NAIMA
NORTH AMERICAN INSULATION
MANUFACTURERS ASSOCIATION

VIA E-MAIL

August 30, 2012

Mr. Steven S. Cliff, Ph.D.
Mr. James Goldstene
California Air Resources Board
1001 I Street
Sacramento, CA 95814

RE: NAIMA's Comments On CARB's Cap-and-Trade Proposed Provisions Addressed At Emissions Leakage Workshop Held July 30, 2012

Dear Messrs. Cliff and Goldstene:

INTRODUCTION

The North American Insulation Manufacturers Association ("NAIMA") greatly appreciates the opportunity to again provide comments on the need for the California Air Resources Board ("CARB") to recognize that fiber glass insulation manufacturing (NAICS Code 327993 – mineral wool) is highly trade-exposed, clearly subject to high leakage risk, and in need of a 100 percent assistance factor or 100 percent allowances[1] in all three compliance periods under the AB 32 Cap-and-Trade Program. Fiber glass insulation manufacturing should also be afforded a 100 percent assistance factor because insulation strongly promotes energy efficiency in buildings, and CARB has formally recognized the critical importance of energy efficiency in achieving the state-wide greenhouse gas ("GHG") emissions goals of AB 32.

NAIMA is the association for North American insulation manufacturers of fiber glass and mineral wool insulation products. Specifically, NAIMA represents four fiber glass insulation manufacturers with manufacturing plants in California:

- CertainTeed Corporation – Chowchilla, California
- Johns Manville – Willows, California
- Knauf Insulation – Shasta Lake, California
- Owens Corning – Santa Clara, California

NAIMA has previously provided written and oral comments to CARB regarding leakage. These previously submitted comments and the comments set forth herein emphasize the absolutely

[1] "Assistance factor" and "allowances" are used interchangeably throughout these comments.

critical role that domestic leakage must play in CARB's analysis of leakage if it is committed to protecting jobs and safeguarding California's economy.

Therefore, NAIMA strongly urges CARB to carefully consider these comments and give the fiber glass industry 100 percent allowances in all three compliance periods.

DOMESTIC MARKETS IMPACT LEAKAGE TO A GREATER DEGREE THAN FOREIGN COMPETITION

Fiber glass insulation (NAICS Code 327993 – mineral wool) has been judged as having only a medium leakage risk, which equates to an assistance factor of 100 percent in 2012–2014; 75 percent in 2015–2017; and 50 percent in 2018–2020. *See* Table 8-1: Industry Assistance. The other two glass sectors (flat glass and glass packaging) have been judged to have high leakage risks and have been awarded an assistance factor of 100 percent for all three compliance periods. CARB has justified that distinction based on its perception of the effect of foreign competition on each segment of the glass industry. Prevention of leakage is how CARB intends to address the alternative supplier threat to California industry from the Cap-and-Trade Program and the inability of California to regulate those suppliers' greenhouse gas emissions.

CARB Has A Mandate To Minimize Leakage

AB 32 mandates that CARB minimize leakage "to the extent feasible." *See* California Health and Safety Code § 38562(B)(8). CARB's technical appendices on leakage and allowance allocation seem to focus on international leakage (relocation of industry from California to other countries). But the statutory definition of leakage is not restricted to the international context; rather, it includes any situation where "a reduction in GHG emissions within the state [] is offset by an increase in GHG emissions outside the state." Cal. Health & Safety Code 38505(J). The main body of CARB's "Initial Statement of Reasons" (or "ISOR") for the Cap-and-Trade Program defines leakage in similar terms: "If production shifts outside of California to a region not subject to GHG emissions-reduction requirements, emissions could remain unchanged or even increase."

Given CARB's clear duty to minimize leakage in all forms, there is no reasonable justification for CARB restricting leakage consideration to international leakage. In the context of trade exposure, for example, CARB admits that its methodology "may not be sufficient to accurately quantify the degree of exposure to competition for many sectors." *See* ISOR App. K at page K-27. There may be more data on international trade than on commerce between the states, but additional domestic data has been previously provided by NAIMA.

