” means the process of resetting or reprogramming a vehicle security system by means of an ignition key.
- (11) A “Reasonable business mean” means a method or mode of distribution or delivery of information that is commonly used by businesses or government to distribute or deliver and receive

information at a fair, reasonable, and nondiscriminatory price. A reasonable business mean includes, but is not limited to, the Internet, first-class mail, courier services, and fax services.

- (c) (1) Service Information: Motor vehicle manufacturers shall make available to all covered persons all emission-related diagnosis and repair information for subject vehicle models that is provided to the motor vehicle manufacturer's franchised dealerships. The information must include, but is not limited to service and repair procedures, technical service bulletins, and training materials.
- (2) On-board Diagnostic System (OBD II) Information. Motor vehicle manufacturers shall make available to all covered persons, a general description of each OBD II system used in their vehicles, which shall include the following:
 - (A) A general description of the operation of the monitor, including a description of the parameter that is being monitored.
 - (B) A listing of all typical OBD II diagnostic trouble codes associated with each monitor.
 - (C) A description of the typical enabling conditions for each monitor to execute during vehicle operation, including, but not limited to, minimum and maximum intake air and engine coolant temperature, vehicle speed range and time after engine startup.
 - (D) A listing of each monitor sequence, execution frequency and typical duration.
 - (E) A listing of typical malfunction thresholds for each monitor.
 - (F) For OBD II parameters for specific vehicles that deviate from the typical parameters, the OBD II description shall indicate the deviation and provide a separate listing of the typical values for those vehicles.
 - (G) Information necessary to interpret and understand data available to a generic scan tool through "mode 6," pursuant to SAE J1979, incorporated by reference into section 1968.1.
 - (H) The information required by this subsection shall not include specific algorithms, specific software code or specific calibration data beyond that required to be made available through the generic scan tool pursuant to section 1968.1, except where such algorithms, codes or data are made available to franchised dealerships.
- (3) Manufacturers shall make available to covered persons for vehicle models meeting the requirements of subsection (e)(2) all vehicle reprogramming information and materials necessary to install manufacturers' software and calibration data.
- (4) On-Board Computer Initialization Procedures: Motor vehicle manufacturers shall provide to all covered persons information regarding initialization procedures if such procedures are necessary for the proper installation of vehicle on-board computers.

- (5) The information in this subsection shall be made available no later than 90 days after the effective date of these regulations for vehicle models produced on or before the effective date. For all new vehicle models for which production commences after the effective date of these regulations, motor vehicle manufacturers must make available the required information no later than 90 days after the start of vehicle production or concurrently with its availability to franchised dealerships, whichever occurs first.
- (d)
 - (1) All information required to be made available under subsection (c) shall be accessible via the Internet.
 - (2) Notwithstanding the provisions of this subsection, motor vehicle manufacturers must also offer for sale the information required by this section in an off-line electronic format(s), including CD-ROM, that can be read using a personal computer and commonly available software.
 - (3) For purposes of making the information available via the Internet, motor vehicle manufacturers, or their designees, shall establish and maintain an Internet website(s) that:
 - (A) Is accessible at all times, except during times required for routine and emergency maintenance. Routine maintenance shall be scheduled after normal business hours.
 - (B) Houses all of the required information such that it is available for downloading, except as provided in subsection (d)(3)(L).
 - (C) Is written in English with all text using readable font sizes.
 - (D) Has clearly labeled and descriptive headings or sections, has an online index connected to a search engine and/or hyperlinks that directly take the user to the information, and has a comprehensive search engine that permits covered persons to obtain information by various query terms including, but not limited to, vehicle model, model year, vehicle identification number, bulletin number, diagnostic procedure, and trouble code.
 - (F) Identifies a contact person(s) who is familiar with the information available at the site and operation of the site itself and provides e-mail access and a phone number(s) for direct communication with the contact person(s). A contact person(s) shall be available during all normal business hours in California, and shall respond to any inquiries within 24 hours. The website shall also provide a business address for the purposes of receiving overnight or certified mail.
 - (G) Lists the most recent updates to the website. Updates must occur concurrently with their availability to franchised dealerships.
 - (H) Provides schedules for training classes (if any) offered by the motor vehicle manufacturer, and instructions for obtaining any training materials that are not in a format that can be readily downloaded directly from the Internet.

- (I) Offers media files (if any) and other documents in formats that can be viewed with commonly available software programs.
 - (J) Provides secure Internet connections (i.e., certificate-based) for transfer of payment and personal information.
 - (K) Provides hyperlinks to any related information or websites.
 - (L) Provides ordering information and instructions for the purchase of manufacturer emission-related enhanced diagnostic tools and reprogramming information pursuant to subsection (e).
 - (M) Complies with the following website performance criteria:
 - (i) Possesses sufficient server capacity to allow ready access by all covered persons and have sufficient downloading capacity to assure that all covered persons may obtain needed information without undue delay.
 - (ii) Broken weblinks shall be corrected or deleted weekly.
 - (iii) Navigation does not require returning to the motor vehicle manufacturer's home page or a search engine to access a different portion of the site. The use of "one-up" links is recommended at the bottom of subordinate webpages in order to allow a user to stay within the desired subject matter.
- (4) Motor vehicle manufacturers must implement fair, reasonable, and nondiscriminatory pricing structures that take into account different periods of time for online access and/or the number of online requests or searches, as well as requests for information for particular technical service bulletins, particular manuals or other requests of a limited scope. These pricing structures shall be posted on the motor vehicle manufacturer's website(s) and submitted to the Executive Officer for review.
- (e) Diagnostic and Reprogramming Equipment and Information.
- (1) Motor vehicle manufacturers shall make available the following diagnostic tools and information:
 - (A) To all covered persons, all emissions-related enhanced diagnostic tools, including software and data files used in such equipment.
 - (B) To all equipment and tool companies, all information necessary to design and manufacture tools capable of reading and formatting all emission-related data stream information available when using diagnostic tools supplied to franchised dealerships, and to activate all emission-related bi-directional controls that can be activated by franchised dealership tools.
 - (2) Beginning with the 2004 model year, manufacturers' reprogramming methods shall be compatible with the Society of Automotive Engineers (SAE) J2534 Draft Paper, "Recommended Practice for Microsoft Windows 32-Bit Application Programming Interface for Pass-Through Vehicle Reprogramming" for all vehicle models that can be reprogrammed by licensed dealerships.

