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April 18, 2016

Comments by Auto Care Association, Coalition for Auto Repair Equality (CARE) and California Automotive Wholesalers Association (CAWA)

Re: Proposed Amendments to the Regulation for Small Containers of Automotive Refrigerant

The Auto Care Association, Coalition for Auto Repair Equality (CARE) and California Automotive Wholesalers Association (CAWA) thank the Board for the opportunity to provide comments on the proposed amendments to the Regulation for Small Containers of Automotive Refrigerant. The Auto Care Association is a national trade association representing manufacturers, distributors, retailers and installers of automotive parts and accessories. CARE is a national trade group that is comprised of many of the major automotive parts retailers in the United States. CAWA is a state group representing the auto parts industry in California. Each of our organizations have members involved in both the packaging and retailing of the small cans of refrigerant that are the subject of this rulemaking.

I want to note that auto parts retailers in California have played an important role in making sure that their products are used in an environmentally responsible way. This includes taking back from their customers oil, batteries and other used automotive parts. All of these items are recycled and reused, both reducing the environmental impact of these products and increasing the reuse of the raw materials needed to build parts.

Our associations and our members are proud of the cooperative effort that took place with the Board in developing and implementing this regulation. In particular, the self-sealing valve that is required on all small containers sold in California has resulted in a substantial reduction in emissions of R-134a, both in the use and disposal of cans. In fact, the self-sealing valve has been so successful that the U.S. Environmental Protection Agency (EPA) is in the process of finalizing a regulation that will make the self-sealing valve a national standard.

In addition to the self-sealing valve, the current regulation requires that retailers charge consumers a deposit of $10 on the purchase of the can. The deposit and recycling program were included in the rule due to concerns from CARB that the cans retained a significant amount of refrigerant even after their use by a consumer. Under the regulation, the retailer must return the deposit to the consumer if the used container is returned to the retailer within 90 days. The retailer has the discretion not to refund the deposit if the can is not returned within 90 days. In

practice, our members tell us that in most cases they are returning the deposit to the customer no matter when that can is returned. Under the program, once the can is returned, the retailer sends it back to the manufacturer where the refrigerant is evacuated and the can recycled.

Similarly, manufacturers of small containers are required to collect deposits at the time of sale to a distributor or retailer, and refund that deposit when the used can is returned. However, the regulation intentionally did not establish an amount for the deposit that the manufacturer is required to charge the retailer. According to CARB, this was to allow the manufacturers to offer the retailer a market-based incentive to participate in the program. Therefore, the amount of deposit that the retailer might hold based on unreturned containers and the money held by the manufacturers for unreturned cans will likely be different based on the deposit charged by the manufacturer to the retailer.

Furthermore, manufacturers are required to use unreturned deposits received from the retailer only on enhanced educational programs approved by CARB, designated to inform consumers of measures to reduce greenhouse gas emissions associated with do-it-yourself recharging of MVAC systems. However, the regulations do not impose similar requirements on retailers. CARB had originally included a provision that stated: "All deposits not returned to customers in exchange for used small containers of automotive refrigerant will accrue to the benefit of the manufacturer." As part of its "Proposed Additional Modifications to the Original Proposed Regulation Order" CARB explicitly took that requirement out. Therefore, the rule as it currently stands has no requirement regarding what retailers are supposed to do with unreturned deposits. Retailers assumed that the elimination of this requirement was to provide funds for the retailers to implement the deposit program required by this regulation.

Last fall, CARB initiated discussions with the refrigerant can industry and retailers to eliminate the recycling program because the self-sealing valve had made it redundant. During those discussions, unfortunately and incorrectly, the CARB staff accused the retailers of failing to properly follow the regulation by not returning the deposits to the manufacturer. When the retailers pointed out that CARB had taken that requirement out of the rule, the CARB staff ended discussions over eliminating the recycling program. There was no further discussions about ending the program until March 1, 2016 when this rulemaking was proposed.