CARB's seeming admission that there may be deficiencies in its leakage analysis illustrates why NAIMA's additional information on leakage is so relevant. The information set forth herein should help CARB to more precisely meet AB 32's mandate to minimize leakage in this industry.

U.S. Domestic Insulation Production Presents Genuine Leakage Threat For California

CARB should recognize that if the California fiber glass operations are not economically viable as a result of AB 32, some of NAIMA's California members might close their plants or significantly reduce capacity. The fiber glass insulation production capacity in other jurisdictions will be able to adequately supply the California market, thereby increasing emissions in those jurisdictions. This fact is particularly relevant at the present moment because industry manufacturing capacity is and will continue to be substantially underutilized for many years due to current economic conditions and the downturn in the construction industry.

Any demand previously fulfilled by a California plant can be easily and economically supplied from other U.S. plants. This industry does not have to look to offshore facilities to supply the California market. In addition to the increase in greenhouse gas emissions per ton of fiber glass insulation produced at these plants located outside California, the transportation needed to get that material to California markets would have a further negative impact on greenhouse gas emissions.

Aislantes Minerales, S.A. de C.V.
San Luis Potosi, Mexico

Amerrock Products, LP
Nolanville, TX

CertainTeed Corp.
Athens, GA
Chowchilla, CA
Kansas City, KS
Mountain Top, PA
Ottawa, Ontario
Redcliff, Alberta
Sherman, TX
Tilsonburg, Ontario

Fibrex Insulations Inc.
Sarnia, Ontario

Guardian Fiberglass
Albion, MI
Inwood, WV
Kingman, AZ
Mineral Wells, MS
Winnsboro, SC

Industrial Insulation Group, LLC
Phenix City, AL

Isolatek International
Huntington, IN
Stanhope, NJ
San Bernardino, CA
Houston, TX

Johns Manville
Berlin, NJ
Cleburne, TX
Defiance, OH
Defiance, OH
Innisfail, Alberta
McPherson, KS
Richmond, IN
Waterville, OH
Willows, CA
Winder, GA

Knauf Insulation
Lanett, AL
Shasta Lake, CA
Shelbyville, IN

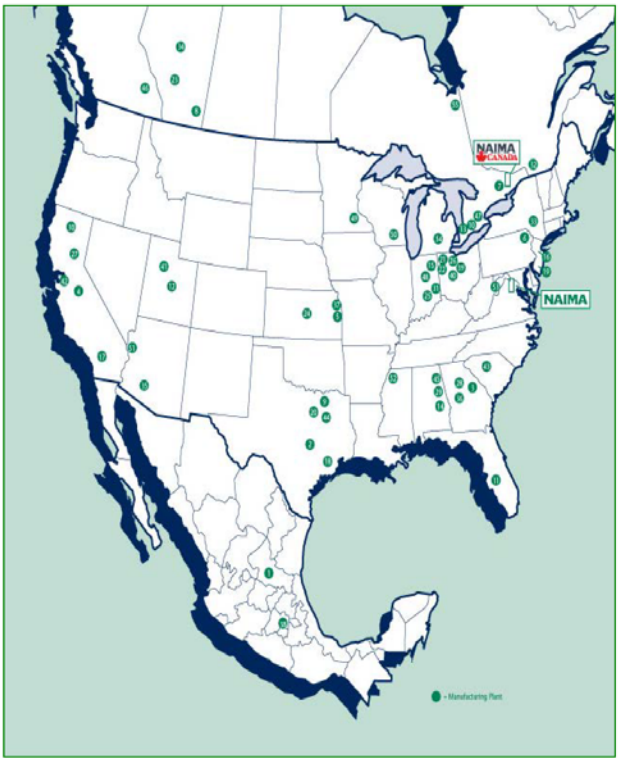
Owens Corning
Candiac, Quebec
Delmar, NY
Edmonton, Alberta
Eloy, AZ
Fairburn, GA
Kansas City, KS
Lakeland, FL
Mexico City, Mexico
Mount Vernon, OH
Nephi, UT
Newark, OH
Salt Lake City, UT
Santa Clara, CA
Scarborough, Ontario
Waxahachie, TX

