

## What EPA Crackdown On Defeat Devices Means For Cos.

By **Robert Meyers and Paul Freeman** (January 26, 2021, 5:45 PM EST)

In February 2020, the U.S. Environmental Protection Agency announced that it was making enforcement of Clean Air Act prohibitions against "defeat devices" and tampering with the emissions control systems of engines and vehicles one of its National Compliance Initiatives, or NCIs.

Defeat devices and vehicle tampering are often designed to improve vehicle speed or performance — but they can often come at the cost of increased air pollution. A vehicle that has been illegally altered may produce 30 to 40 times more pollution than a newly certified and compliant vehicle.

In the short time since the elevation of this issue to an NCI, the Air Enforcement Division of the EPA's Office of Enforcement and Compliance Assurance, or OECA, has entered settlements in more than 30 enforcement cases, some imposing several millions of dollars in fines. Despite this increased activity, there are several strong signals that this EPA enforcement effort is far from over, and could even accelerate under the Biden administration.

Just before Thanksgiving, the EPA reported that approximately 550,000 diesel trucks had employed illegal devices or strategies, resulting in the emission of more than half a million tons of excess air pollution[1] — making clear that the agency itself believes significant work remains to be done in order to accomplish its stated goal of "stopping the manufacture, sale, and installation of [aftermarket] defeat devices." [2]

Following closely from the release of this tampering report, the EPA revised long-standing guidance documents that detail when aftermarket parts and devices cross the line from helpful consumer products to Clean Air Act violations that carry fines of up to \$5,000 for each illegal device.[3]

And the agency has been assembling evidence from many sources — including purchasing devices and conducting sophisticated emissions testing — to back up its claims of violations. All of this effort points to an impending increased risk of enforcement for manufacturers, distributors and retailers of aftermarket parts, as well as companies that service vehicle fleets.

Anyone in the aftermarket parts supply chain or in the business of servicing motor vehicles should



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therefore be apprised of what products and activities EPA considers to cross the line from permissible performance improvements to unlawful activities affecting the proper functioning of vehicles' emission control systems — and should take steps to ensure they stay on the right side of that line.

### **EPA Enforcement Analysis**

The release of the tampering report, and the unfinished business it documents, raise the profile of specific products that the EPA has considered to be unlawful defeat devices. The EPA terms its work in this area to be "ongoing, focused on many types of vehicles and engines." [4]

The agency also names specific products that have been the focus of past enforcement efforts: products that block exhaust gas recirculation systems, hollow straight pipes and anything that changes an onboard diagnostic system. [5] Particularly problematic may be "delete kits," which the EPA describes as "[e]gregious examples of aftermarket defeat devices." [6]

While this is a general statement of policy, the tampering report estimates that federal emission controls have been removed from over 550,000 diesel pickup trucks in the last decade.

But as striking as this estimate may be, this number of noncompliant vehicles should probably be considered to be a floor, not a ceiling, as the EPA notes that it was based on the number of vehicles subject to the agency's civil investigations, and did not constitute an attempt to estimate the total number of vehicles that may have removed or compromised emission control systems. [7]

The tampering report was also confined to Class 2b and 3 diesel vehicles — meaning that the EPA did not analyze other medium- and heavy-duty diesel vehicles, or extend its analysis to the much larger gasoline-powered light duty market.

Thus, it is reasonable to expect that the incoming Biden administration could not only review both the historical data already assembled — involving 32 "delete tuning" manufacturers alone and 57 product lines — but also undertake additional reviews or extend this type of effort into other engine and vehicle categories. The Clean Air Act provides the EPA with ample authority to require the submission of any information "the Administrator may reasonably require." [8]

### **New EPA Tampering and Defeat Device Policy**

Following closely on from the release of the tampering report, the EPA scrapped a 46-year old guidance document, known as Memorandum 1A, that informed nearly all previous enforcement efforts in this area. Memorandum 1A helped establish the agency's policy that "nonoriginal" equipment manufacturers and others — including those making vehicle or engine adjustments or alterations — must have a "reasonable basis for knowing that [use of a replacement part or add-on or auxiliary part] will not adversely affect emissions." [9]

This general directive applied to wide variety of actions and resulting enforcement actions. In its place — virtually unannounced — is a much more detailed policy document, containing several pages of detailed categories and lists of specific devices that the agency considers problematic, as well as enumerated actions that define what it means to have a reasonable basis to believe parts or electronic strategies will not adversely affect emissions. [10]

Adoption of such far more defined criteria in this area could be viewed as putting manufacturers and

other parties on notice of what the EPA does — and does not — consider as supplying a reasonable basis for concluding that aftermarket parts or devices are compliant with the Clean Air Act. Going forward, products that fall within the categories noted above that are effectively called out in the tampering report and the new policy will face particular challenges.

### **EPA Notice of Availability**

Late last year, the EPA also made public a notice of availability regarding elements of its new tampering policy.[11] The notice of availability addresses the agency's 1986 enforcement policy concerning the manufacture, sale, offering for sale and installation of replacement catalytic converters.[12]

This policy included criteria that required a replacement catalyst to have 30% effectiveness regarding emissions of nitrogen oxides, and to retain this level of effectiveness for at least 25,000 miles. Giving the timing of publication, the public comment period extended past the Jan. 20 presidential inauguration — meaning that the EPA could potentially chose to extend or conceivably supplement this notice.

But it is notable that the notice references the new tampering policy, and posits that a reasonable basis for replacement catalysts exists if such parts achieve 90% control effectiveness for nitrogen oxides and remain effective for half of a vehicle's useful life period.

