



MEMBER NOTICE

To: SEMA Members in Performance Market
From: Chris Kersting, SEMA President & CEO
Date: June 15, 2018
Re: EPA Enforcement Visits

SEMA has recently received a number of calls from member companies in the performance segment who have experienced unscheduled visits from the U.S. Environmental Protection Agency (EPA) enforcement personnel. SEMA would like to inform all member companies of their rights and the fact that they are not legally required to turn over any materials or documents to the EPA without providing legal authorization. While it may be unlikely that the EPA will pay a visit to your offices, this Member Notice is provided so that you and your management team can be informed of your legal rights.

The EPA employees have been informing the companies they visit that they are carrying out investigations and will typically provide business cards to identify themselves. However, the teams usually provide little or no other paperwork connected with or explaining the purpose of the visit. This is at odds with past practices of the agency, where an investigation would typically begin with a letter from the EPA enforcement division requesting that the recipient provide specific information. SEMA member companies in a few cases have requested guidance from the association on how to best respond to the agency concerning these visits. SEMA recommends that you confer with legal counsel for more specific guidance (see below) as you consider the following:

- Brief your top management now that the EPA has made unscheduled visits

to several SEMA member companies in recent months. The companies have so far typically been those who make or market performance equipment. If a visit occurs, staff should be advised to contact top management to handle the interaction and should be advised they are not required to provide anything to the EPA officials absent some legal mandate.

- Advise your managers to interact in a courteous and business-like manner. Begin by requesting proper credentials from the EPA employees showing up at your facility so that you know with whom you're dealing.

- Let the officials know that it is company policy to first gather information when government officials contact the company. Request that the EPA write down or provide you a written request for what they are seeking and the statute or regulation under which they are seeking it. This will allow you to better address the request and to confer with your legal counsel in considering a response.

- Request that the EPA write down or provide the deadline for providing the information requested. You and your legal counsel will need to know when the information is due.

- Request the EPA specify where the information is to be sent once it is compiled.

- When interacting with EPA employees, remember to be professional and non-contentious. The EPA is requesting information to do its job, and you need information from them to properly respond to their request.

- In connection with a potential EPA visit, now is a good time to share this information with your legal counsel, who can advise on your obligations under the law. An attorney may also advise on marking certain business records as "confidential business information" so that the agency will make sure those records are not accessible to the public.

- If the EPA presents a search warrant or a subpoena, request a copy of the document and an opportunity to review it. Request the opportunity to contact legal counsel in order to better understand the document and to comply with the request.

- If you own a small business and the EPA is making burdensome or confusing requests, please take a moment to share your experience with the Small Business Administration at 1-888-REG-FAIR (1-888-734-3247). Small businesses are entitled to comment on agency actions without fear of retaliation. EPA employees are prohibited from using enforcement or any other means of retaliation against any member of the regulated community in response to comments made under the Small Business Regulatory Enforcement Fairness Act.

We hope that the above information is helpful in understanding some initial steps in the unlikely event that your company experiences an unscheduled visit from the U.S. EPA. If you have questions or desire additional information, please feel free to contact, Daniel Ingber, (danieli@sema.org; 202-792-4446).

ATTORNEYS

SEMA is not able to recommend attorneys for individual member companies, but we can share the names of a few attorneys whom we know to be active in this area of law. These attorneys are listed below:

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CITATIONS

Given the obscure area of the law at issue, SEMA has prepared a list of citations that may be helpful for legal counsel to review when advising SEMA members on responding to EPA enforcement:

42 U.S.C. § 7522 - Prohibited acts.

42 U.S.C § 7524 - Civil penalties.

42 U.S.C. § 7542 - Information collection.

18 U.S.C. § 1905 - Disclosure of confidential information generally.

40 C.F.R. § 86.000-7 - Maintenance of records; submittal of information; right of entry (applicable to OEMs/suppliers).

40 C.F.R. § 86.091-7 - Maintenance of records; submittal of information; right of entry (applicable to OEMs/suppliers).

40 C.F.R. § 86.094-7 - Maintenance of records; submittal of information; right of entry (applicable to OEMs/suppliers).

40 C.F.R. § 86.096-7 - Maintenance of records; submittal of information; right of entry (applicable to OEMs/suppliers).

40 C.F.R. § 1068.20 - May EPA enter my facilities for inspections? (currently applicable to nonroad vehicles/engines/equipment).

Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities Pursuant to Public Law 106-544, U.S. DOJ Office of Legal Policy, at Appendix A2 (2002), available at https://www.justice.gov/archive/olp/rpt_to_congress.htm