I wish point out that the staff's position on this issue is incorrect. Not only does the current regulation not include any reference to what retailers are to do with unreturned deposits, but the guidance issued by CARB (attached to this testimony) for retailers also fails to mention that retailers were to forward unreturned deposits to the manufacturer. Finally, this issue has never been raised with retailers by CARB since the program's inception nearly six years ago. Thus, in summary, CARB expected retailers to comply with a non-existent regulatory requirement and has chastised them for failing to do so.

Notwithstanding this fact, CARB is maintaining in its proposal that the requirement in this proposal for retailers to forward unreturned deposits to the manufacturer is a "clarification" of the current requirements. We take exception to this assertion. This proposal is not a clarification, but instead a new requirement and should be treated as such by the Board.

Moving forward, we do not believe, based on the current situation, that the recycling program should continue. As CARB staff has admitted when they were first proposing to eliminate the program last fall, there is very little refrigerant remaining in the vast majority of used cans and therefore the value of the program in reducing global warming emissions is extremely low. Further, the $10 deposit serves to raise the initial cost of the containers for low income individuals who are likely using the product because they can't afford the higher cost of using a professional service to recharge their air conditioning system. While such action could have been justified due to the global warming reductions that CARB thought it was achieving, the current information on the program effectiveness fails to demonstrate that the program provides any significant benefit in reducing emissions of global warming gases.

While we understand that CalRecycle has raised concerns regarding the disposal of the cans, which they consider a hazardous waste, this is a very different issue from controlling global warming gases and should be undertaken as part of another rulemaking. Controlling the recycling of solid waste has been delegated by the legislature to CalRecycle and therefore, since the disposal of the refrigerant no longer has any significant effect on greenhouse gas emissions, it should be left to the agency which has that responsibility. Even if CARB has authority to regulate the disposal of the small can, the recycling program as it currently stands is extremely inefficient from an environmental and resource point of view based on the fact that the cans are used in California and then shipped across the country for recycling. Since there is so little refrigerant remaining in the cans, there is little resource recovery for the manufacturers that would justify the current program from their end. Further, the state currently deals, on a daily basis, with a large amount of household waste that is considered hazardous. The cans of refrigerant would represent a miniscule portion of this waste stream (we estimate less than 0.5 percent of the products designed are household hazardous waste) and therefore it is unclear why an inefficient stand-alone program focused on refrigerant cans is justified. The Auto Care Association has offered to work with staff on a better solution, but we have been told that there is no interest in such discussions.

We strongly oppose this rulemaking and the confrontational process that CARB has employed in its development. If the Board is going to move forward with the current proposal, we have some specific comments on provisions contained within the proposal:

1. Due to the fact that the staff has labeled the use of unreturned consumer deposits by retailers a "clarification," it is not clear whether the staff intends to impose the new requirement on retailers to unreturned deposits they are currently holding. As I have stated, it would be unfair to impose this requirement on the retailers retroactively. Therefore, any amendment should clearly state that it only applies to deposits received in sales transactions after the effective date of the rulemaking.

2. A requirement for retailers to return unreturned deposits every 90 days to the manufacturers is an unworkable and inefficient program that conflicts with the reason for requiring the self-sealing valve. For starters, if consumers are being urged

to keep the cans until they are empty, then pushing them to return the can in 90 days is conflicting. Such a situation might cause unnecessary of venting by consumers of gas from the cans and could cost the retailer to pay two deposits: one when it is returned to the manufacturer after 90 days and one that the consumer demands when they do finally return the can after the 90 days has expired. We understand that staff is proposing to increase the time to 180 days for reports and deposit return requirements. While this would be an improvement, we still are opposed to the retailers being forced to send money to manufacturers for education in California. Similar to the entire recycling program, it is inefficient and burdensome on all parties involved.

3. A paragraph should be added that clarifies how the process will work for review, approval and reconciliation of funds used by manufacturers for consumer education. The current wording is vague and provides little guidance as to what kinds of consumer education programs will be acceptable.

