

competition between OEM franchised dealers and independent service stations. The legislative history states:

There again, when we require them to promptly provide information needed, we recognize that we do not want to require somebody to provide a lot of expensive manuals absolutely for free, but we do not want the kind of charges that make this a profit center. 36 Cong. Rec. 3272 (1990).

Since independent service stations may repair vehicles manufactured by many different companies, they may be competitively disadvantaged if the cost of each manufacturer's service information were large. There can be little question that information provided only at exorbitant prices cannot be said to be "available" to the purchasers.

We continue to be concerned that OEMs will establish pricing structures that will essentially render their information unavailable to the aftermarket. In the 1995 rule, we established factors that should be taken into consideration when determining if the prices being charged were fair and reasonable. We received comments from the Alliance, AIAM, AAIA, AWDA, AERA, and APRA and others suggesting that EPA include the factors we established for the 1995 rulemaking when making general determinations about fair and reasonable cost. Additionally, we received comments suggesting that EPA should also include the list established by CARB in their September 2002 final rule which includes factors that are directed at determining fair and reasonable cost. There is extensive overlap between the EPA list and the factors finalized by CARB and we agree that items on both of these lists should be considered when determining fair and reasonable cost and will include them in this final rule.

EPA will therefore include certain of the factors from CARB's list to supplement EPA's preexisting list. In particular, in addition to the factors that EPA may already take into account under EPA's preexisting list, we will include: The cost to the OEM's franchised dealerships for similar information obtained from OEMs; the ability of the aftermarket technicians and shops to afford the information; and the extent to which the information is used, including the number of users, and frequency, duration and volume of use.

Regarding the comments that the proposal notes the factors EPA "may" consider, rather than "shall" consider, EPA believes that given the differing types of information required by the regulation and the numerous factors listed, it is appropriate that there be

flexibility in determining what factors are appropriate in each given situation.

On the issue of price caps proposed for access to OEM Web sites, EPA received a significant amount of comments, most of which were against the proposal. Some OEMs questioned our authority to set price caps and several members of the aftermarket claimed that the caps were too high. While we believe that EPA has the authority to set price caps and that the caps proposed by EPA would provide us with a more objective measure of OEM compliance with our reasonable cost expectations, we will not finalize any price caps with this regulation. However, EPA believes it is necessary to thoroughly evaluate the pricing structure of each OEM Web site to ensure that information is being made available at a fair and reasonable price, and that OEMs are not pricing Web access in such a way that precludes its availability to a significant portion of the aftermarket. Therefore, in order to evaluate an OEM's pricing structure, we are establishing a process whereby each OEM must obtain EPA approval of its pricing structure. OEMs must submit a request to EPA that sets forth a detailed description of the pricing structure as well as amounts for access to their Web sites. In addition, OEMs must provide support for the position that the pricing structure and amounts are fair and reasonable by addressing the criteria listed in sections 86.094–38, paragraph (g)(7)(i) and 86.1808–03, paragraph (f)(7)(i) of the regulatory language for this final rule. Some of these criteria are further clarified below.

Regarding the net cost to the OEM franchised dealerships for similar information obtained from OEMs, less any discounts, rebates, or other incentive programs, EPA expects that OEMs will supply detailed information on the true costs that are incurred by their franchised dealerships to access information.

Regarding the ability of aftermarket technicians or shops to afford the information, EPA will consider the ability of the smallest service facilities as well as larger repair facilities. This includes facilities that either specialize in single or multiple vehicle brands, or that work on all brands.

Regarding the extent to which the information is used, this includes the number of users, and frequency, duration, and volume of use. EPA expects that as larger numbers of the aftermarket begin accessing OEM Web sites, the pricing and amounts for accessing the sites per customer should decrease.

A complete description of the approval process can be found in sections 86.094–38, paragraph (g)(7)(ii) and 86.1808–03, paragraph (f)(7)(ii) of the regulatory language for this final rule. Subsequent to the approval of the OEM Web site pricing structure and amounts, OEMs are required to notify the Administrator of any increase in price of twenty percent or more (accounting for inflation), including a justification based on the criteria for reasonable cost as established by this regulation.

Regarding the comments on the proposed tiering structure, EPA believes that it is necessary for the aftermarket to be able to access OEM information in a variety of ways given the varying nature of how the aftermarket services vehicles. However, we also agree with OEMs that it is reasonable for them to have some flexibility in how they design these tiers in order to ensure end-user satisfaction and to provide the OEMs with the ability to minimize the administrative burden in implementing a tiered approach. Therefore, EPA will finalize the following provisions for the tiered access of OEM Web sites.

OEMs shall allow short-term, mid-term, and long-term access to their Web sites. Short term access shall be for a period of 24–72 hours. Mid-term access shall be for a period of 30 days. Long-term access shall be for a period of 365 days. Access includes the ability to view and print the information. Based on comments received about potential copyright violations, EPA will not require OEMs to make their information available for downloading on to an end-user's computer system.

In addition, for each of the tiers, OEMs are required to make their entire site accessible for the respective period of time and price. In other words, an OEM may not limit any or all of the tiers to just one make or one model.

Regarding the Alliance and AIAM's legal discussion, EPA disagrees with the assertion that the Agency's responsibility for ensuring service information is provided to service providers is subsidiary to its other responsibilities under the Act. Section 202(m)(5) contains no language indicating that EPA's responsibilities and powers under that part of the Act are somehow limited by its other general responsibilities under the Act. Regarding the effect of these regulations or OEMs' incentives to provide timely, detailed user-friendly service information, Congress did not mandate that EPA create an incentive program to motivate OEMs, but instead Congress mandated that EPA promulgate regulations that bind their actions.