Rock Wool Manufacturing Co.
Leeds, AL

Roxul Inc.
Grand Forks, BC
Milton, Ontario

Thermafiber, Inc.
Wabash, IN

USG Interiors, Inc.
Red Wing, MN
Walworth, WI



A close look at the map of currently operating fiber glass plants in North America effectively illustrates why fiber glass companies should be treated the same as the other segments of the glass industry and be given 100 percent assistance factor for all compliance periods through 2020. NAIMA points out two manufacturing plants right at California's border in Arizona. Two additional plants in Utah also could easily take up the work of supplying the California market. There are also four manufacturing plants in Western Canada.

The fiber glass insulation plants in the states bordering California are far more relevant to assessing the potential for leakage in this industry than 20 plants in Europe or 10 plants in Asia. If CARB is serious about preventing leakage from the State of California, it must carefully weigh the manufacturing potential, as illustrated on the above map of U.S. manufacturers. The presence of those 40-plus plants are the most effective argument for giving fiber glass plants 100 percent allowances for all compliance periods through 2020.

The fiber glass industry in California does face some competition from plants in Canada and Mexico, and some manufacturers already supply some of the California market from Canadian manufacturing plants. While there have been some efforts by Chinese manufacturers to supply the U.S. market, the Chinese insulation produced was inferior to U.S. and Canadian-produced product, and to date, China has not caught on as a source of supply for the U.S. market. However, a reduction of production in California could prompt a renewed effort on the part of Chinese manufacturers to supply this market.

Fiber Glass Companies Can Cover Production In California Plants

NAIMA has analyzed the fiber glass industry's capacity to compensate for the closure of 1 or more of California's fiber glass insulation manufacturing plants. Such plant closures would be likely triggered by the serious deleterious impacts from CARB's implementation of the proposed Cap-and-Trade Program.

First, to effectively assess the ability of North American fiber glass and mineral wool insulation manufacturers to satisfy any gap in the production of fiber glass insulation created by the closure of California's plants, it is necessary to assess the current production of California manufacturing facilities.

The following chart identifies the number of production lines available at the California fiber glass facilities:

Company	**Plant Locations**	**Number of Lines**
CertainTeed	Chowchilla, CA	2
Johns Manville	Willows, CA	2
Knauf	Shasta Lake, CA	1
Owens Corning	Santa Clara, CA	2

The cumulative potential production capacity for the four California plants is 449,604 tons of fiber per year. The average utilization of this capacity in 2010 was only 47 percent.

The CertainTeed, Johns Manville, Knauf, and Owens Corning facilities are producing residential and commercial insulation products that are used throughout the United States.

If any of the California plants were to close due to regulatory burden, fiber glass production facilities operating in the western part of North America could easily increase their production to serve the California market. These plants currently produce residential and commercial

insulation products that are equivalent to those manufactured at California plants; there is no reason why they would not be able to serve the California market. In addition, as the chart below demonstrates, these western U.S. producers have sufficient capacity to meet the demands of its current market plus anything west of its operation:

Company	Plant Locations	Number of Lines
CertainTeed	Redcliff, Alberta	1
Guardian	Kingman, AZ	1
Johns Manville	Innisfail, Alberta	3
Owens Corning	Eloy, AZ	1
Owens Corning	Nephi, UT	2
Owens Corning	Salt Lake City, UT	2
Owens Corning	Edmonton, Alberta	2
Roxul	Grand Forks, British Columbia	1

The cumulative potential production capacity of these western North American manufacturing plants is 332,801 tons of fiber per year. The average utilization of this capacity in 2010 was only 54 percent.