4. We are not clear what will happen if the manufacturer is overseas. Will that manufacturer be complying with the consumer education requirements? There is little guidance in the regulation to address this issue.

5. Auto Care and CARE do not support the current labeling provisions in the proposal. The can labels already contain significant instructions in fairly small type on the proper use of the can, the refrigerant, and warnings on potential misuse and proper disposal. We do not believe that any additional labeling will be effective in communicating information to consumers as it would require either using even smaller type or eliminating other necessary information. Users are only going to read so much. If there is too much information on the can, they are more likely to ignore all of it or be confused. We understand that CARB is going to propose to significantly reduce the amount of added verbiage for the label. While we would prefer no additions, this proposal would be a significant improvement.

6. Auto Care and CARE further urge that if the labeling requirement moves forward, the Board does not require a sell-through period for retailers. This would be unnecessarily costly to manufacturers and retailers, requiring retailers to return the unused cans to the manufacturer. Instead, we would propose that there be a manufacture-through date allowing for an orderly transition and avoiding the emissions generated by having to return the unsold cans to the manufacturer. The Board has told us that they are in agreement on this issue, which we appreciate.

7. Finally, we do not believe that any new changes should be adopted until the issue of the current unreturned consumer deposits is resolved. It is unfair for CARB to expect industry to support any new changes to the regulation while trying to retroactively impose conditions on the use of the current unreturned consumer deposits.

The Auto Care Association, CARE and CAWA regret that this rulemaking process has not been the same positive experience that occurred during the development of the original regulation. We believe that the Board's attempts to blame retailers for non-compliance, that is clearly not supported by the regulation, is unfair and has been counter-productive to developing a regulation of small cans that makes sense for the environment and consumers. Our associations and our members continue to stand ready to move forward on discussions that could lead to the development of a more effective program in the future, but we refuse to be bullied into accepting an interpretation of a past regulation that is not supported by either the regulatory language or the actions of Board staff.

Sincerely,

Aaron Lowe
Senior Vice President, Regulatory and Government Affairs
Auto Care Association

FACTS ABOUT

Automotive Refrigerants: Retailer Requirements

Do-It-Yourself recharging of automobile air conditioners: A significant source of climate-changing gases

The refrigerant R134a is a highly potent greenhouse gas. A single 12-ounce container has the same climate-changing potential as all the emissions from a typical California vehicle driven over 1,000 miles. California's regulation requires more control over R-134a and its containers to reduce unnecessary releases.

What is the purpose of this regulation?

The regulation reduces:

- Greenhouse gases emissions
- Waste going to landfills

Californians gain these benefits while still being able to charge their own vehicle's air conditioner.

Who must comply with the regulation?

The primary regulatory burden falls on manufacturers; however, those who sell automotive refrigerant products to consumers who recharge motor vehicle air conditioning systems must also comply.

What are the regulatory requirements for retailers?

Retailers must:

- Collect a $10 deposit at the time of product sale to the consumer.
- Return deposits when containers are brought back within 90 days of purchase, with a sales receipt and undamaged (After 90 days retailers may refund a deposit at their discretion).
- Store returned containers in a manner compatible for transport to recycling facilities.

Deposits paid to the distributor or manufacturer as part of the wholesale cost must be returned when used canisters are returned.

Manufacturers must coordinate with and assist retailers in transporting used containers to recycling facilities.

In addition, retailers must:

- Distribute the manufacturers' educational brochures to consumers.
- Display an 8 1/2" X 11" manufacturer-supplied placard next to the automotive-refrigerant products.

Finally, upon the request of the California Air Resources Board (ARB), retailers must report annual sales and returned-container data by March 1 of the following year. Report forms are available from the regulation's website listed below or the product manufacturers. Retailers must maintain records of invoices of the product bought and sold for a minimum of five years.

California retailers must only sell small-container automotive-refrigerant products certified by the ARB. The certified products are listed in the executive orders posted on the regulation's website.

When does the regulation take effect?