- (3) The information in this subsection shall be made available 90 days after the effective date of these regulations for vehicle models produced on or before the effective date. For all new vehicle models for which production commences after the effective date of the regulations, motor vehicle manufacturers must comply with the requirements of this subsection within 90 days after the start of vehicle production or concurrently with its availability to franchised dealerships, whichever comes first.
- (f) **Costs:** All information and diagnostic tools required to be provided to covered persons by these regulations shall be made available at a fair, reasonable, and nondiscriminatory price.
- (g) **Access Codes:** Motor vehicle manufacturers shall not utilize any access code, recognition code or encryption for the purpose of preventing a vehicle owner from using an emission-related part (with the exception of the powertrain control module, engine control modules and transmission control modules), that has not been manufactured by that motor vehicle manufacturer or any of its original equipment suppliers.
- (h) **Trade Secrets:** Manufacturers may withhold trade secret information which otherwise must be made available, subject to the following:
 - (1) At the time of initial posting of all information required to be provided under sections (c) through (e) above, the motor vehicle manufacturer shall identify, by brief description, any information that it believes to be a trade secret and not subject to disclosure.
 - (2) A covered person, believing that a manufacturer has not fully provided all information that is required to be provided under subsections (c) through (e) above or that such information is needed to offset anticompetitive effects, shall submit a request in writing by certified mail to the motor vehicle manufacturer for release of the information.
 - (3) Upon receipt of the request for information:
 - (A) If the information has not been previously made available because of an oversight on the part of the motor vehicle manufacturer, the motor vehicle manufacturer shall within 3 days make the information available directly to the requesting covered person at reasonable cost and by reasonable business means. The motor vehicle manufacturer shall, within 7 days, make available such information pursuant to subsections (c) through (e).
 - (B) If the motor vehicle manufacturer has not made the requested information available because it believes it to be a trade secret, the motor vehicle manufacturer shall within 14 days, notify the requesting covered party that it considers the information to be a trade secret, provide justification in support of its position, and

- make reasonable efforts to see if the matter can be resolved informally.
- (C) If the parties can informally resolve the matter, the motor vehicle manufacturer shall immediately provide the requesting covered person with all of the information that is subject to disclosure consistent with that agreement. The motor vehicle manufacturer shall also, within 7 days, make such information available on its Internet site(s) and by such other reasonable business means that the motor vehicle manufacturer has been using to distribute information pursuant to this section.
 - (D) If the matter cannot be informally resolved, the motor vehicle manufacturer shall, within 21 days from the date that it initially received the request for information, petition the California superior court, in the county of the covered person's principal place of business, to make a finding as to the information being a trade secret that is exempt from disclosure. The petition shall be accompanied with a declaration stating facts that show that it has made a reasonable and good faith attempt to informally resolve the matter.
 - (E) The parties shall comply with the order of the superior court.
- (i) Executive Officer Review of Compliance
 - (1) Order to Show Cause.
 - (A) The Executive Officer shall monitor compliance with the requirements of Health and Safety Code section 43105.5 and this regulation.
 - (B) It shall periodically conduct surveys of the motor vehicle manufacturer Internet sites and other distribution sources to determine whether the information requirements of Health and Safety Code section 43105.5 and this regulation are being fulfilled. Among other things, in conducting such surveys, the Executive Officer will consider any complaints or charges of noncompliance that have been filed with the Executive Officer by covered persons.
 - (C) If after such review, the Executive Officer determines that a motor vehicle manufacturer is not in compliance, the Executive Officer shall issue to the motor vehicle manufacturer an order to show cause why a notice to comply should not be issued. The order to show cause shall set forth the Executive Officer's finding supporting its contentions that the motor vehicle manufacturer is not in compliance.
 - (D) Upon receipt of an order to show cause, the motor vehicle manufacturer shall have 15 days to respond, by written declaration, to the contentions and findings set forth in the order to show cause.

- (E) In conducting its review, the Executive Officer may request that the motor vehicle manufacturer or any other person provide such information that he or she deems necessary.
 - (F) After due consideration of all of the evidence, the Executive Officer shall determine whether the motor vehicle manufacturer is in compliance. If the Executive Officer determines that the motor vehicle manufacturer is not in compliance, he or she shall issue to the motor vehicle manufacturer a notice to comply.
- (2) Request for Review by a Covered Person
- (A) A covered person may request that the Executive Officer review whether the motor vehicle manufacturer has failed to comply with the requirements of Health and Safety Code section 43105.5 and this regulation.
 - (B) The covered person shall concurrently serve a copy of the request for review on the motor vehicle manufacturer at the time that it files the request with the Executive Officer.
 - (C) The request to the Executive Officer shall be in the form of a written declaration setting forth specific allegations and supporting evidence demonstrating that the motor vehicle manufacturer is not in compliance.
 - (D) Within 15 days of being served with the request for review, the motor vehicle manufacturer may respond to the Executive Officer regarding the allegations and evidence raised in the covered person's request and may assert any defenses that it deems appropriate. The response shall be by written declaration and shall be concurrently served on the covered person.
 - (E) The Executive Officer, or his designated representative, shall within 30 days of receipt of the request for review, commence an investigation into the issues that have been raised in the request for review and the motor vehicle manufacturer's response, if any. The Executive Officer may request or subpoena the parties to provide any additional evidence, either in writing or at a hearing convened by the Executive Officer, as deemed necessary. The Executive Officer shall make a determination on the merits of the request for review within 60 days after its receipt. The Executive Officer may for good cause extend the time for issuing the determination.
 - (F) If the Executive Officer determines that the motor vehicle manufacturer has failed to comply with any of the requirements of this section, the Executive Officer shall issue, in writing, a notice to comply to the motor vehicle manufacturer.
- (j) Notice to Comply.
- (1) Within 30 days from the date of issuance of the notice to comply, the motor vehicle manufacturer shall either:

