

# 2016 Federal Regulatory Update for Truck Dealers



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# Topics We'll Cover

- New USDOT And Other Issues
- New Employment Law Matters
- New Environmental Concerns
- Federal Excise Tax
- Lease Accounting
- Text Messaging restrictions

# Caution!

- State and local laws can be different or even stricter than federal law.
- Please check with your state and local dealer associations and your dealership legal counsel for the specific requirements applicable to your operations and facilities.

# New USDOT and Other Matters

- Record-of-Duty Electronic Logging Devices
- New SBA Size Standard
- Withdrawal of Label Mandate

# Electronic Logging Devices (ELD)

- 12/15: FMCSA mandates use of ELDs to record driver hours of service; ATD pushed to exempt techs, dealership employees moving new and used vehicle inventory, lease or rental fleet trucks, parts trucks and wreckers, and vehicles under 26,000 lbs. GVWR.



# Electronic Logging Devices (ELD)

- Compliance due: 12/18/17
- Carriers responsible for putting ELDs into “special driving mode” to account for miles driven by drivers who do not need to keep logs (like mechanics on text drives).
- No leased truck exemption; preference for portable ELDs that stay with the driver rather than the CMV.

# New SBA Size Standard

- 1/16: SBA raises small business size standard for NAICS 423110: *Automobile and Other Motor Vehicle Merchant Wholesalers* from 100 to 250 employees per commercial truck dealership establishment.
- New size standard increases universe of dealerships eligible to access SBA loan and other programs; also impacts potential application to truck dealerships of other government programs which incorporate SBA's size standards by reference.



# Withdrawal of Label Mandate

- 8/15: ATD comments on FMCSA proposal that manufacturer compliance certification labels be affixed, retroactively, on all CMVs operating in interstate commerce.
- Addressed flawed basis for the label mandate, argued that it would offer virtually no safety benefit yet would impose a financial burden on the truck retail industry of some \$3 million annually.
- 12/15: FMCSA withdraws proposal pointing to ATD's cost/benefit issue as one reason for doing so.

# New Employment Law Issues

- Wage and Hour
- FMLA
- OSHA Restroom Guidance
- Joint Employer and Worker Classification

# Service Writer Overtime Exemption

- Federal law provides that "any salesman, partsman or mechanic primarily engaged in selling or servicing automobiles . . . if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to the ultimate purchaser" is exempt from overtime.
- "Service Writers" have long been considered "salesmen" of service.
- "Commission Employee" exemption also may apply.

# Service Writer Overtime Exemption

- 3/15: 9th Circuit Court of Appeals reverses decision holding that service writers exempt from overtime.
- 5/15: NADA/state dealer associations in 9th Circuit file amicus brief in support of a petition for review; 6/15: 9th Circuit denies the petition.
- Fall /15: Dealer files cert petition with U.S. Supreme Court; NADA/state associations file amicus brief;
- 1/16: Cert granted, briefing underway.

# “White Collar” Overtime Exemptions

- 7/15: DOL proposes to revise its “white-collar” overtime exemptions, each of which involve both a salary and a duties test.
- Employee categories include:
  - Executive
  - Administrative
  - Professional
  - Outside Sales
  - Computer
  - Highly Compensated
- Exemptions apply to many dealership employees.

# “White Collar” Overtime Exemption

Proposed salary test “updates”; no proposed duty test changes. Final rule expected by mid-2016.

Compensation test for “white collar” employees.

**CURRENT**

\$455/week  
(\$23,669/year)



**PROPOSED**

\$970/week  
(\$50,440/year)

Compensation test for highly compensated employees

**CURRENT**

\$100,000/year



**PROPOSED**

\$122,148/year

# “White Collar” Overtime Exemption

- Higher salary tests could prove disruptive for many “white collar employees”; unlikely to increase compensation. If salary test not met, employers likely to:
  - Ride herd on overtime and use more part-time employees to satisfy needs.
  - Pay overtime, but reduce base pay so that total compensation remains equivalent.
  - Adjust compensation plan and apply alternative exemptions (e.g., “commission employee”).