The regulation took effect January 1, 2010 and only small-container refrigerant products certified by the ARB may be sold in California. Anyone selling small cans of R-134a for automotive air-conditioner replenishing must now meet all retailer requirements specified above.

What are the consequences of not complying?

Penalties may be assessed for any violation of this regulation pursuant to Health and Safety Code section 38580. Each day during any portion of which a violation occurs is a separate offense.

For more information

This regulation, fact sheets, executive orders for the certified products, and report forms are available at: *www.arb.ca.gov/cc/hfc-mac/hfcdiy/hfcdiy.htm*

For any further information, contact Mr. Winston Potts, ARB Research Division, at *wpotts@arb.ca.gov* or (916) 323-2537.

To obtain this document in an alternative format or language please contact the ARB's Helpline at (800) 242-4450 or at *helpline@arb.ca.gov*. TTY/TDD/ Speech to Speech users may dial 711 for the California Relay Service.

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April 15, 2016

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Re: Proposed Amendments to the California Air Resources Board Rules on Small Cans of Refrigerant

Dear Mr. Lowe:

You requested our opinion on the claim by the California Air Resources Board ("ARB") staff that consumer deposits held by retailers in California under the regulations adopted by ARB to control the sale and disposal of small cans of automotive refrigerant were required to be used for consumer education under those regulations. You also requested our opinion on the need for the continuation of the can deposit and return program established by those regulations because that program has been shown to have only negligible emissions reduction benefit.

EXECUTIVE SUMMARY

On March 1, 2016, the ARB staff published a Notice of Public Hearing (the "2016 Notice") to consider amendments to the Regulations for Small Containers of Automotive Refrigerant (California Code of Regulations, title 17, Sections 95360 et seq.) (the "Regulations"). According to staff, the primary purpose of the proposed amendments was "to clarify the existing requirement that retailers must transfer unclaimed consumer deposits to manufacturer-managed accounts to be spent on programs for the benefit of the consumers,..." (2016 Notice, page 3).

However, there is no requirement in the current Regulations for retailers either to return unclaimed deposits to the manufacturers or to use them for consumer education. Those requirements were considered and specifically deleted from the proposed Regulations before they were finalized in 2010.

The regulatory background and staff actions since adoption of the Regulations also demonstrate that staff did not expect the unclaimed deposits the retailers held to be returned to the manufacturers until

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the staff changed its position late last year. In fact, both staff and industry recognized that the unclaimed deposits held by the retailers were to be retained by the retailers to reimburse them for the administrative costs that they incurred in participating in the program. For staff to now claim that this requirement has always existed under the Regulations is a misstatement of the facts and an Orwellian attempt to change the Regulations retroactively

This position by the staff is even more unjustifiable because last summer it had proposed scrapping the can deposit and return program because it was not an effective emissions reduction measure. Since then it has reversed its course and proposed retaining the program and implementing this new change in a less than subtle attempt to force retailers to use previously unclaimed consumer deposits for consumer education.

The can deposit and return program no longer serves any significant emission reduction purpose. Therefore it should be eliminated for practical reasons and because ARB lacks the legal authority to continue it merely for waste recycling purposes.

BACKGROUND

The Regulations were initially proposed as a Discrete Early Action regulation under the California Global Warming Solutions Act of 2006 (AB32, Nunez, 2006). AB 32 required ARB to adopt regulations by January 1, 2010 to achieve the maximum technologically feasible and cost-effective reductions in greenhouse gases. Pursuant to AB 32 the Board adopted an Early Acton Plan and the regulation of small cans of refrigerant was one of the proposed Early Action items.

Proposed Regulations were published by the staff in December, 2008 (the "Original Proposed Regulations") and initially presented to the Board in January of 2009. The final text was adopted on January 5, 2010 after changes were made based on two fifteen day comment periods. Both before the proposed Regulations were initially prepared and throughout the comment and amendment period, the manufacturers of small containers of refrigerant worked with the ARB staff to achieve a workable program that would benefit the environment but not impose unnecessary burdens on consumers, retailers or manufacturers.

