

Automotive Industry: Enforcement Trends Regarding Aftermarket Auto Parts



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While EPA's recent multi-billion dollar settlement with Volkswagen for diesel-related Clean Air Act (CAA) emissions violations has received significant press coverage, many are not aware that EPA is also targeting smaller manufactures, distributors, and installers of aftermarket auto parts for CAA enforcement.

The Clean Air Act prohibits knowingly removing or rendering inoperative any device or design element that would take a vehicle or emissions system out of CAA compliance. This "tampering prohibition" targets devices that defeat (i.e., devices that by-pass, defeat or render inoperative certain vehicle equipment) or otherwise tamper with emissions controls.

In 2018 alone, EPA has settled enforcement actions with close to two dozen companies accused of such tampering. In November alone, EPA settled with three California auto parts manufacturers and one Arizona company, and in September, Derive Systems agreed to pay a \$300,000 fine and spend \$6.25 million to implement injunctive relief. These are not slaps on the wrist.

Given this enforcement trend, potentially affected companies should act now – i.e., before EPA comes knocking – to: determine whether, and to what extent, they may be liable for violating tampering prohibitions; address any past or ongoing violations; and establish and implement protocols to protect against future violations. In other words, companies should be proactive to best position themselves to defend against future enforcement, limit potential liability, and minimize or mitigate consequences of an enforcement action, by:

- Conducting internal audits of procedures and protocols that relate to or could be implicated by EPA regulatory compliance issues. Working with legal counsel, to ensure attorney-client privilege, companies should focus on: (i) their existing procedures and protocols, (ii) the products/product lines subject to EPA regulation and potential enforcement; and (iii) products that the Company previously manufactured or sold that could trigger liability.
- Establish and implement a Compliance Plan to avoid illegal tampering and aftermarket defeat devices. The first step in preparing such a plan is fully understanding the relevant CAA provisions and EPA's regulatory compliance requirements. While consent decrees with past violators outline compliance plans generally, and can serve as a starting point for affected companies, more will be needed for a company to individualize a plan to meet its own unique business operations, needs and potential exposure.
- Address past violation. Based upon the audit results, companies should work with legal counsel to develop an accurate and comprehensive understanding of their exposure and identify further steps (as necessary) to develop a plan for addressing such liabilities.

Lawyers in Lippes Mathias' Energy and Environment; Government Investigation and Enforcement; and Litigation Practices are well suited to advise on the steps companies should consider to protect themselves against, and address potential liabilities stemming from, EPA's recent enforcement efforts. Please contact Ian Shavitz, Practice Team Leader for our Environment and Energy Practice, for additional information.

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