- (A) Submit to the Executive Officer a compliance plan that adequately demonstrates that the motor vehicle manufacturer will come into compliance with this section within 45 days from the date of submission of the plan, or such longer period that the Executive Officer deems appropriate to allow the motor vehicle manufacturer to properly remedy the noncompliance; or
 - (B) Request an administrative hearing to consider the basis or scope of the notice to comply.
 - (2) If the motor vehicle manufacturer elects to submit a compliance plan, the Executive Officer shall review the plan and issue a written determination, within 30 days, either accepting or rejecting the plan. The plan shall be rejected if it will not bring the motor vehicle manufacturer into compliance within 45 days from the date of the plan's submission. The written determination shall set forth findings supporting the conclusions that are reached.
- (k) Administrative Hearing Review
 - (1) A motor vehicle manufacturer may request that an administrative hearing officer review:
 - (A) The basis and scope of an Executive Officer's order to comply.
 - (B) The Executive Officer's rejection of a compliance plan submitted in response to an issued order to comply.
 - (2) A covered person may request that an administrative hearing officer review:
 - (A) An Executive Officer's determination following a review conducted pursuant to a request filed under subsection (i)(2), that a motor vehicle manufacturer has not failed to comply with either Health and Safety Code section 43105.5 or this regulation.
 - (B) The Executive Officer's acceptance of a compliance plan submitted by a motor vehicle manufacturer in response to an issued order to comply.
 - (3) Administrative hearings under this regulation shall be conducted pursuant to the procedures set forth in Title 17, California Code of Regulations, section 60060 et seq.
- (l) Penalties. If after an administrative hearing, the hearing officer finds that the motor vehicle manufacturer has failed to comply with any of the requirements of this section, and the motor vehicle manufacturer fails to correct the violation within 30 days from the date of his finding, the hearing officer may impose a civil penalty upon the motor vehicle manufacturer in an amount not to exceed \$25,000 per day per violation until the violation is corrected. Further, the hearing officer may order the Executive Officer to suspend approval of the motor vehicle manufacturers' pending certification applications until compliance is achieved.

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NOTE: Authority cited: sections 39600, 39601, 43104 and 43105.5, Health and Safety Code. Reference: section 39027.3, 43104 and 43105.5, Health and Safety Code.

Attachment 3

CALIFORNIA REGULATIONS FOR ADMINISTRATIVE
PROCEDURES FOR REVIEW OF EXECUTIVE OFFICER
DETERMINATIONS REGARDING SERVICE INFORMATION
FOR 1994 AND SUBSEQUENT MODEL YEAR VEHICLES

--DRAFT--

Article 3. Administrative Procedures for Review of Executive Officer Determinations Regarding Service Information for 1994 and Subsequent Model Year Vehicles.

Subarticle 1. General Provisions

§ 60060.1. Applicability.

(a) This article governs review of Executive Officer determinations regarding compliance with the provisions of Health and Safety Code section 43105.5, and the implementing regulations, Title 13, California Code of Regulations, section 1969.

(b) The provisions of this article apply only to complaints filed on or after the effective date of this article.

Note: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105(e) and (f), Health and Safety Code; Sections 11500, et seq., Government Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.2. Definitions.

(a) The definitions applicable to these rules include those set out in the Health and Safety Code (commencing with section 39010) and in Title 13, California Code of Regulations, section 1969(b).

(b) The following definitions also apply:

(1) "Administrative record" means all documents and records timely filed with the hearing office, pursuant to section 60060.4 and the time deadlines of these rules, including pleadings, petitions, motions, and legal arguments in support thereof; all documents or records admitted into evidence or administratively noticed by the hearing officer; all official recordings or written transcripts of hearings conducted; and all orders or decisions issued by the hearing officer or Executive Officer regarding the complaint at issue; administrative record does not include any prohibited communications as defined in section 60060.13, and any settlement discussions or offers of settlement pursuant to section 60060.25.

(2) "Days" means calendar days.

(3) "Discovery" refers to the process set forth in section 60060.26 allowing one party to request and obtain information relevant to the complaint proceedings. The scope of discovery is limited by the express terms of that section.

(4) "Executive Officer" is the Executive Officer of the state board and employees of the state board authorized to represent the Executive Officer in the determination made pursuant to Title 13, CCR, section 1969(i).

(5) "Ex Parte Communication" means an oral or written communication not on the public record for which reasonable prior notice to all parties should have been given.

(6) "Hearing Office" refers to the administrative hearing office established by the state board to conduct administrative hearings to implement the provisions of these rules or to the Office of Administrative Hearings established pursuant to Government Code section 11370.2. The administrative hearing office of the state board shall include at least one administrative law judge who shall act as a hearing officer.

(7) "Hearing Officer" is an administrative law judge appointed by the state board to conduct hearings under these procedures.

(8) "Interested Party" means either the motor vehicle manufacturer or the covered person, who has not requested the review proceeding but whose interests are directly affected by any decision of a hearing officer in a hearing conducted under these provisions.

(9) "Party" refers to those persons that appear before the hearing officer in an administrative review proceeding and typically include the Executive Officer; a motor vehicle manufacturer who contests an Executive Officer's determination to issue a notice to comply or reject a compliance plan submitted by a manufacturer pursuant to Health and Safety Code section 43105.5(e); covered persons, as that term is defined in Health and Safety Code section 39027.3(b), who have requested disclosure of information or diagnostic tools pursuant to Health and Safety Code section 43105.5 and who contests an Executive Officer decision regarding a motor vehicle manufacturer's compliance with the provisions of Health and Safety Code section 43105.5; and interested parties as defined in paragraph (9) above.

(10) "Proceeding" means any hearing, determination or other activity before the hearing officer involving the parties to a complaint.

(11) "Request for Review" refers to the document requesting an administrative hearing that may be filed by a motor vehicle manufacturer contesting a notice to comply issued by the Executive Officer pursuant to Health and Safety Code section 43105.5(e); by the Executive Officer upon rejecting a compliance plan submitted by a motor vehicle manufacturer pursuant to Health and Safety Code section 43105.5(e); or by a covered person who objects to the compliance plan submitted by the motor vehicle manufacturer and accepted by the Executive Officer.

(12) "Response" means a document, responsive to the request for review filed by those parties opposed to the relief requested in the request for hearing.

(13) "Settlement Agreement" means a written agreement executed by the parties to the hearing that settles the issues raised in the request for review.

NOTE: Authority cited: Sections 39010, 39600, 39601, 43028, and 43031(a), et seq., Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Part 5, (commencing with 39010) and Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.3. Right to Representation.

(a) A party may appear in person or through a representative, who is not required to be an attorney at law. The right to representation is at the party's own expense. Following notification that a party is represented by a person other than him or herself, all further communications regarding the proceedings shall be directed to that representative.