### **The Bottom Line: Enhanced Risk Ahead for Manufacturers, Distributors, Retailers, Trucking Companies and Service Shops**

The EPA's enforcement analysis and its findings — combined with the issuance and continuing development of more definitive enforcement policies — portend an enhanced risk of enforcement for manufacturers, distributors and retailers of products that are considered to be aftermarket devices that serve as defeat devices.

The agency may also more aggressively pursue enforcement actions for tampering with vehicles and engines. Those who regularly service vehicles, or who own and service their own fleets, may be subject to additional scrutiny.[13] In assessing the degree of risk, we would note the following factors.

#### ***EPA Targeting Specific Products, Coordinating With States***

The EPA has assembled a large, and perhaps growing, inventory of aftermarket product types — including specific part numbers — it believes are unlawful. This inventory includes numerous products manufactured and/or offered for sale by companies for which no record of enforcement is publicly identifiable.

The agency has also indicated that it is "already in contact with many states about tampering and aftermarket defeat devices, and these interactions are generating constructive dialogue, exchange of information and training, and in some cases assistance on inspections." [14] A simple translation of this statement is: There's more to come.

#### ***OECA Set the Stage for Stronger Enforcement***

The extent of the underlying data referenced in the tampering report makes it clear that OECA has invested significant resources to develop an advanced and nuanced understanding of the overall defeat device industry and key players.

Through multiple enforcement actions over the last several years, OECA has also developed internal staff capacity and undertaken efforts to streamline the enforcement process.[15] Stopping the "manufacture, sale, and installation of defeat devices" remains designated as a National Compliance Initiative through fiscal year 2023.

The work done by OECA to date, therefore, sets the stage quite well for the incoming Biden administration to pursue the initiative seamlessly, potentially with an increased budget. A new political team at the EPA could find it difficult to ignore what might be termed compliance gaps identified in the OECA report.

### ***EPA and State Enforcement Under Biden***

OECA's reliance to date upon state enforcement agencies could account for the absence of public cases targeting more distributors and retailers — both online and brick-and-mortar. But unlike other aspects of the Clean Air Act which may be implemented primarily by states — e.g., stationary source controls — the EPA possesses direct enforcement authority over defeat devices and the prohibition of tampering with onboard vehicle emission controls.

At the same time, state authority to take actions for such violations will vary and, within a particular state, enforcement could be constrained by competing priorities. The Biden administration is not bound by previous Trump administration enforcement policies, and could adopt a different approach to the federal/state relationship in this area.

### ***Pursuing Hot Spots and Mobile Source Emissions***

States may also be motivated to address persistent issues with attaining and maintaining ozone and particulate matter National Ambient Air Quality Standards, or to control air pollution in localized hot spots. While stationary sources will undoubtedly continue to play a large role in the planning of state efforts, in some areas, mobile sources account for a growing percentage of local air pollution issues.

Enforcement of existing mobile source standards can, in some cases, yield fairly immediate reductions, especially when compared to relying on long-term fleet turnover to address air quality issues over time. The recent proliferation of personal hand-held monitoring devices could also play a role in identifying micro-environments with higher levels of mobile source emissions.

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[1] Tampered Diesel Pickup Trucks: A Review of Aggregated Evidence from EPA Civil Enforcement Investigations, Enclosure to letter from Mr. Evan Besler, Deputy Director, AED, OECA, and Chair, Steering Committee, EPA National Compliance Initiative to state air agencies, Nov. 20, 2020 ("Tampering Report").

[2] National Compliance Initiative: Stopping Aftermarket Defeat Devices for Vehicles and Engines.

See <https://www.epa.gov/enforcement/national-compliance-initiative-stopping-aftermarket-defeat-devices-vehicles-and-engines>.

[3] Under the Clean Air Act, it is unlawful for "any person to manufacture or sell, or offer to sell, or install, any part or component ... where a principal effect of the part or component is to bypass, defeat or render inoperative" any emission control device on an engine. 42 U.S.C. § 7522(a)(3)(B). Tampering prohibits "any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine [prior to or after sale and delivery] or for any person [to] knowingly remove or render inoperative any such device or element of design." 42 U.S.C. § 7522(a)(3)(A). Violations of these prohibitions can result in significant legal and financial exposure: Each device manufactured, sold or offered for sale is treated as a separate violation of the CAA, carrying a statutory penalty of nearly \$5000 per device. 42 U.S.C. § 7524(a).

[4] Letter from Evan Besler at 2.

[5] Tampering Report at 4, Tampering Policy at 3-4.

[6] Tampering Policy at 4.

[7] Id. at 7.

[8] Clean Air Act § 114(a). It should be noted that such authority does not extend to manufacturers of new motor vehicles or new motor vehicle engines. But aftermarket devices are installed on non-new vehicles. In addition, Clean Air Act § 208(a) provides the EPA with additional information collection authority regarding vehicle or engine parts or components.

[10] EPA Tampering Policy: The EPA Enforcement Policy on Vehicle and Engine Tampering and Aftermarket Defeat Devices under the Clean Air Act, Nov. 23, 2020 ("Tampering Policy").

[11] Notice of Availability of EPA Tampering Policy and Request for Information Regarding 1986 Catalyst Policy, FRL-10015-93-OECA (Federal Register publication pending) ("Notice of Availability").

[12] Sale and Use of Aftermarket Catalytic Converters, 51 Fed. Reg. 28,114, 28,132 (Aug 5, 1986).

[13] See, e.g., Royal Crown Bottling Corporation, Consent Agreement and Final Order Preliminary Statement, April 9, 2019. Accessed at <https://www.epa.gov/enforcement/2019-clean-air-act-vehicle-and-engine-enforcement-case-resolutions>.

[14] Letter from Evan Besler.

[15] For smaller matters especially, the EPA has developed and repeatedly used a standardized template: Clean Air Mobile Source Expedited Settlement Agreement.