# Family Medical Leave Act (FMLA)

- FMLA covers eligible employees at dealerships with 50 or more employees.
- Entitlement is for up to 12 weeks of unpaid leave for certain serious health conditions (oneself or a close family member) or for child's birth or adoption.
- *NADA Dealer Guide the Family Medical Leave Act.*





# New FMLA Definition of Spouse

- Old “state of residence” rule: legal marriages in employee’s state of residence.
- New “place of celebration” rule: law where marriages entered into; covers lawfully recognized same-sex and common law marriages, including those validly entered into outside of U.S., if could have been entered into in at least one state.
- Expands universe of employees eligible to request FMLA leave to care for spouses and children.

# Documents Needed to Prove “Spouse”

- Employees may provide marriage license or court document, or may simply assert that a requisite family relationship exists.
- Employer has limited ability to verify such assertions.



# Restroom Access for Transgender Workers

- OSHA: requires employers to provide sanitary toilet facilities.
- New guidance: Employer may not
  - ask for medical or legal documentation of gender identity.
  - require use of segregated (gender-neutral) facilities based on gender identity or transgender status.



# Joint-Employer and Worker Classification

- New tests for whether two different businesses may jointly control the same employee:
  - NLRB: Direct, indirect, or potential to control.
  - DOL Wage & Hour: economic realities test.
  - OSHA: Franchisee/franchisor relationship test.
- Worker Classification: DOL, IRS, State.

# New Environmental Concerns

- Commercial Truck Fuel Efficiency/GHG Standards
- Emissions Compliance
- Underground Storage Tanks (USTs)

# Truck Fuel Efficiency/GHG Standards

- Phase 1:
  - Goal: to reduce GHG emissions and increase fuel efficiency (FE) w/existing technologies; harmonize with CARB; offer a reasonable pay-back.
  - Timeframe: MY 2014-and beyond; a two-tiered program with more stringent standards taking effect in MY 2017; separate vehicle/engine stds.

# Truck Fuel Efficiency/GHG Standards

- Phase 2: new and more stringent technology-forcing standards for MY 2018 and later vehicles; performance-based, builds on Phase 1 technologies.
- 7/13/15: proposal published; designed to set standards for MYs 2021/2024/2027.
- Final rule in expected in early 2016; “legacy rule” designed to control far into the future.

# Truck Fuel Efficiency/GHG Standards

- Phase 2 Regulatory Objectives:
  - Commercial Trucking = 20% of on-road fuel used and GHGs emitted; 65% Class 7/8 tractors and trailers, 21% vocational, 14% large P/Us and vans.
  - Eliminate: 1 billion tons GHGs/1.8 billion bbl. oil.
- *NADA/ATD supports: achievable, cost-effective, acceptable improvements; largely market-driven.*
- 8/6/15: testimony; 10/1/15: comments.



# Truck Fuel Efficiency/GHG Standards

- Class 7/8 Combination Tractors:
  - Aims for 24% improvement starting in MY 2021, bumping up in MY 2024, and fully phased in w/MY 2027 (in addition to 7-20% Phase 1 improvement).
  - Expected technologies: engine, transmission, and driveline improvements, aerodynamics, LRR tires, idle reduction, 6x2's, ATIs, and waste heat recovery.
  - Cost Increase: feds predict \$11,700/vehicle MY 2027 vs. MY 2018; two year average payback.

# Truck Fuel Efficiency/GHG Standards

- Vocational Vehicles (all classes):
  - MY 2027 to achieve up to 16% improvement vs. MY 2018 (in addition to 7-10% Phase 1 improvement).
  - Expected technologies: engine, transmission, and driveline improvements; LRR tires; workday idle reduction technologies, and weight reduction.
  - Cost Increase: feds predict \$3400/vehicle MY 2027 vs. MY 2018; six year average pay-back.

# Truck Fuel Efficiency/GHG Standards

- Class 2b and 3 P/Us and Vans:
  - Standards ratchet up 2.5 percent each MY for 16% improvement over Phase 1 by MY2027.
  - Expected technologies: engine and transmission improvements, LRR tires, engine stop/start, powertrain hybridization, engine downsizing and light-weighting.
  - Cost Increase: feds predict \$1,300/vehicle MY 2027 vs. MY 2018; three year average pay-back.

# Truck Fuel Efficiency/GHG Standards

- ATD Issues/Concerns:
  - Structure: whole vehicle vs. engine-only (4/16% improvement); multi-stage manufacturing, alterations.
  - Adoption: LRR tires, hybridization/electrification.
  - Affordability: actual vs. average cost; complex and varied uses vs. small numbers; creditworthiness, interest rates; leasing; lead time vs. predictability.