The primary achievement of the Regulations was to require the use of self-sealing valves on all small cans of motor vehicle refrigerant. One of the concerns regarding use of small cans of refrigerant was that if the entire contents of the can were not used during one recharge of the vehicle's air conditioning system, the contents remaining in the can would eventually leak into the atmosphere. Unlike the valves it replaced, the self-sealing valve virtually eliminates releases of refrigerant from the can while it is not in use thus achieving significant reductions in greenhouse gas emissions.

While the industry believed that the self-sealing valve alone would be sufficient to eliminate almost all of the emissions from the cans, the staff was concerned that used cans, even if apparently empty, might still contain a significant amount refrigerant which would eventually be emitted. Therefore, it also required a can deposit and return program. Under that program, whenever a small can of refrigerant is purchased by a consumer, in addition to the price of the can, the consumer has to pay the

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retailer a $10.00 deposit (the "Consumer Deposit"). This deposit is to be returned to the consumer when he or she returns the empty can to the retailer. (While the Regulations only required the retailer to refund the deposit if the can was returned within 90 days of purchase, most retailers refunded the deposit for cans returned after that date.)

In addition to the Consumer Deposit, the Regulations also required the retailers to pay a deposit to the manufacturer at the time it purchased a small can of refrigerant from the manufacturer (the "Retailer Deposit"). Like the Consumer Deposit the Retailer Deposit was to be refunded to the retailer when it returned an empty can to the manufacturer. However, unlike the Consumer Deposit, and despite the repeated requests of the manufacturers to do so, no fixed amount was set for the Retailer Deposit. Both the staff and the industry expected the Retailer Deposit to be less than the Consumer Deposit.

The Regulations clearly state that any unclaimed Retailer Deposits are to be spent by the manufacturer on consumer education (the "Education Requirement"). The Regulations contain no such requirement for the Consumer Deposits and in fact do not specify how those deposits are to be used.

REGULATORY LANGUAGE REGARDING UNCLAIMED CONSUMER DEPOSITS

Section 95366 of the Regulations contains the rules relating to the two can deposit programs. Subsection (a) establishes the rules for the Consumer Deposit program (the "Consumer Deposit Rules") and subsection (b) the requirements for the Retailer Deposit program (the "Retailer Deposit Rules"). While the Consumer Deposit Rules and the Retailer Deposit Rules contain many similarities, such as the requirements to collect and return deposits, in many ways they are different. That was why it was necessary to divide them into two different sets of requirements.

The Education Requirement is contained in subsections (b)(5) and (b)(6) of the Retailer Deposit Rules. No similar language exists in the Consumer Deposit Rules. Subsection (b)(5) specifically states that "All deposits not returned by the manufacturers to retailers in exchange for used small containers of automotive refrigerant will accrue to an account managed by the manufacturer to be used solely as described in section 9536(b)(6) for the purpose of enhancing the consumer education program." [Emphasis added]. As indicated in subsection (b)(5), subsection (b)(6) merely describes the type of consumer education for which these unexpended funds must be used. Therefore the clear language of the Regulations state that the Education Requirement only applies to unreturned Retailer Deposits.

The language of subsection (b)(5) is clear and not open to interpretation. That subsection only applies to Retailer Deposits not Consumer Deposits. Therefore, under California law, neither the history of the adoption of the Regulations or ARB's interpretation of them has any significance. The plain meaning of a statute controls if there is no ambiguity in the statutory language. Poole v Orange County Fire Authority, 61 Cal 4th 1378 (2015); Flour Corp. v Superior Court, 61 Cal 4th 1175 (2015). Administrative interpretation by an agency cannot override the plain language of a statute or regulation City of Scotts Valley v County of Santa Cruz, 201 Cal App 4th 1 (2011) and cases cited therein. Where the plain language of a statute or regulation is clear and unambiguous a court will not resort to rules of

construction or extrinsic evidence. Butts v Board of Trustees of the California State University, 225 Cal App 4th 825 (2014)

However, the conclusion that Consumer Deposits are not subject to the Education Requirement is confirmed by the support documents published during the adoption of the Regulations.