Many of these western North American manufacturers are currently underutilized because of the building downturn; therefore, these plants have sufficient existing capacity to meet the increased demand occasioned by the closure of one or more California plants. In addition, consistent with the westward migration of products described above, any challenge to meet market demands from these western manufacturing facilities could be met by those manufacturing in the middle region of the United States and Mexico:

Company	Plant Locations	Number of Lines
Aislantes Minerales	San Luis Potosi, Mexico	1
Amerrock Products	Nolanville, TX	1
CertainTeed	Kansas City, KS	4
Guardian	Albion, MI	4
Guardian	Mineral Wells, MS	2
Johns Manville	Cleburne, TX	3
Johns Manville	McPherson, KS	2
Johns Manville	Richmond, IN	2
Knauf Insulation	Shelbyville, IN	6
Owens Corning	Kansas City, KS	3
Owens Corning	Mexico City, Mexico	1
Owens Corning	Waxahachie, TX	3
Thermafiber	Wabash, IN	2

The cumulative potential production capacity of these middle North American manufacturing plants is 1,304,137 tons of fiber per year. The average utilization of this capacity in 2010 was only 57 percent.

As these charts demonstrate, the further east on the U.S. map, the greater the fiber glass insulation capacity. As illustrated above, the number of plants and the capacity of those plants are significantly greater. These simple geographic facts demonstrate that the current manufacturing capacity within the United States can, with a slight shift westward, accommodate the market demands created by the closure of three of the four California plants.

To further illustrate this point and bring it home, consider the chart below that lists the eastern manufacturing plants that also have the ability to meet any market demands created by the closure of California plants and the demand placed on plants in closer proximity to the California market:

Company	**Plant Locations**	**Number of Lines**
CertainTeed	Athens, GA	3
CertainTeed	Mountain Top, PA	2
CertainTeed	Ottawa, Ontario	3
Guardian	Inwood, WV	2
Guardian	Winnsboro, SC	1
Industrial Insulation Group	Phenix City, AL	1
Johns Manville	Berlin, NJ	1
Johns Manville	Defiance, OH	13
Johns Manville	Winder, GA	2
Knauf Insulation	Lanett, AL	3
Owens Corning	Candiac, Quebec	2
Owens Corning	Delmar, NY	2
Owens Corning	Fairburn, GA	3
Owens Corning	Lakeland, FL	2
Owens Corning	Mount Vernon, OH	1
Owens Corning	Newark, OH	3
Owens Corning	Scarborough, Ontario	2
Rock Wool Manufacturing	Leeds, AL	1
Roxul	Milton, Ontario	2

The cumulative potential production capacity of these eastern North American plants is 1,705,758 tons of fiber per year. The average utilization of this capacity in 2010 was only 49 percent.

The total cumulative capacity[2] for North America is 3,792,300 tons of fiber per year. The total utilization of this capacity in 2010 was only 52 percent. As summarized in the table below, the

[2] Specific facilities that produce fibers for the production of ceiling tiles, fire proofing products, or specialized insulation production – for example, automotive, aerospace, and battery separators – are not included in this total capacity calculation. This capacity specifically relates to building insulation in residential, commercial, and industrial applications.

numbers speak for themselves, and it is plainly evident that any market gap caused by closure of California's plants could be quickly and easily satisfied by existing operations.

Geographic Area	Manufacturing Capacity	Capacity Utilization – 2010
California	449,604	47%
Western North America	332,801	54%
Middle North America	1,304,137	57%
Eastern North America	1,705,758	49%
All North America	3,792,300	52%

It is also worth noting that fiber glass insulation can readily be transported into California from other jurisdictions. Insulation can, and today is currently, being shipped economically by truck or by rail (using intermodal trailers). It does not require any special infrastructure, and there are no hard and fast limits on shipping distances. In fact, some manufacturers have in the past and currently do ship products to Australia and Europe.

The above series of charts tell a story of an industry and its ability to supply and meet the North American insulation market demands.

Over the last five years, the industry has witnessed a downturn in the building market, and, hence, a correlating downturn in its business. Since 2005, annual new housing starts have decreased by more than two-thirds. In fact, 2008, 2009, and 2010 represent the three lowest annual housing start totals since 1959 (the earliest year for which statistics are available on the United States Census Bureau website.

Year	New Housing Starts[3]
2005	2,068,200
2006	1,800,900
2007	1,355,000
2008	905,500
2009	554,000
2010	587,600

As a result, some of the fiber glass insulation plants identified above are operating on a reduced capacity; others have reduced the number of lines actually operating; and others have closed their doors and are waiting for a change in the market to resume manufacturing. All of these plants are eager to increase or return to full capacity, and are capable of doing so should market opportunities present themselves.