(b) A representative of a party shall be deemed to control all matters respecting the interest of such party in the proceeding. Persons who appear as representatives shall not engage in unethical conduct or intentionally fail to observe the procedures set forth in these rules and the proper instructions or orders of the hearing officer.

(c) A representative may withdraw an appearance by filing a written notice of withdrawal with the hearing office and by serving a copy on all parties.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.4. Time Limits; Computation of Time.

(a) All actions required pursuant to these rules shall be completed within the times specified in this article, unless extended by the hearing officer upon a showing of good cause, after consideration of prejudice to other parties. Requests for extensions of time for the filing of any pleading, letter, document, or other writing or completing any other required action must be received in advance of the date on which the filing or action is due and should contain sufficient facts to establish a reasonable basis for the relief requested.

(b) In computing the time within which a right may be exercised or an act is to be performed, the day of the event from which the designated period runs shall not be included and the last day shall be included. If the last day falls on a Saturday, Sunday, or a state holiday, time shall be extended to the next working day.

(c) In computing time, the term "day" means calendar day, unless otherwise provided.

(d) Unless otherwise indicated by proof of service, the mailing date shall be presumed to be the postmark date appearing on the envelope if first-class postage was prepaid and the envelope was properly addressed.

(e) Where service of any pleading, petition, letter, document, or other writing is by mail, overnight delivery, or facsimile transmission (fax), pursuant to section 60060.5(c), and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time within which such right may be exercised or act performed shall be extended as provided in section 60060.5(c).

(f) Papers delivered to or received by the hearing office during regular business hours (8 a.m. to 5 p.m.) will be filed on that date. Papers delivered or received at times other than regular business hours will be filed on the next regular business day.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.5. Service, Notice and Posting.

(a) Except as otherwise provided in this article, the original of every pleading, petition, letter, document, or other writing served in a proceeding under these rules shall be filed with the hearing office.

(b) A copy of the request for review shall be concurrently served on the Executive Officer and the covered person or motor vehicle manufacturer.

(c) Unless otherwise required, service of any documents in the proceedings may be made by personal delivery, by United States first-class or interoffice mail, by overnight delivery, or by fax.

(1) Service is complete at the time of personal delivery.

(2) In the case of first-class mail, the documents to be served must be deposited in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, properly addressed to the person on whom it is to be served at the address as last given by that person on any document filed in the present cause of action and served on the party making service or otherwise at the place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended five days if the place of address is within the State of California, ten days if the place of address is outside the State of California but within the United States, and fifteen days if the place of address is outside the United States.

(3) If served by overnight delivery, or interoffice mail, the document must be deposited in a box or other facility regularly maintained for interoffice mail or by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the address as last given by the person on any document filed in the present cause of action and served on the party making service or otherwise at that place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.

(4) If served by fax, the document must be transmitted to a fax machine maintained by the person on whom it is served at the fax machine telephone number as last given by that person on any document which he or she has filed in the present cause of action and served on the party making the service. The service is complete at the time of the transmission, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.

(d) Each document filed shall be accompanied by a proof of service on each party or its representative of record on the date of service. The proof of service shall state whether such service was made personally, first-class mail, overnight delivery, or fax.

(1) Where service is made by personal delivery, the declaration shall show the date and place of delivery and the name of the person to whom the documents were handed. Where the person making the service is unable to obtain the name of her person to whom the documents were handed, the person making the service may substitute a physical description for the name.

(2) Where service is made by first-class mail or overnight delivery, the declaration shall show the date and place of deposit in the mail, the name and address of the person served as shown on the mailing envelope and that the envelope was sealed and deposited in the mail with the postage fully prepaid.

(3) Where service is made by fax, the declaration shall show the method of service on each party, the date sent, and the fax number to which the document was sent.

(e) The proof of service declaration shall be signed by the person making it and contain the following statement above the signature: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at (City, State) on (Date)." The name of the declarant shall be typed and signed below this.

(f) Proof of service made in accordance with Code of Civil Procedure section 1013a complies with this regulation.

(g) Service and notice to a party who has appeared through a representative shall be made upon such representative.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Sections 11182 and 11184, Government Code; Sections 1013 and 1013a, Code of Civil Procedure; Section 1969, Title 13, California Code of Regulations.

§ 60060.6. Motions.

(a) Any motion or request for action by the hearing officer relating to any proceeding pending before him or her filed by any party, except those made orally on the record at the hearing, shall be in writing and shall be directed to the hearing officer, with written notice and proof of service to all parties. The caption of each motion shall contain the title and docket number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefore.

(b) Except as otherwise provided by statute or these regulations, or as ordered by the hearing officer, a motion shall be made and filed at least 15 days before the date set for the motion to be heard or the commencement of the hearing on the merits. Any response to the motion shall be filed and served no later than five days before the motion is scheduled to be heard or as ordered by the hearing officer.

(c) The hearing office shall set the time and place for the hearing of the motion. The hearing shall occur as soon as practicable.

(d) Except as otherwise provided by statute or these regulations, the hearing officer may decide a motion filed pursuant to this section without oral argument. Any party may request oral argument at the time of the filing of the motion or the response. If the hearing officer orders oral argument, the party requesting oral argument, or any party directed to do so by the hearing officer, shall serve written notice on all parties of the date, time and place of the oral argument. The hearing officer may direct that oral argument be made by telephone conference call. The hearing officer may order that the proceedings be recorded.

(e) The hearing officer shall issue a written order deciding any motion, unless the motion is made during the course of the hearing on the merits while on the record. The hearing officer may request that the prevailing party prepare a proposed order.

(f) A request for a prehearing conference or a settlement conference under sections 60060.27 and 60060.28 does not constitute a motion within the meaning of this section.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.7. Form of Pleadings.

(a) Except as otherwise expressly provided in this article or by the hearing officer, there are no specific requirements as to the form of documents filed in a proceeding under these rules.

(b) The filing party or its representative shall sign the original of any pleading, letter, document, or other writing (other than an exhibit). The signature constitutes a representation by the signer that it has read the document, that to the best of its knowledge, information and belief, the statements made therein are true, and that it has not filed the document for the purpose of delay.