The Original Proposed Regulations were supported by the staff's "Initial Statement of Reasons for Proposed Regulation for Small Containers of Automotive Refrigerant" released on December 5, 2008 (the "Statement of Reasons"). The can deposit and return program is discussed on pages 15 and 16 of the Statement of Reasons. On page 16 it states "Unclaimed deposits that are retained by a manufacturer must be spent on enhanced education and outreach programs designed to inform consumers of measures to reduce GHG emission associated with DIY recharging of MVAC systems." [Emphasis added]. There is no discussion of how Consumer Deposits must be used.

However, the above language and the current subsection (b)(5) were not included in the Original Proposed Regulations.. Subsection (b)(6) was in the Original Proposed Regulations, but it only refers to "deposits" without making any distinction between the two different deposits. Industry did not believe that the Original Proposed Regulations were clear enough about the unclaimed deposits and their use. To address this problem subsection (b)(5) was the added to the Retailer Deposit Rules to confirm that only the Retailer Deposits held by the manufacturers were to be used for consumer education.

. Additionally, the Original Proposed Regulations contained a subsection (a)(4) in the Consumer Deposit Rules section which read,

> "(4) All deposits not returned to customers in exchange for used small containers of automotive refrigerant will accrue to the benefit of the manufacturer."

This was a clear statement that unreturned Consumer Deposits were not to be retained by the retailer. However, after discussion with industry concerning the need to offer incentives to retailers to participate in the program, this provision was deleted to eliminate the requirement that Consumer Deposits had to be returned to the manufacturer.

These conclusions are also supported by staff comments in the Notice of Hearing on the proposed 15 Day Modifications to the Regulations ("15 Day Notice"). In the 15 Day Notice the staff admits that the requirements related to unclaimed deposits were confusing and therefore "Prior section 95366(a)(4) and new section 95366(b)(5) have therefore been deleted and added, respectively, to clarify that manufacturers do not ultimately retain unclaimed deposits, but must expend and account for the expenditure of those deposits in accordance with sections 95366(b)(6) and 95367(a)(5) of the regulations." [Emphasis added] So in "clarifying" the deposit issue the staff eliminated the requirement for retailers to return the unclaimed Consumer Deposits to the manufacturer and added language that only required the manufacturers to use the unclaimed Retailer Deposits for consumer education. Despite this clear statement, staff is now alleging that the Consumer Deposits were to be returned to the manufacturers and that both deposits were to be used for consumer education.

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UNCLAIMED CONSUMER DEPOSITS AS INCENTIVES FOR THE RETAILERS

The staff also cannot claim that it did not know that there would be a difference between the amount of the Consumer Deposit and the Retailer Deposit and that the difference between those amounts for the unreturned cans would be used to incentivize the retailers to participate in the program.

ARB knew from the very beginning of the rulemaking that there could be a difference in the amounts of the Consumer Deposit and the Retailer Deposit and recognized that some incentive might be necessary to compensate the retailer for participating in the program. This is clearly stated on page 23 of the Statement of Reasons.

> "The proposed regulation only specifies the amount of deposit the consumer must pay. The regulation leaves a manufacturer the flexibility to adjust the deposit at different steps of the process. If a retailer incentive is needed to cover handling costs or promote a higher return rate, a manufacturer may decide to pay a small incentive to retailer when the used cans are collected and returned."

The juxtaposition of these two concepts, i.e., the difference in the two deposit amounts and the need to offer the retailers an incentive, make it clear that staff knew that the deposit difference could be used to compensate the retailer and that is exactly what happened.

However, industry quickly pointed out to the staff that unless the Retailer Deposit was also fixed, albeit at a different level than the Consumer Deposit, competition among the manufacturers would force the Retailer Deposit to a very low level.

