



Equipment Dealers

A S S O C I A T I O N

MEMORANDUM

DATE: 10/7/19

TO: Equipment Dealers Association Members and Dealer Legal Counsel

FROM: EDA General Counsel, Natalie Higgins

RE: Clean Air Act Compliance with Emissions Standards

Please note that this handout is a general summary prepared by EDA's General Counsel, Natalie Higgins, to give guidance dealership legal counsel on the topic of EPA compliance. It does not attempt to cover your specific situation or detail all potential situations.

BEFORE DETERMINING A COURSE OF ACTION, WE ENCOURAGE YOU TO REVIEW THIS WITH THE ATTORNEY OF YOUR CHOICE FOR A SPECIFIC ASSESSMENT OF YOUR SITUATION.

Background

The Clean Air Act was originally passed in 1970 and was amended in 1990 to add nonroad vehicles. The CAA has specific emissions regulations relating to different types of equipment. The equipment discussed in this document is defined as nonroad vehicles and engines by 40 C.F.R. 1039.801. The emissions standards set by the CAA are applicable to these nonroad vehicles and the CAA has specific requirements for new equipment, used equipment, and maintenance of equipment.

New Equipment

For each newly produced motor vehicle engine or nonroad engine that a manufacturer intends to introduce into the United States, they must obtain a Certificate of Conformity (“COC” or “Cert”) from the EPA. *See* 40 C.F.R. Part 1039. Subpart C. Under 42 U.S.C. § 7550(1), manufacturer is defined such that it may also apply to dealers. (*Note: It is important to understand that there is an apparent conflict in the statutory framework. While the definition for *manufacturer* under 42 U.S.C. §7550(1) excludes dealers, like members of the Association, it does apply to those *who act under the control of the manufacturer*. Thus, the dealers’ liability exposure under the CAA is subject to interpretation and argument depending on the facts and circumstances). The “cert” is issued by the EPA and new equipment must have it in order to be in compliance with these regulations. In addition to the COC, there should be an accompanying label placed directly on the engine to confirm certification and compliance.

Manufacturers (and dealers) are prohibited from distributing into commerce, selling, offering for sale or introduction into commerce, or delivering for introduction into commerce any non-compliant new engines which are manufactured after the effective date of regulations. *See* 42 U.S.C. § 7522(a)(1) (It is staggered implementation based upon horsepower). The penalty for each piece of equipment found to be in violation could run up to \$44,539 (as of the date of this memorandum). The civil penalty specified in 40 CFR 19.4 for violations, increases annually.

With this in mind, some key recommendations for dealerships in ensuring compliance include:

1. Ensure that any new equipment going out for sale has the requisite COC and mandatory labeling.
2. Implement a redundancy system to ensure that the emissions controls have not been impaired in any way prior to sale.

Maintenance of Equipment

The CAA prohibits any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in an engine in compliance with regulations, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use. *See* 42 U.S.C. § 7522(3)(B). In addition, 42 U.S.C. § 7522(a)(3) prohibits any person from removing or rendering inoperative any device or element of design installed on or in an engine in compliance with regulations prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser. These regulations, in essence, prohibit the sale or installation of “defeat” devices which are designed to bypass emissions control systems or the tampering with emissions systems in order to disable them.

These are important regulations when repairing or servicing equipment. If equipment comes in equipped with a “defeat” device, it isn’t mandatory per the CAA that the dealer fix it. However, it is in the best interest of the dealer to thoroughly document and keep service records which clearly indicate and identify any parts or modifications which exist on serviced equipment that are in violation. This should be done so that the dealer can defend itself against allegations of CAA violations if an enforcement action is pursued. Any part that is in violation of the CAA may lead to penalties as well as a larger penalty being assessed for each piece of equipment in violation. With this in mind, it is recommended that dealerships enact policies and procedures to:

1. Check for all the required labels and make sure they are all present.
2. Ensure that the dealership does not sell or install devices which compromise emissions (defeat devices) applications.
3. Document and keep repair records which clearly demonstrate that a piece of equipment and/or part serviced by the dealership had a compromised emissions system *prior to* the time of service *and at no fault of the dealer*.

Trade-in Equipment

The CAA covers the sale of new equipment not the sale of used equipment. Despite this, dealers need to remain cognizant that the regulations and penalties for the installation and/or use defeat devices remain a threat. Based upon the severe fines and penalties (as well as additional liability concerns), should consider implementing policies and/or procedures which:

1. Require the removal of the non-conforming parts or devices to eliminate possible liability upon re-sale of the equipment;
2. Lowering the trade-in value of non-conforming equipment;
3. Requiring trade-in customers to sign a form which contains either:
 - a. A statement that the trader or seller attests that the equipment complies with the CAA and EPA's regulations and/or that the equipment's emissions system has not been modified from its original condition;
 - b. An acknowledgement of modification wherein the individual selling and/or trading in the equipment acknowledges that they (*not the dealer*) modified the equipment in a manner which may have rendered it non-compliant with the CAA.
 - c. An agreement from the seller/trader of the non-compliant equipment will agree to indemnify the dealer against claims arising out of the modification of the equipment during their ownership.

Imported Equipment

The CAA prohibits importation into the United States of any motor vehicle engine or nonroad engine that does not conform to the EPA emission standards and requirements. With some exceptions, these CAA standards apply to all vehicles regardless of (a) where they are manufactured and (b) whether they are new or used. Nonconforming vehicles can be imported in limited circumstances and with proper certification. For example, an imported nonconforming vehicle may be imported if it has been modified, tested and certified by an Independent

Commercial Importer (ICI). EPA regulations also allow for the temporary, pre-approved importation of nonconforming vehicles for: (a) Testing; (b) Display; (c) Repair or alteration; (d) Competition/Racing. The EPA recommends that before shipping a nonconforming vehicle or engine into the U.S., that the importer either: (1) make arrangements with an ICI for modifications, testing, and certification, or (2) obtain EPA pre-approval for the exemptions listed above.

Reporting Bad Actors

EDA acts as a clearinghouse for dealers that wish to report bad actors who are violating the Clean Air Act through unlawful tampering and/or the use of defeat devices. Reports of violations can be made to the EDA's general counsel, Natalie Higgins, at nhiggins@equipmentdealer.org. Reports of violations should include the following information:

1. Suspected Violation City/State/Zip
2. Name of Party or Entity Suspected to have violated the CAA
3. Whether the suspected violation still occurring
4. Date of incident
5. Whether the violation is Accidental, Intentional or Unknown
6. Description of violation
7. Photographs or Video evidence
8. Other relevant documentation
9. Name, email and phone number for complaining party (will be kept confidential by EDA)