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Mary D. Nichols
Chairman
California Air Resources Board
1001 I Street
Sacramento, California 95814

RE: Comments by AIMCAL-WFC and IWFA on the Cool Car Standard, Agenda Item 09-6-4

The International Window Film Association ("IWFA") and the Window Film Committee of the Association of Industrial Metalizers, Coaters and Laminators ("AIMCAL-WFC"), representing 9 of the 12 worldwide manufacturers of window films and their distributors and dealers, submit these comments in connection with the upcoming hearings scheduled for June 25th and 26th regarding proposed glazing mandates under the California Air Resource Board's ("CARB's") Cool Car Standard. The IWFA and AIMCAL-WFC support CARB's overall objective to increase fuel efficiency and reduce greenhouse emissions. Nevertheless, we question the strategy and methods, at least those relating to glazing requirements, that CARB seems ready to adopt to achieve a performance based standard.

Rather than adopting a prescriptive standard, which would focus on specifying the particular components that the industry must use to achieve cooler car cabins or, in particular, the amount of radiant heat entering the cabin through the glazing, the IWFA and AIMCAL WFC urge CARB to adopt performance based standards. These performance standards would set either an energy efficiency or cabin temperature standard and then leave decisions on the meeting of such standard up to the provider of the vehicles into the California marketplace. When California issued its own vehicle emission standards many years ago, it did not state how a vehicle must meet such a standard; instead the vehicle was either certified by the manufacturer as meeting such standard or tested as a used vehicle and then remedial action was required. The state did not determine the method or technology needed to meet such a standard.

Performance based standards would achieve the same objectives, but at the same time preserve those market conditions that foster competition, lead to greater innovation, and reduce costs, ultimately increasing consumer welfare and advancing those technologies most likely to serve CARB's objectives in increasing fuel efficiency and lowering carbon emissions into the future.

California law embodies a preference for performance standards over prescriptive standards. Indeed, as other comments have pointed out, California law requires that "[i]n the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative." California Government Code Section 11346.2(b)(3)(A)(emphasis added). California law's preference for performance based standards is in harmony with the preferences expressed by other regulatory and standard setting bodies for such standards, including the U.S. Environmental Protection Agency and the National Highway Traffic Safety

Administration. *See, e.g.*, Richard Clagg, *Who Remembers the Small Builders? How to Implement Ohio's New Statewide Residential Business Code Without Sinking Ohio's Small Builders*, 34 Capital Univ. L.Rev. 741, 751 (2006) (discussing Ohio's enactment of a performance based, rather than prescriptive, building code). This preference for performance standards makes sense given the inherently restrictive nature of any prescriptive standard. *See, e.g.*, Sean P. Gates, *Standards, Innovation, and Antitrust – Integrating Innovation Concerns Into the Analysis of Collaborative Standard Setting*, 47 Emory L.J. 583, 651 (1998) (Economic studies show performance standards encourage innovation, while prescriptive standards stifle it.) For these reason, competition policy, which is reflected in the federal antitrust laws, recognize the benefits of performance over prescriptive standards. *See, e.g.*, Christine Varney, then-FTC Commissioner, Association *Activity and Antitrust Liability*, remarks before the Chicago Association Law Symposium *available at* 1995 WL 218060 *3 (April 12, 1995) (performance standards less likely than prescriptive standards to harm competition) (Ms. Varney now serves as Assistant Attorney General for U.S. Department of Justice, Antitrust Division). As prominent antitrust law scholars have noted, industry standards that reduce consumers' choice generally, harm consumer and social welfare because, "economists generally presume that consumers fare best when many companies compete to offer different sorts of products." Herbert Hovenkamp, Mark D. Janis, and Mark A. Lemley, II IP and Antitrust, 35-5 (2002).

OEM components are generally much more expensive than aftermarket components. By prescribing a standard for window glazing in newly manufactured vehicles, CARB will effectively foreclose from the market any competing products not specified in the proposed regulation, including window film, even if those products provide the same, if not better, reductions in temperature, and fuel consumption at a comparable cost. Indeed, any automobile on the road today or in the foreseeable future could be retrofitted to achieve the same reduction in radiant heat at a cost comparable to or lower than that which consumers will be forced to bear under the proposed standard. Put simply, window film and other existing technology can achieve CARB's goals and there is simply no need to exclude these technologies from the market to the detriment of California consumers. An example of the above is in the area of headlights for automobiles. In quantity, the auto manufacturers enjoy one cost. However, those same factory-branded headlights cost much more to the public if purchased individually. In addition, and particularly in the aftermarket, there are many other brands and types of headlights offered to the marketplace which meet the performance requirements than those offered as OEM equipment on new vehicles.