[4] www.census.gov/const/startsan.pdf.

Domestic Leakage Must Be Addressed

Based on CARB's previous acknowledgement that its analysis of leakage risk for the fiber glass industry was limited because domestic market data was not utilized by CARB and, more importantly, CARB's statement to NAIMA that it would consider domestic data provided by NAIMA and use that data to reevaluate its leakage analysis, NAIMA prepared and presented in its February 16, 2011 letter to CARB and during the March 17 meeting with CARB, detailed capacity data for the entire fiber glass industry. This detailed data demonstrated that the U.S. fiber glass industry, as a whole, has the capacity to compensate for any closure of California plants. Therefore, NAIMA strongly urges CARB to give fiber glass 100 percent allowances for every phase of the Cap-and-Trade Program.

CARB SHOULD AFFORD FIBER GLASS INSULATION MANUFACTURING A 100 PERCENT ASSISTANCE FACTOR TO RECOGNIZE THE CRITICAL IMPORTANCE OF ENERGY EFFICIENCY IN ACHIEVING THE AB 32 GREENHOUSE GAS EMISSION GOALS

AB 32 established the goal that California achieves a reduction of GHG emissions to 1990 levels by 2020. The law also required CARB to develop a scoping plan to outline the State's overall strategy to achieve that 2020 GHG emissions goal. After much study and public input, CARB, in December 2008, issued its Climate Change Scoping Plan, which identifies a comprehensive set of actions designed to reduce overall GHG emissions in California, improve the environment, reduce dependence on oil, diversify energy sources, save energy, create new jobs, and enhance public health.

Section II.C. of the Scoping Plan identifies specific emissions reduction measures needed to achieve the GHG emissions goal. Several of the recommended actions focus on the critical importance of energy efficiency:

> *Maximize energy efficiency building and appliance standards, and pursue additional efficiency efforts including new technologies, and new policy and implementation mechanisms. Pursue comparable investment in energy efficiency from all retail providers of electricity in California (including both investor-owned and publicly-owned utilities).*[4]

The importance of energy efficiency is driven home by the Scoping Plan's "Table 2: Recommended Greenhouse Gas Reduction Measures,"[5] which recognizes that energy efficiency is even more important than the 33 percent renewable portfolio standard ("RPS") in achieving the AB 32 GHG emissions reduction goals. CARB estimates that energy efficiency will result in emissions reductions of 26.3 $MMTCO_2E$ in 2020, while the 33 percent RPS is estimated to achieve only 21.3 $MMTCO_2E$ in 2020.[6]

[4] California Air Resources Board, "Climate Change Scoping Plan, a framework for change," December 2008, p. 41.
[5] *Ibid.* at p. 17.
[6] *Ibid.*

Among the Scoping Plan quotes on energy efficiency are the following:

- "Many older homes can be retrofitted to use far less energy than at present."[7]
- "Furthermore, retrofitting existing residential and commercial buildings would achieve substantial greenhouse gas reduction benefits."[8]
- "Strategies for Existing Buildings – Voluntary and mandatory whole-building retrofits for existing buildings."[9]
- "As the Governor recognized in his Green Building Initiative (Executive Order S-20-04), significant reductions in greenhouse gas emissions can be achieved through the design and construction of new green buildings as well as the sustainable operation, retrofitting, and renovation of existing buildings."[10]
- "This Scoping Plan . . . further recommends that California adopt mechanisms to encourage and require retrofits for buildings that do not meet minimum standards of performance."[11]
- "Achieving significant greenhouse gas emissions reductions from new and existing buildings will require a combination of green building measures for new construction and retrofits to existing buildings."[12]

The Scoping Plan's recognition that energy efficiency is an important tool in lowering GHG emissions is collaborated through multiple sources. Energy conservation in buildings offers one of the most significant opportunities for savings and pollution reduction.[13] Moreover, insulation is cost effective, and, perhaps even more appealing, insulation is practical and an immediately available resource.[14]