In the comments submitted by the Automotive Refrigeration Products Institute (ARPI) on April 22, 2008 to the proposed 15 day modifications to the Regulations (ARPI 4-22-09 Comments"), ARPI stated "There must be a minimum specified deposit amount at the manufacturer's level..." "in order to assure fair administration of manufacturer deposits, remove the possibility of 'competing' deposit sums" and antitrust problems." When the second 15 day modifications failed to include a fixed amount for the Retail Deposit, ARPI submitted additional comments on November 16, 2009 (the "ARPI 11-16-09 Comments") explaining in even stronger language why the Retailer Deposit needed to be fixed.

However, despite these requests staff left the Retailer Deposit unfixed which resulted in it being set at a very low level.

ARB ACTIONS SINCE ADOPTION CONFIRM INDUSTRY POSITION

Not only does the administrative record of the rulemaking confirm the retailers' position that the unclaimed Consumer Deposits were not required to be used for consumer education, ARB actions since 2010 do also.

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ARB published a two page fact sheet for retailers concerning the can deposit and return program and it has been revised at least once since its original publication. The document "Facts About Automotive Refrigerants: Retailer Requirements"(the "Facts") is available on the ARB website. One of the questions posed in the Facts is "What are the regulatory requirements for retailers?" In a lengthy answer all aspects of the deposit collection and return program are addressed, but there is no mention that the Consumer Deposits for unclaimed cans had to be returned to the manufacturer or had to be used for consumer education.

Similarly, although the can deposit and return program has been in existence since 2010 and the ARB staff has assiduously tracked return rates for cans and the use of unreturned Retailer Deposits for consumer education, it never asked how the unclaimed Consumer Deposits were being used until last fall. It did not do so because it never expected the Consumer Deposits to be returned to the manufacturers or used for consumer education and demonstrates that its current position on this issue was only recently developed. It is now trying to create a new requirement that never existed.

STAFF'S PROPOSAL TO EXTEND THE CAN DEPOSIT AND RETURN PROGRAM IS AN UNATHORIZED ATTEMPT TO COMPEL RETAILERS TO COMPLY WITH A NON-EXISTENT REQUIREMENT

On August 25, 2015 ARB held a public workshop in Sacramento to discuss amending the Regulations. It was attended by several of the manufacturers and retailers.

The staff presented its proposal to eliminate the program and there was little or no opposition to the proposal. The majority of the discussion concerned how to transition out of the program. During that discussion the issue of the unclaimed Consumer Deposits came up. Despite its current position, at that time staff did not know what should be done with them and did not claim that they had to be returned to the manufacturers or used for consumer education.

Following this workshop, the staff took a more active position in trying to get the retailers to return the unclaimed Consumer Deposits and developed a position that, despite the clear language of the Regulations, such a return was required. During several discussions with the retailers and their representatives, it was made quite clear that if the retailers would not return the unclaimed Consumer Deposits to the manufacturers that the staff would reverse its original inclination to terminate the program and would continue it. This is exactly what staff has now done. Such actions are a blatant attempt to force compliance with a non-existent regulation and impose requirements on the retailers retroactively.

THE CAN DEPOSIT AND RETURN PROGRAM NO LONGER SERVES AN EMISSIONS REDUCTION PURPOSE AND SHOULD BE ELIMINATED

The can deposit and return program was initially created to address the supposed need to recapture the refrigerant remaining in the cans after their use by consumers. However, the self-sealing valve has virtually eliminated any refrigerant residue in returned small cans. The ARB staff confirms this

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in the Staff Report: Initial Statement of Reasons released March 1, 2016 (the "2016 Statement of Reasons") supporting the proposed amendments.

ARB had originally estimated that there would be about 20% of refrigerant remaining in the recycled cans by volume (2016 Statement of Reasons, page 4). As its states further,

> "During implementation, it became apparent that the remaining refrigerant was about 2% to 4% of the container volume, which is far below the original anticipated amount of recovered refrigerant (20%). This was verified by ARB staff conducting the evacuation of used product container returned to retailers (ARB, 2015). So the emission reduction from the container return program is significantly less than originally anticipated."