# Truck Fuel Efficiency/GHG Standards

- ATD Issues/Concerns:
  - Operational Issues: will technology-forcing mandates compromise vehicle performance resulting in reliability, maintenance, service, or repair issues?
  - Stringency: “sweet spot” targeting = everyone wins.
  - Administration and Enforcement: mid-term review, tampering, etc.
  - Glider Kit restriction.

# Emissions Compliance

- Clean Air Act (CAA) sets vehicle emissions standards.
- OEMs must certify to EPA, CARB, or both, that engine families comply with applicable, current MY emission standards, and must comply with applicable emissions warranties.
- EPA and CARB may seek injunctions or penalties for prohibited acts.

# Emissions Compliance

- It is prohibited under the CAA to:
  - Sell or offer for sale new motor vehicles not covered by, or out of compliance with, certificates of conformity.
  - Refuse to comply with testing or recordkeeping mandates or to make requested info available.
  - Remove or render inoperative emissions components (*tampering by individuals or shops*).
  - Manufacture, sell, offer to sell, or install parts that bypass, defeat, or render inoperative an emission control device (*defeat devices*).

# Emissions Compliance

- 10/98: EPA/DOJ settle w/7 manufacturers on claims that they installed defeat devices in HDDDEs, causing illegal NOx emissions; manufacturers spend more than \$1 billion to prevent 75 million tons of NOx emissions and pay \$83.4 million penalty, at the time the largest ever for an environmental law “violation.”
- Pulled forward to 2002 compliance with 2004 NOx standards, triggered software changes on rebuilt engines, *but did not conduct an emissions recall.*



# Emissions Compliance

- VW Matter:
  - 2015: EPA/CARB claim certain VW engines contain “defeat devices” rendering vehicles noncompliant with CAA sales prohibition; apparently sense when being tested and “switch” to maximum emissions performance; in-use “road calibration” results in emissions 10-40 times NOx standards.
  - Maximizing fuel economy/GHG performance may have played a role as “dyno calibrations” maximize NOx reductions at the expense of fuel economy.

# Underground Storage Tanks (USTs)

- 7/15: new EPA UST rules aim to improve the prevention and detection of leaks; close regulatory gaps, update technologies, and set new secondary containment and operator training mandates.
- First major revision since 1988; several states have similar standards; new rules promote uniformity.
- Most dealerships have eliminated unnecessary USTs, upgrading or replacing those that remain.
- See revised NADA *Dealer Guide to USTs* and <http://www.epa.gov/ust>

# Underground Storage Tanks (USTs)

- Key provisions:
  - Effective 10/13/15; with compliance by 10/13/18.
  - Mandatory secondary containment for new/replaced tanks and piping.
  - New operator training and periodic operation and maintenance requirements.
  - Must ensure UST system compatibility before storing certain biofuel blends.
  - Updates codes of practice
  - Preserves exclusions for lift cylinders and wastewater tanks

# FET – The Basics

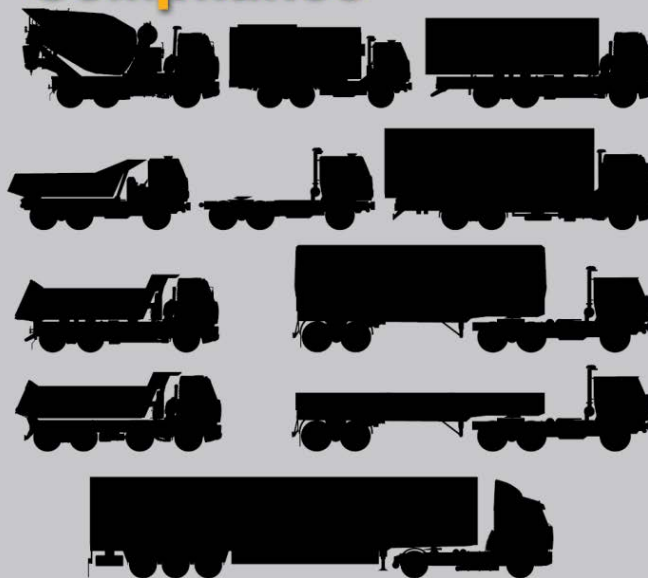
- 12% tax on the “first retail sale” of a taxable body, chassis, or tractor.
- Some highlights
  - Dealer is generally responsible for payment
  - Highly complicated
  - Many exceptions
  - Numerous subjective “gray” areas
  - FET Audits relatively common
- NOTE
  - Efforts Exist to Replace with Increased Fuel Tax
  - Also, efforts to prevent an *increase*

