



## **EPA's Initiative Against Illegal Aftermarket Parts: Deleting Defeat Devices**

One of the hottest topics of discussion at the November 12, 2019, National Enforcement Conference held by the American Bar Association's Section on Environment, Energy and Resources was enforcement concerning aftermarket defeat devices. The Environmental Protection Agency's (EPA) recent efforts have resulted in a marked upswing in cases – both civil and criminal – against parts manufacturers and installers of the devices, including some entities that are less than obvious targets.

Aftermarket parts are replacement or additional vehicle or engine parts not made by the original equipment manufacturer. Most aftermarket parts do not violate the Clean Air Act, but some are designed to reduce or eliminate the effectiveness of required emissions controls on vehicles and engines. These are defeat devices, and there is a market for such devices as they can dramatically increase fuel efficiency or boost engine power. Among the most common users of these defeat devices are truck fleet owners and the shops that service them. Many of the recent enforcement cases have been against companies or individuals that produce or install “tuners” - engine control module reprogrammers that disable emission control systems with preloaded software (“tunes”). These defeat devices are obvious enforcement targets. However, other devices or software could also fall in this category, and therefore liability could extend to other aftermarket suppliers.

### *EPA's Enforcement Against Aftermarket Defeat Devices*

The EPA released its Fiscal Year 2020 – 2023 National Compliance Initiatives on June 7, 2019. The memorandum from Assistant Administrator for Enforcement and Compliance Assurance Susan Parker Bodine explains the agency's selection of “Stopping Aftermarket Defeat Devices for Vehicles and Engines” as a new compliance initiative. The memorandum emphasizes that the Clean Air Act prohibits “tampering with emissions controls, as well as manufacturing, selling, and installing aftermarket devices intended to defeat those controls. The EPA has found numerous companies and individuals that have manufactured and sold both hardware and software specifically designed to defeat required emissions controls on vehicles and engines used on public roads as well as on nonroad vehicles and engines.” Enforcement focuses on “stopping the manufacture, sale, and installation of these defeat devices.”

During the national enforcement conference, Ms. Bodine and her enforcement staff informed participants that it is “astonishing how much noncompliance” is being found in the mobile source sector, confirming the need for this compliance initiative. According to the EPA, their enforcement efforts have uncovered at least half a million vehicles that have been tampered with, potentially increasing emissions by the equivalent of nine million additional trucks on the road.

### *Clean Air Act Liability*

The EPA can take two approaches to enforcement under the Clean Air Act – criminal enforcement or civil enforcement. Although criminal enforcement has historically been less prevalent, the EPA has increased enforcement against vehicle and equipment manufacturers

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### **CONTACT**

**JULIE R. DOMIKE**  
[jdomike@babstcalland.com](mailto:jdomike@babstcalland.com)  
202.853.3453

**GINA N. FALASCHI**  
[gfasalchi@babstcalland.com](mailto:gfasalchi@babstcalland.com)  
202.853.3483

**Washington, DC**  
Suite 700  
505 9th Street NW  
Washington, DC 20004  
202.853.3455

**[BABSTCALLAND.COM](http://BABSTCALLAND.COM)**

in recent years across both civil and criminal venues. Title II of the Clean Air Act, which addresses mobile sources, does not contain provisions for criminal enforcement. To find criminal liability, the EPA relies on Section 113 of the Clean Air Act, which allows for criminal prosecution of an individual who knowingly “falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method required to be maintained[.]” 42 U.S.C. §7413(c). If convicted, an individual may be subject to a fine or up to two years in prison for a first offense, or both.

By contrast, Title II of the Clean Air Act expressly defines prohibited acts against which the EPA can initiate civil enforcement, including the manufacture, sale, or installation of aftermarket defeat devices. Section 203 of the Clean Air Act prohibits any person from rendering inoperative or removing any emissions control devices on a motor vehicle prior to or after its sale to the ultimate purchaser, and prohibits any person from manufacturing, selling, offering to sell or installing any part or component intended for use on a motor vehicle where the principal effect of the part is to bypass, defeat, or render inoperative any emission controls. 42 U.S.C. §7522. The statute thus authorizes the EPA to hold liable anyone who *knows or should know* that a part or component is being sold or installed for such use. *Id.* Civil penalties for violations of this section could be as high as \$4,735 per unit produced or \$47,357 per vehicle altered; one recent settlement required payment of \$1.1 million in penalties, in addition to other injunctive relief. Resolution of violations in the civil context does not prevent criminal prosecution.

#### *Who could be liable?*

The Clean Air Act creates a broad scope of potentially liable parties. The EPA has historically taken enforcement against manufacturers and retailers of tuners and those individuals who install them in motor vehicles. The EPA has also taken enforcement against those individuals who remove emissions control systems from vehicles, especially trucks, after they are delivered to the ultimate purchaser. Other activities giving rise to liability may be less obvious. Those who modify fleets of vehicles with additional equipment may violate the Clean Air Act by causing excess emissions due to vehicle weight increases, causing the vehicle to operate outside of its manufacturer certified parameters. The agency views this activity as tampering.

With the EPA’s current emphasis on enforcement, liability risk can extend beyond the manufacturers and installers of tuners and other defeat devices. Retailers who neither manufacture nor install defeat devices could also be subject to civil enforcement for selling aftermarket defeat devices in their stores or online. Additionally, those who manufacture and sell devices that they know or should know are being used as defeat devices to tamper with emissions control equipment could also find themselves the target of an EPA enforcement action. This additional liability could even extend to manufacturers of equipment that is known to be used improperly as a defeat device but has other legitimate uses, as well as to authors of software programs that could alter the manufacturer-installed software as certified by the EPA.

#### *California: Liability and Compliance*

EPA’s increased enforcement activity against manufacturers and sellers of aftermarket parts, as well as individuals who utilize or install those parts, follows decades of similar enforcement by California’s Air Resources Board (CARB).

Section 27156 of the California Vehicle Code states that “[n]o person shall install, sell, offer for sale, or advertise any device, apparatus, or mechanism intended for use with, or as a part of, a required motor vehicle pollution control device or system that alters or modifies the original design or performance of the motor vehicle pollution control device or system.” Unlike the Clean Air Act, however, California allows for CARB review of aftermarket parts and the grant of exemptions in the form of Executive Orders, allowing for the sale of parts that are certified not to increase vehicle emissions. As part of recent settlements, EPA has required companies to demonstrate that their future products do not alter vehicle emissions by obtaining such Executive Orders from CARB.

For a more detailed assessment of these provisions or assistance in determining any potential liability, please contact a Julie Domike at 202-853-3453 or [jdomike@babstcalland.com](mailto:jdomike@babstcalland.com) or Gina Falaschi at 202-853-3483 or [gfaschi@babstcalland.com](mailto:gfaschi@babstcalland.com).

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