The reason for this was the self-sealing valve. As stated by the staff

> "Finally, the self-sealing valve requirement has resulted in relatively low container return rates as well as minimal residual refrigerant. This provision of the regulation has essentially negated the emission reduction attributable to the container deposit and return program." (2016 Statement of Reasons, page 6).

These statements demonstrate that the program no longer provides significant emissions benefits and certainly not the benefits that were intended when it was adopted. Continuation of the program imposes not only a burden on the retailers, manufacturers and consumers but on the ARB staff who must monitor the program. Funds spent for this program could be better spent on programs that offer greater emissions reduction benefit. Therefore, from a practical standpoint, the program serves no useful emission-related purpose and therefore should be terminated.

BECAUSE THE PROGRAM NO LONGER SERVES TO SIGNIFICANTLY REDUCE EMISSIONS ARB HAS NO AUTHORITY TO CONTINUE IT

The duties of the ARB are clear. It is the state's air and emissions agency. As stated in Section 39003 of the Health and Safety Code.

> "The State Air Resources Board is the state agency charged with coordinating efforts to attain and maintain ambient air quality standards, to conduct research into the causes of and solution to air pollution and to systematically attack the serious problem caused by motor vehicles, which is the major source of air pollution in many areas of the state."

Unless a program has a clear and significant effect on emissions and air pollution and control, it is outside the rulemaking authority of the agency.

Section 38560 of the Health and Safety Code which was part of AB32, and specifies ARB's authority with respect to the Early Action program, states, "The state board shall adopt rules and regulations in open public process to achieve the maximum technologically achievable and cost effective

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greenhouse gas reductions from sources or categories of sources, subject to the criteria and schedules set forth in this part." While ARB originally thought that the can deposit and return program would significantly reduce greenhouse gas emissions and therefore met these criteria, experience has shown that that is not the case. The program does not achieve significant emissions reductions nor is it cost effective.

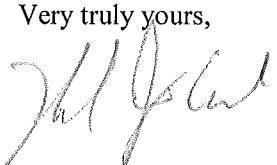
Since the workshop last summer, both the manufacturers and the retailers pointed out to staff the program's lack of effectiveness and suggested that staff proceed with its original plan to terminate the program. However, the staff indicated that it wanted to continue the program because CalRecycle wanted the cans to continue to be recycled regardless of whether the program served any emissions reduction purpose. However, solid waste recovery and recycling is not within the purview of ARB's administrative mandate.

California law is very clear that an agency cannot adopt regulations that go beyond the authority delegated to it by the state. "Whenever by the express or implied terms of any statute a state agency has the authority to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." California Code of Regulations, Title 2, Section 11342.2. "An administrative agency has only such rulemaking power as is invested in it by the statute." Paintcare v Mortensen, 233 Cal App4th, 1292 (2015); Carmel Valley Fire District v State of California, 25 Cal4th 287 (2001). It may not enlarge its authority or exceed the powers given to it by the statute. Martinez v Combs, 49 Cal.4th 35 (2010). Regulations that are inconsistent with a statute, alter or amend or enlarge or impair its scope are void. Paintcare v. Mortensen, supra

These rules apply to ARB Environmental Defense Fund v California Air Resources Board, 30 Cal App.3d 829 (1973). ARB has no authority to enact regulations that primarily serve a waste recycling purpose. It must act within the scope of its delegated authority. Western Oil & Gas Association v Air Resources Board, 3 Cal 3d 502 (1984). An agency has no discretion to promulgate a regulation which is inconsistent with its governing statute. Carmel Valley Fire District, supra

Staff acknowledges that the can deposit and return program no longer serves any significant emissions reduction purpose and until the issue of the use of unclaimed Consumer Deposits arose had intended to ask the Board to terminate it. Addressing the issue of can disposal absent an emissions purpose is a solid waste reduction measure and not within CARB's authority. Therefore, the amendments should not be adopted and the program should be eliminated.

Very truly yours,



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