## Driven

NADA MANAGEMENT SERIES

A DEALER GUIDE TO

### Federal Excise Tax Compliance



NADA-ATO  
Resource  
Toolbox

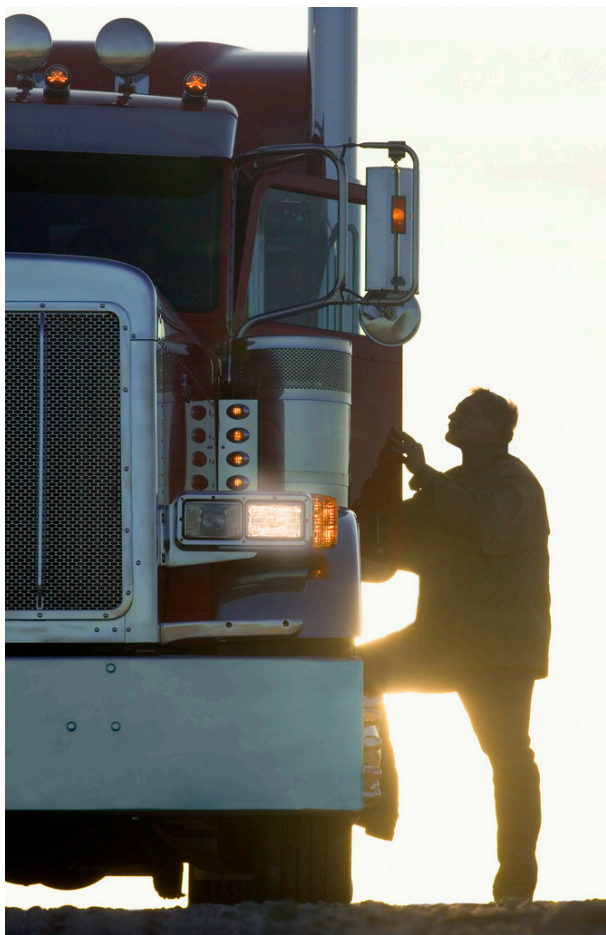
# Glider Kits

## Overview:

- Past history and current market environment
- Federal and state regulatory concerns
- FET issues



# Glider Kits



## Yesterday:

- Rebuilding wrecks with salvageable components to avoid new chassis costs

## Today:

- Avoiding new vehicle purchase and operational costs, EPA engine mandates
- Using multi-sourced components, often custom specified, sometimes stocked as completed vehicles

# FET - Glider Kits

## Background

- General Rule: used articles not taxable, but if previously used article is subsequently modified, may be taxable
- “Further Manufacturing” Rule:
  - When significant modifications or repairs made to an item, improved or changed item is treated as “new” for FET purposes.
  - New item is once again subject to tax upon its “first retail sale” (if, as modified, it satisfies the basic requirements).

# FET- Glider Kits

## 75% Rule:

- Used article is NOT “further manufactured” if cost of modifications to the used article (including repairs) does not exceed 75% of the retail price of comparable new article.
- This is a “Safe Harbor” from “further manufacturing” rule.
- “Donor” vehicle required



# FET- Glider Kits

## IRS Guidance:

- January 2013 – IRS CCA re Glider Kits
  - Addressed some questions related to “cost” & “retail price”
  - Implied guidance regarding “donor vehicles”
- January 2014 – Second IRS CCA
  - Instructed to “ignore” the 2013 guidance
    - Unclear scope
  - 4 Scenarios
  - Risky tax strategy to rely on 75% Rule
    - Except in narrow circumstances
  - 4% presumed markup

# FET- Glider Kits

- Bottom Line
  - Generally taxable
  - Understand *who* pays the tax
  - Selling the part – not taxable
  - Some room for challenge
    - 2013 sales
    - 4% presumed markup
  - Audits were paused, now have resumed in force

# FET - Overallowance

- Overallowance
  - *“When a manufacturer sells a truck at retail and receives cash plus a trade-in vehicle, the amount stated as allocable to the trade-in will be presumed to be equal to the fair market value of the trade-in unless the manufacturer can establish that the fair market value was less than this stated amount.” Rev Rul. 81-268*
- IRS recognizes overallowance, but you must be able to prove
- Dealers should:
  - document the overallowance and retain records, and
  - should reduce the inventory value of the used truck in your inventory to the overallowance value.
    - The overallowance value should be the fair market value