(c) The initial document filed by any person shall indicate his or her status (as a party or representative of the party) and shall contain his or her name, address and telephone number. Any changes in this information shall be communicated promptly to the hearing office and all parties to the proceeding. A party who fails to furnish such information and any changes to it shall be deemed to have waived his or her right to notice and service under these rules.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.8. Limitations on Written Legal Arguments or Statements

(a) Any written legal argument or statement submitted to the hearing officer by a participant in an action under this part shall be double spaced and typed in a font size 12 point or larger. Except as otherwise provided by this part, further limited by the hearing officer, or otherwise authorized by the hearing officer for good cause shown, no written legal argument, exclusive of any supporting documentation, may exceed:

(1) Fifteen pages, for arguments in support of or opposition to motions;
and

(2) Five pages, for reply arguments.

Note: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.9. Records of the State Board.

Except where public disclosure of information or exhibits is restricted by law, records of the state board are public records and are available to the public pursuant to section 91000, et seq., Title 17, California Code of Regulations.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Sections 6250, et seq., Government Code; Sections 91000, et seq., Title 17, California Code of Regulations; Section 1969, Title 13, California Code of Regulations.

§ 60060.10. Interpreters and Other Forms of Accommodation.

(a) In proceedings where a party, a party's representative, or a party's expected witness requires an interpreter for any language, including sign language, that party shall be responsible for notifying the hearing office as soon as the requirement is known, but no later than ten days prior to the first day of hearing. The hearing officer may allow later notification for good cause. The hearing office shall be responsible for securing the interpreter, and for providing reasonable accommodation.

(b) The state board shall pay the cost of interpreter services if the hearing officer so directs. In determining who should pay the cost of the interpreter, the hearing officer shall base the decision on equitable considerations, including the ability of the party in need of the interpreter to pay the cost.

Note: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Sections 11435.25, 11435.30 and 11435.55, Government Code; Section 751, Evidence Code; Section 1969, Title 13, California Code of Regulations.

Subarticle 2. Hearing Officers

§ 60060.11. Authority of Hearing Officers.

- (a) The hearing officer shall have authority to review all matters arising under Health and Safety Code section 43105.5(f). Such authority shall include those matters in which:
- (1) A motor vehicle manufacturer has contested a notice to comply that has been issued by the Executive Officer because the motor vehicle manufacturer has allegedly failed to comply with the provisions of section 43105.5 and the regulations adopted thereto;
 - (2) The Executive Officer has rejected a compliance plan submitted by a motor vehicle manufacturer pursuant to section 43105.5(e); and

- (3) A covered party has challenged an Executive Officer's finding that a manufacturer has complied with the provisions of section 43105.5 and the regulations adopted thereto or has submitted an appropriate compliance plan after a notice to comply has been issued.

(b) In any matter subject to review pursuant to these rules, the hearing officer shall have the authority to do any act and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules, including, but not limited to, authority to hold prehearing conferences; conduct hearings to determine all issues of fact and law presented; to rule upon motions, requests and offers of proof, dispose of procedural requests, and issue all necessary orders; administer oaths and affirmations and take affidavits or declarations; to issue subpoenas and subpoenas duces tecum for the attendance of a person and production of testimony, books, documents, or other things; to compel the attendance of a person residing anywhere in the state; to rule on objections, privileges, defenses, and the receipt of relevant and material evidence; to call and examine a party or witness and introduce into the hearing record documentary or other evidence; to request a party at any time to state the respective position or supporting theory concerning any fact or issues in the proceeding; to certify official acts; to extend the submittal date of any proceeding; to hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings, decisions, and appropriate remedies, including penalties, as may be necessary for the full adjudication of the matter.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Sections 11181-11182 and 11425.30, Government Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.12. Disqualification.

(a) The hearing officer shall disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing.

(b) A hearing officer may not hear any case in which he or she has previously served as an investigator, prosecutor, or advocate.

(c) Any party may request the disqualification of a hearing officer by filing an affidavit or declaration under penalty of perjury. A request against the hearing officer must be made no later than five days prior to the commencement of a prehearing conference or first day of hearing on the merits, whichever is earlier. The affidavit or declaration must state with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. The issue shall be determined by the hearing officer against whom the request for disqualification has been filed.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Sections 11425.40 and 11512, Government Code; Section 1969, Title 13, California Code of Regulations.

Subarticle 3. Ex Parte Communications

§ 60060.13. Prohibited Communications.

(a) Except as otherwise provided in this section, while the proceeding is pending, the hearing officer shall not participate in any communications with any party, representative of a party, or any person who has a direct or indirect interest in the outcome of the proceeding about the subject matter or merits of the case at issue, without notice and opportunity of all parties, to participate in communication except a party that has been determined to be in default pursuant to section 60060.38.

(b) No pleading, letter, document, or other writing shall be filed in a proceeding under these rules by a party unless service of a copy thereof together with any exhibit or attachment is made on all other parties to a proceeding. Service shall be in a manner as prescribed in section 60060.5.

(c) For the purpose of this section, a proceeding is pending from the time that a request for review is filed.

(d) Communications prohibited under paragraph (a) do not include communications concerning matters of procedure or practice, including requests for continuances that are not in controversy. It also does not prohibit communications between a party and the hearing officer when the opposing party has had a default entered against it pursuant to section 60060.38.

(e) A communication between a hearing officer and an employee of the state board that would otherwise be prohibited by this section is permissible if the employee is another employee of the hearing office whose job duties include aiding the hearing officer in carrying out the hearing officer's adjudicative responsibilities. Upon request, the hearing office will provide a list of employees of the hearing office to the parties. The prohibitions of paragraph (a) that apply to the hearing officer shall also apply to such other employees employed in the hearing office. Communications permitted under this paragraph shall not furnish, augment, diminish, or modify the evidence in the record.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Sections 11430.70 - 11430.80, Government Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.14. Disclosure of Communication.

(a) If, while the proceeding is pending, but before serving as hearing officer, the hearing officer receives a communication of a type that would be in violation of this subarticle if received while serving as hearing officer, he or she shall, promptly after starting to serve, disclose the content of the communication on the record and give all parties an opportunity to address it as provided below.

(b) If a hearing officer receives a communication in violation of this article, the hearing officer shall make all of the following a part of the record in the proceeding:

(1) If the communication is written, the writing and any written response of the hearing officer to the communication; and

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the hearing officer, and the identity of each person from whom the hearing officer received the communication.

