

2016 Federal Regulatory Update for Truck Dealers



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Regulatory Affairs

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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)



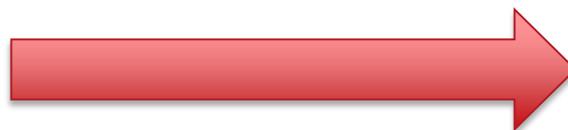
PROPOSED

\$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

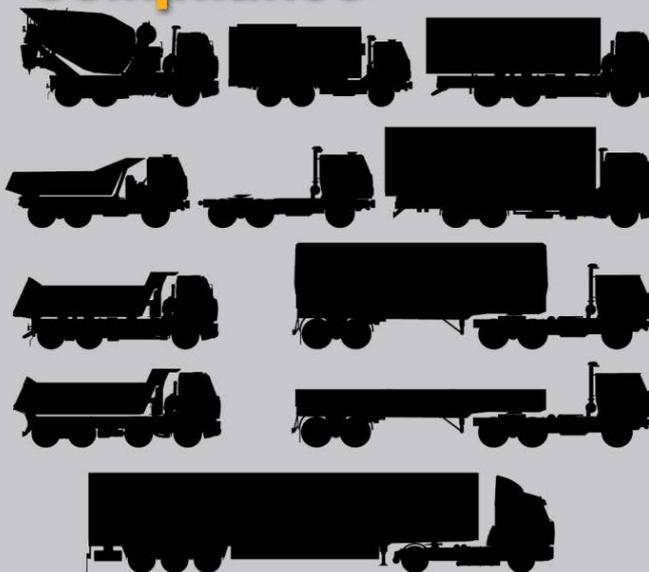
- 12% tax on the “first retail sale” of a taxable body, chassis, or tractor.
- Some highlights
 - Dealer is generally responsible for payment
 - Highly complicated
 - Many exceptions
 - Numerous subjective “gray” areas
 - FET Audits relatively common
- NOTE
 - Efforts Exist to Replace with Increased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

Driven

NADA MANAGEMENT SERIES

A DEALER GUIDE TO

Federal Excise Tax Compliance



NADA-ATD
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 | • Total Selling Price | \$105,000 |
| • FMV of trade in | - \$25,000 | • Cash received | \$75,000 |
| • overallowance | - \$5,000 | • 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
Autodialed	Yes	Yes	No
Prerecorded	N/A	Yes	No
Manually Dialed/ Not Prerecorded	No	No	No

Prior Express *Written* Consent

Marketing

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