# FET – Overallowance - Example

- Original sales price - \$100,000
- FMV of trade in - \$25,000
- overallowance - \$5,000
- Total Selling Price \$105,000
- Cash received \$75,000
- FMV of trade in \$25,000
- Basis for tax \$100,000

*Value of trade in dealer inventory  
\$25,000*

# Lease Accounting

- FASB and IASB have proposed several changes to lease accounting guidelines.
  - These changes, broadly speaking would require lease obligations to be reflected on a company's balance sheet.
- Overall market effects of proposed changes are unclear, but general agreement is that they likely will make leasing less attractive, at least in the short run.
- NADA /ATD two sets of comments:
  - *de minimis* exception
  - further study is needed
- Also joined coalition letter regarding application to private companies

## Lease Accounting (cont.)

- November 2015, the FASB announced the tentative effective date of the accounting standard titled *Leases*, ASC Topic 842.
- Expected to be effective
  - For public business entities for fys beginning after Dec. 15, 2018,
    - Including interim periods within those years
  - For non-public business entities for fys beginning after Dec. 15, 2019.
  - Early adoption of the standard will be permitted.

# Telemarketing - Text Messaging

- Telephone Consumer Protection Act (“TCPA”)
- Text messages are deemed “phone calls”
  - FCC primary regulator
  - Text messages are also potentially email
    - subject to CAN-SPAM

# Text Messaging (cont.)

- Since Oct 2013 – heightened consent standard
  - Prior express consent required for *all*:
    - autodialed and/or pre-recorded calls made to cell phones;
      - consent must be written if it is a telemarketing call
    - autodialed text messages;
      - consent must be written if a telemarketing text, and
    - pre-recorded calls made to residential land lines for marketing purposes
- Applies to all calls – including b2b
- NO MORE Established Business Relationship exception








# TELEPHONE

## CONSUMER PROTECTION ACT

### CONSENT REQUIREMENTS




#### Prior Express Consent

##### Non-Marketing

	 Text Message	 Call to Cell	 Call to Landline
<b>Autodialed</b>	Yes	Yes	No
<b>Prerecorded</b>	N/A	Yes	No
<b>Manually Dialed/ Not Prerecorded</b>	No	No	No

#### Prior Express *Written* Consent

##### Marketing

	 Text Message	 Call to Cell	 Call to Landline
<b>Autodialed</b>	Yes	Yes	No
<b>Prerecorded</b>	N/A	Yes	Yes
<b>Manually Dialed/ Not Prerecorded</b>	No	No	No

NADA © 2015. This chart addresses only TCPA issues and does not address federal "Do-Not-Call" or other marketing restrictions and is provided for informational purposes only. Dealers should consult with counsel prior to engaging in any marketing activities.

# Text Messaging (cont.)

- Written consent must be unambiguous
  - Must include phone # and name of dealership
  - Cannot be condition of purchase
  - Dealer bears burden of proof

**Sample  
Consent  
Language**

I hereby consent to receive autodialed and/or pre-recorded telemarketing calls and/or text messages from or on behalf of [DEALER] at (\_\_\_\_)\_\_\_\_-\_\_\_\_ [telephone number]. I understand that consent is not a condition of purchase.

Signature\_\_\_\_\_

## Text Messaging (cont.)

- July 2015 – FCC “Omnibus Order” responding to numerous clarification requests
  - Autodialer – basically ALL texts
  - Reassigned numbers
    - one text safe harbor
  - Revocation of consent
  - “On demand” text messages
    - Can respond to a customer text requesting information, BUT conditions apply

# Text Messaging - Today

- Numerous lawsuits – TCPA Cases
  - 2008 – 14 cases
  - first nine months of 2014 – 1908 cases
- Written consent only way to fully protect
- Law is unsettled regarding
  - What is an autodialer
  - level of consent required

# Dealer Takeaways

- VERY careful with Text Messages
  - All “marketing” texts (broadly defined)
  - Even informational texts
- Robocalls in Service
- Who is texting at the store and how are they controlling?
  - Personal phones?
  - Consent?
  - Tracking opt-outs?
- Vendor compliance promises
- Third party lead providers

# Questions?

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