(c) The hearing officer shall notify all parties that a communication described in this section has been made a part of the record.

(d) If a party requests an opportunity to address the communication within ten days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

(2) The hearing officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that hearing having been concluded.

(e) Receipt of ex parte communications may be cause for disqualification of the hearing officer.

NOTE: Authority cited: Sections 39600 and 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Sections 11340.1 - 11340.5, Government Code; Section 1969, Title 13, California Code of Regulations.

Subarticle 4. Initiating Review by the Hearing Officer

§ 60060.15. Requests for Review by a Motor Vehicle Manufacturer.

(a) A motor vehicle manufacturer may file a request that a hearing officer review:

(1) An Executive Officer decision to issue a notice to comply to the motor vehicle manufacturer, pursuant to Health and Safety Code section 43105.5(e), for failing

to comply with any of the requirements of section 43105.5 or the regulations of the ARB implementing that section.

(2) An Executive Officer determination rejecting a compliance plan submitted by the motor vehicle manufacturer in response to a notice to comply issued pursuant to Health and Safety Code section 43105.5.

(b) The motor vehicle manufacturer shall file the request for hearing within 30 days of receipt of the notice to comply, if challenging the notice, itself, or within 30 days of being notified by the Executive Officer that the submitted compliance plan has been rejected. The hearing officer may, for good cause, extend the time for such filing.

(c) A failure to file a timely request for hearing shall result in the Executive Officer action becoming final and may subject the motor vehicle manufacturer to penalties pursuant to Health and Safety Code section 43105.5(f).

NOTE: Authority cited: Sections 39600 and 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.16. Requests for Review by a Covered Person

(a) If a covered person has requested that the Executive Officer review the compliance of a motor vehicle manufacturer pursuant to the procedures at Title 13, CCR section 1969 (i)(2) and the Executive Officer finds that the motor vehicle manufacturer is in compliance with the provisions of Health and Safety Code section 43105.5 and Title 13, CCR section 1969, a covered person may, within 30 days of service of that determination, request that the determination be reviewed by a hearing officer.

(b) If the Executive Officer determines that the motor vehicle manufacturer does not comply with either the statute or regulations and issues a notice to comply to the motor vehicle manufacturer and if the Executive Officer subsequently accepts the motor vehicle manufacturer's submitted compliance plan, a covered person may, within 30 days of being notified of the Executive Officer's acceptance of the plan, request that the acceptance of the plan be reviewed by a hearing officer.

(c) The hearing officer may, for good cause, extend the time for filing a request for hearing.

(d) A failure to file a timely request for hearing shall result in the Executive Officer action becoming final.

NOTE: Authority cited: Sections 39600 and 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections

43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.17. Content of a Request for Review.

(a) A party filing a request for review is not required to follow any particular form or format. But the request for review shall include all of the following.

(b) A request for review shall be signed by the requesting party or its designated representative.

(c) A request for review shall include copies of and specifically refer to the respective determination of the Executive Officer that is the subject of the request for review (i.e. the determination that the motor vehicle manufacturer is in compliance with Health and Safety Code section 43105.5, the notice to comply issued to the motor vehicle manufacturer, or the determination regarding the motor vehicle manufacturer's compliance plan).

(d) A request for review shall also contain:

(1) The correct business address of the requesting party and, if applicable, the name and address of the party's designated representative.

(2) A statement of the circumstances or arguments that are the basis of the request for hearing, with specific reference to the evidence that was before the executive officer that supports such arguments.

(3) A statement of the proposed relief sought by the requesting party.

(e) All statements shall be in the form of a declaration signed under penalty of perjury.

NOTE: Authority cited: Sections 39600 and 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.18. Notice of Receipt of Request for Review.

(a) Upon receipt of a timely request for review, the hearing office shall review the request for completeness.

(b) If the request does not include the information required under section 60060.17, the hearing office shall immediately acknowledge receipt of the request and notify the requesting party of the deficiencies that must be corrected before the request for hearing may be deemed filed and docketed. The requesting party shall have 10 days from the date of mailing the notice of deficiencies to submit a complete request for

hearing. If the deficiencies are not corrected within the 10 days or 30 days from the date that the requesting party received the document that is the subject of review, whichever is later, the underlying Executive Officer determination will become final.

(c) If the hearing office finds the request for hearing to be complete:

(1) It shall deem the request filed on the date that the request was received.

(2) The hearing office shall notify the requesting party, the Executive Officer, and, the interested party that a request for hearing has been filed.

(3) The notice shall inform the parties that:

(A) A hearing will be conducted by a review of the evidentiary record that was considered by the Executive Officer in issuing his or her determination that is under review, and set forth a schedule for the parties to submit responsive and reply argument to the hearing office.

(B) The Executive Officer shall forward to the hearing officer, within 15 days from the date of service, a certified copy of the evidentiary record that it amassed during its investigation of the matters considered in making the determination that is under review.

(C) The Executive Officer and the interested party shall, within 30 days from the date of service of the notice, file a written response to the issues raised in the request for hearing. The response should include rebuttal to the arguments raised by the requesting party and specifically refer to the record that was before the Executive Officer that supports such rebuttal. The response should be in the form of a declaration signed under penalty of perjury.

(D) The requesting party may submit a reply within 15 days of receipt of any response submitted by the Executive Officer or interested party. The reply shall also be in the form of a declaration signed under penalty of perjury.

(E) The hearing record shall close on the last date in which the requesting party's reply could be received, which in no event shall be earlier than 30 days after the date that the hearing officer served the notice of filing on the parties.

(F) The parties have the right to request a hearing, in person, before the hearing officer but that such hearings shall only be granted when it is determined by the hearing officer that oral testimony is necessary to establish a complete record and assure a full and fair hearing.

(G) The parties have the right to be represented by counsel or other representative of its choosing and the right to an interpreter or other necessary accommodation.

Note: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Part 5, Health and Safety Code; Sections 60075.1, et seq., Title 17, California Code of Regulations; Section 1969, Title 13, California Code of Regulations.

§ 60060.19. Forwarding of the Evidentiary Record.

Within 15 days from the date of being served with the notice of filing, the Executive Officer shall forward to the hearing officer, a certified copy of the evidentiary record that it amassed during its investigation of the matters underlying the determination that is under review.

NOTE: Authority cited: Sections 39600 and 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.20. Response to Request for Review.