The retrofit option is even more appealing when considering CARB's unrealistic estimate of both the benefits and costs of the new standard. The IWFA and AIMCAL-WFC agree with comments submitted by the Ford Motor Company that CARB has underestimated the costs required to comply with the proposed glazing standard and overestimated the benefits. And these estimates do not even take into account the inflationary impact that CARB's proposed regulation will have on the costs of OEM tinted glazing.

The proposed glazing standard will effectively grant a monopoly to the relatively few glazing companies that can meet the product standard. This concentrated group of manufacturers will have the ability and incentive to raise prices given that their product will be mandated by the state. This will cause an increase in costs to automobile manufacturers and ultimately consumers.

Furthermore, consumers will incur significantly more costs for repair and maintenance of glazing than they would if window film and other technologies remained as viable alternatives. Indeed, after the proposed regulation goes into effect, consumers will have no option but to turn to OEM replacement materials, which generally cost more than aftermarket parts, to meet their needs. We urge CARB not to pick winners and losers by regulation.

In addition to foreclosing existing technology from the market and increasing consumer costs, the proposed standard will stifle innovation and reduce the technologies that will be available in the future to help CARB meet its objectives regarding cool car standards. Developing new technologies, of course, requires substantial investment in research and development. But companies will not invest in the research and development necessary to create new technologies that perform better than those products specified in CARB's proposed glazing standard if CARB preemptively excludes the fruits of such research and development from the market. Moreover, even those companies that benefit from CARB's proposed standard, *i.e.*, the OEM window manufacturers, will likely reduce their investment in R&D, which will lead to a decrease in innovation. With fewer competitive threats facing them in the market place, at least in California, the OEM window manufacturers will not have the same incentive to invest in R&D. Indeed, economic research shows that R&D spending and innovation tend to increase and decrease along with the level of competition and concentration in the market place. *See* **Kenneth J. Arrow, Economic Welfare and the Allocation of Resources of Innovation, in the Rate and Direction of Inventive Activity: Economic and Social Factors at 609-25 (Nat'l Bureau of Econ. Research ed. 1962).** Although the standard will apply only in California, given the size and importance of the California market, the standard will undoubtedly frustrate innovation on a national scale.

In addition to the concerns discussed above regarding the inherent flaws of a prescriptive standard, we believe CARB must obtain a federal preemption waiver in order not to run afoul of the Clean Air Act. Specifically, Section 209(b) of the Clean Air Act, 42 U.S.C. § 7543 requires that states obtain a preemption waiver from the Environmental Protection Agency ("EPA") in order to circumvent Section 209(a), which provides that "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." CARB's standard surely "relat[es] to the control of emissions from new motor vehicles" and we do not believe the proposed standard falls within the parameters of any existing waiver. Accordingly, it will be preempted by federal environmental laws.

Likewise, we believe the proposed regulation may conflict with and, therefore, be preempted by NHTSA's glazing standard, Federal motor vehicle Safety Standard No. 205, 49 C.F.R. § 571.205, to the extent the proposal would effectively restrict the types of glazing materials that manufacturers may use. See 49 U.S.C. § 30103(b) (providing that, "[w]hen a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter" (emphasis added)).

The last full industry mailing list used by our associations contained over 1,200 small businesses in California involved in the window tinting industry, normally employing less than 10 employees each. A prescriptive standard which may preclude them or their distributors or manufacturers from participating in either a current or future market in California instead of a performance standard which lets all of them, as well as other possible technologies and small aftermarket companies participate, would not appear to be the best method of achieving the desired end goal.

In sum, we believe CARB can meet its goals with a performance standard that will not limit innovation, harm consumers, or exclude existing technologies from the market. Therefore, we respectfully but unequivocally request that California adopt a performance based standard to meet the goals of California's Global Warming Solutions Act. IWFA and AIMCAL-WFA would welcome the opportunity to work with CARB in developing such a standard.

Sincerely,

Darrell Smith
Committee Manager
AIMCAL Window Film Committee

and

Executive Director
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