Within 30 days after service of the notice of filing by the hearing office, the Executive Officer and the interested party shall file a written response to the issues raised in the request for hearing. The response should include any rebuttal to the issues and arguments raised by the party requesting review, with specific reference to the evidentiary record that was before the Executive Officer when he made his or her determination that is the subject of the review before the hearing officer. The response shall be in the form of a declaration signed under penalty of perjury.

NOTE: Authority cited: Sections 39600 and 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.21. Reply by Requesting Party.

Within 15 days of receipt of the last submitted response to the request for review filed by the Executive Officer and the interested party, the requesting party may file a reply responding to the contentions of the other parties. The reply shall be in the form of a declaration signed under penalty of perjury.

NOTE: Authority cited: Sections 39600 and 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.22. Extensions of Time for Submitting Responses and Reply.

The time period for submitting a response required under section 60060.19 or a reply under section 60020 may be extended:

(1) By stipulation of the parties for 30 additional days to allow the parties to conduct informal settlement negotiations; or

(2) Upon motion to the hearing officer, who may extend the time period for up to 30 days, if the moving party can show good cause and if the other parties are not prejudiced by a delay.

NOTE: Authority cited: Sections 39600 and 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.23. Issues for Hearing.

The issues for hearing shall be limited to those raised in the request for hearing or the responses filed by the other parties.

Note: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.24. Stays Pending Issuance of Hearing Officer's Decision.

Pending the hearing officer's decision, a motor vehicle manufacturer contesting an Executive Officer issued notice to comply or a determination rejecting a compliance plan submitted in response to a notice to comply shall not be required to take any action in response to the challenged Executive Officer determination until the hearing officer has issued his or her decision on the merits of the matters at issue in the hearing.

Note: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

Subarticle 5. Preliminary Procedures

§ 60060.25. Scheduling of Review Proceedings.

(a) Upon receipt of the request for review, the administrative hearing office of the state board shall assign an administrative law judge from the hearing office to be the hearing officer, unless staffing and other resources of the hearing office would prevent

timely consideration of the matter. If the resources of the administrative hearing office prevent assignment, the administrative hearing office shall refer the matter to the State Office of Administrative Hearings for assignment.

(b) The hearing officer shall with the notice of filing issue a schedule for the review proceedings that shall include the dates by which responses to the request for review and any reply to such responses shall be filed, the date the hearing record shall close and the matter submitted to the hearing officer for decision, and the date by which a hearing officer decision shall be issued.

(c) Upon either a motion of the hearing officer or upon request of any party, the hearing officer may grant such delays or adjustments to the schedule for the review proceedings as may be necessary or desirable in the interest of fairness. In applying to the hearing officer, the requesting party shall file the request not less than five days prior to the date set for the action covered by the request and shall submit such evidence to establish good cause for the requested delay or adjustment to the schedule. If the hearing officer orders a delay or adjustment to schedule, he or she shall provide written notice to all parties.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Sections 11509 and 11440.30, Government Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.26. Consolidation, Separation of Proceedings.

(a) Upon the motion of a party or upon the hearing officer's own motion, the hearing officer may consolidate for review and decision:

(1) Any number of proceedings involving the same parties; and

(2) Any number of proceedings involving common issues of law or fact where consolidation would expedite and simplify consideration of the issues and would not adversely affect the rights of the parties.

(b) Upon the motion of a party or upon the hearing officer's own motion, the hearing officer may, in furtherance of convenience or to avoid prejudice or when separate review proceedings will be conducive to expedition and economy, order a separate review proceeding of any issue or any number of issues, including issues raised in a party's response to a request for hearing.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.27. Discovery.

(a) The provisions of this section provide the exclusive right to, and method of, discovery as to any proceeding governed by these review procedures. Nothing in this section prohibits the parties from voluntarily stipulating to exchange any information that they deem appropriate. This section does not authorize the inspection or copying of, any writing, or thing that is privileged from disclosure by law or protected as part of an attorney's work product.

(b) In general, the parties may not engage in any form of discovery in preparing for the review proceeding. Additionally, the parties may not use subpoenas as a means of discovery. In reviewing an Executive Officer's determination, the hearing officer shall limit, whenever possible, his or her consideration to the factual evidence that was before the Executive Officer at the time of his or her determination that is the subject of review.

(c) A party may file a motion requesting that the hearing officer allow further discovery. The motion shall specify the proposed method of discovery that it would like to use and shall include affidavits describing in detail the nature of the information that the requesting party seeks through discovery, the relevance and probative value of the information, proposed time and place of the discovery (if applicable), and why the need for the information was not previously raised with the Executive Officer during his or her investigation into the matter of the motor vehicle manufacturer's compliance with Health and Safety Code section 43105.5 and the regulations of the ARB. After fully considering the arguments of the parties, the hearing officer may order such discovery that will promote a full and fair hearing. The hearing officer's order shall set forth the form and method of permissible discovery and the time and place for its occurrence.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f). Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Sections 11189 and 11507.6, Government Code; Section 915(b), Evidence Code; Section 1969, Title 13, California Code of Regulations.

Subarticle 6. Contempt and Sanctions

§ 60060.28. Contempt.

If any person in proceedings before the hearing officer disobeys or resists any lawful order or, if applicable, refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing, the hearing officer may certify the facts to the Superior Court in and for the county where the proceedings are held for contempt proceedings pursuant to Government Code section 11455.20.

Note: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104,

43105.5(e) and (f), Health and Safety Code; Sections 11455 and 11525, Government Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.29. Sanctions.

(a) Notwithstanding the above, the hearing officer may order a party, a party's representative or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions and the failure to comply with a lawful order of the hearing officer.

(2) "Frivolous" means:

(A) Totally and completely without merit, or

(B) For the sole purpose of harassing an opposing party.

(b) An order for sanctions shall be in writing and shall set forth the factual findings that are the basis for the imposition of sanctions.

(1) In determining reasonable expenses, the party or parties to whom payment is to be made shall, at the hearing officer's discretion, either make a statement on the record under oath or submit a written declaration under penalty of perjury setting forth with specificity the expenses incurred as a result of the other party's conduct.

(2) Within five days of the receipt of the hearing officer's order for the payment of expenses, a party or representative may, on the ground of hardship, request reconsideration from the hearing officer issuing the order. The request for reconsideration shall be filed in writing, and include a declaration under penalty of perjury.

(c) The order or denial of an order to pay expenses under paragraph (b) is subject of procedural review in the same manner as a final decision pursuant to Subarticle 11.

Note: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Sections 11455.30 and 11525, Government Code; Section 1969, Title 13, California Code of Regulations.

Subarticle 7. Review Proceedings

§ 60060.30. Conduct of Review Proceedings.

(a) The review shall be presided over by a hearing officer who shall conduct a fair and impartial review in which each party has a reasonable opportunity to be heard.

(b) Unless otherwise ordered by the hearing officer, the review shall be limited to the review of evidence initially considered by the executive officer in making his or her determination that is under review and the written arguments submitted by the parties.

(c) The review shall be conducted in the English language.

(d) The hearing officer shall decide the matters before him based upon a preponderance of the evidence.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.31. Evidence.

(a) Unless otherwise ordered by the hearing officer, the evidence that the hearing officer will consider in reaching his or her decision will be the evidence the parties presented to the Executive Officer for consideration of the underlying determination that is the subject of the hearing officer's review.

(b) If upon motion of a party or the hearing officer's own motion, the hearing officer orders that oral testimony may be taken, such testimony shall be taken only under oath or affirmation.

(c) The review need not be conducted accordance with technical rules of evidence. Rather, the hearing officer shall admit evidence that is the type of evidence that responsible persons are accustomed to relying upon in the conduct of serious affairs. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but upon timely objection shall not be sufficient by itself to support a finding unless it would be admissible over objection in a civil court action.

(d) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized.

(e) Regarding evidence claimed to be trade secrets or other confidential information, the hearing officer will defer to the findings and conclusions of law made by the superior court pursuant to Health and Safety Code section 43105.5(b) and Title 13, CCR section 1969(i). The hearing officer shall preserve the confidentiality of

information determined to be a trade secret and may make such orders as may be necessary, including considering such information in a closed meeting.

(f) In reaching a decision, official notice may be taken, either before or after submission of the proceeding for decision, of any generally accepted technical or scientific matter within the state board's area of expertise, and determinations, rulings, orders, findings and decisions, required by law to be made by the hearing officer.

(1) The hearing officer shall take official notice of those matters set forth in section 451 of the Evidence Code.

(2) The hearing officer may take official notice of those matters set forth in section 452 of the Evidence Code.

(3) Each party shall give notice of a request to take official notice and be given reasonable opportunity on request to present information relevant to:

(A) The propriety of taking official notice; and

(B) The effect of the matter to be noticed.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Sections 451 and 452, Evidence Code; Section 1969, Title 13, California Code of Regulations.

Subarticle 8. Decisions of the Hearing Officer

§ 60060.32. Order or Decision of the Hearing Officer.

(a) Unless otherwise ordered, all proceedings shall be submitted at the time identified by the hearing officer in the schedule for review that has been served upon the parties, unless otherwise extended by the hearing officer as provided in these rules. Within 30 days of the matter being submitted, the hearing officer shall make findings upon all facts relevant to the issues under review, and file a decision with the reasons or grounds upon which the order or decision was made.

(b) The decision shall be in writing, signed and dated by the hearing officer deciding the proceeding.

(c) The decision shall be based on findings of fact and may affirm, modify or vacate the Executive Officer determination that was under review.

(d) If the decision finds that the motor vehicle manufacturer has failed to comply with any of the requirements of Health and Safety Code section 43105.5 or Title 13, CCR section 1969, the decision shall order the motor vehicle manufacturer to come into compliance within 30 days of the effective date of the decision.

(e) The decision may further order that if the motor vehicle manufacturer fails to come into compliance within the time period set forth in paragraph (e) of this section, the hearing officer may order until such time as the motor vehicle manufacturer comes into compliance:

(1) The motor vehicle manufacturer to pay penalties in an amount not to exceed \$25,000 per day per violation.

(2) The ARB to suspend consideration of all pending motor vehicle or motor vehicle certification applications for that manufacturer.

(f) The decision of the hearing officer is the final decision of the ARB and is effective on the date of issuance.

(g) A copy of the decision shall be served on each party or representative.

(h) Within five days of the filing of any order or decision, a party may file a written request that the hearing officer correct a mistake or clerical error in the decision.

(1) Pursuant to the party's request or on the hearing officer's own motion, the hearing officer may issue a revised decision correcting a mistake or clerical error with respect to any matter covered in the decision. If the hearing officer makes such a determination, he shall provide written notice to the parties.

(2) A motion filed by a party under this subparagraph shall be deemed denied if the hearing officer has taken no action to address the request within 15 days of filing of the request.

(3) Within 15 days notifying the parties of his or her intent to modify the decision, the hearing officer shall serve a copy of any modified decision on each party that had previously been served with the original decision. The modified decision shall supersede the previously served order or decision, and the date of service of the modified decision shall be the effective date of the decision.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

§ 60060.33. Penalty Assessment

In determining the appropriate conditional daily penalties that a motor vehicle manufacturer may be subject to under Health and Safety Code section 43105.5(f) and these regulations, the hearing officer shall consider the following factors.

(a) The extent of noncompliance by the motor vehicle manufacturer.

(b) The harm caused by the noncompliance to the covered person and other persons, as well as any violations to public health and safety and to the environment.

(c) The nature and persistence of the noncompliance.

(d) The compliance history of the motor vehicle manufacturer, including the history of past noncompliance.

(e) The efforts made to comply, and any special circumstances preventing or delaying compliance.

(f) The cooperation of the motor vehicle manufacturer during the course of the Executive Officer's investigation.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43028, 43031(a) and 44011.6, Health and Safety Code; Section 1969, Title 13, California Code of Regulations.

Subarticle 9. Judicial Review

§ 60060.34. Judicial Review.

(a) A party adversely affected by the final decision of the hearing officer may seek judicial review by filing a petition for a writ of mandate in accordance with section 1094.5 of the California Code of Civil Procedure. Such petition shall be filed within 30 days after the order or decision becomes final.

(b) The state board may seek to enforce a final order or decision in superior court in accordance with applicable law.

NOTE: Authority cited: Sections 39600, 39601, 43104, 43105.5(e) and (f), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 43104, 43105.5(e) and (f), Health and Safety Code; Section 1094.5, California Code of Civil Procedure; Section 1969, Title 13, California Code of Regulations.