In testimony before the U.S. House Subcommittee on Energy and Air Quality, it was stated that "Homes and commercial buildings are this nation's largest sector of energy use and – because of the close relationship between greenhouse gases and energy consumption – also the largest US source of anthropogenic greenhouse gases. Suffice it to say that buildings – and particularly residences – represent one of the last great frontiers of wasted energy."[15]

Since homes and commercial buildings consume nearly one half of California's energy, these structures must become an integral part of any successful effort to improve energy efficiency. The California Integrated Waste Management Board states that the residential sector (excluding commercial and industrial) accounts for approximately 31 percent of the electricity consumed in

[7] *Ibid*. at p. ES-13.
[8] *Ibid*. at p. 58
[9] *Ibid*. at p. 42.
[10] *Ibid*. at p. 57.
[11] *Ibid*. at p. 58.
[12] *Ibid*.
[13] Paul Hawken, *The Ecology of Commerce* (New York: Harper Business, 1993), p. 178.
[14] Enkvist, Per-Anders, Tomas Naucler and Jerker Rosander. 2007. "A Cost Curve for Greenhouse Gas Reduction." *The McKinsey Quarterly* 1: 38.
[15] Energy Efficient Codes Coalition, Testimony of Executive Director William D. Fay Before the Subcommittee on Energy and Air Quality of the Committee on Energy and Commerce, U.S. House of Representatives, July 17, 2008.

California.[16] The U.S. Department of Energy, along with various other government and third party organizations, put installation of insulation at the top or in the top five suggestions for energy savings.

Energy efficiency, including insulation, has been deemed the greatest untapped resource available to address the current energy crisis and climate change.[17]

Given the critical importance of energy efficiency in achieving the AB 32 GHG emissions reduction goals, CARB should take affirmative steps to ensure in-state fiber glass insulation manufacturing capabilities are maintained and not relocated to areas outside California not subject to GHG emissions reduction requirements. To retain that manufacturing capability, CARB should provide to fiber glass insulation manufacturers a full 100 percent assistance factor for all three compliance periods.

COLLECTION OF SENSITIVE ECONOMIC DATA CREATES MORE PROBLEMS THAN IT SOLVES

In an implicit acknowledgement that leakage – loss of business from California economy – is a very real threat, CARB has committed to monitor possible leakage. To assist in "monitoring" the leakage issue, CARB proposes to collect facility-level economic data "as a major means by which to monitor for leakage, especially collecting the data through Mandatory Reporting Regulation."[18] There are numerous and very serious problems with CARB's proposed collection of facility-level economic data.

First, the submission of economic data through the Mandatory Reporting Regulation ("MRR") is complex and complicated; it is onerous to use. Therefore, CARB, by advocating the use of MRR, is actually imposing additional burdens solely on California facilities of companies that CARB is supposedly trying to keep in California. It will impose one more significant cost/ burden on those California facilities, further impacting their competitiveness with comparable out-of-state facilities operated by those same companies. In this case, there is no similar reporting requirement imposed on out-of-state facilities by the Federal greenhouse gas reporting obligations that might tend to level the competitive playing field.

CARB's imposition of these onerous reporting requirements of market-sensitive data in the midst of the worst economic conditions since the Great Depression is yet another indicator that CARB is out of touch with the economic realities faced by competitive businesses in California. This is especially true in light of the fact that even if CARB were to receive all available economic data from every facility, there is no assurance that it will be able to accurately predict the leakage it is trying to prevent. Furthermore, it begs the question of whether this data is necessary for CARB to be able to do what it is trying to do – determine whether leakage is taking place.

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[16] www.ciwmb.ca.gov/GreenBuilding/Residential.
[17] "Transforming Energy Efficiency." www.duke-energy.com/docs/CGI-Fact-Sheet.doc, September 27, 2007.
[18] California Air Resources Board, Public Workshop, "Cap-and-Trade Program: Emissions Leakage Research and Monitoring," July 30, 2012, slide 73.

California is losing manufacturing jobs, in both traditional and high-tech industries, to other states and nations. This is an established fact. CARB does not need to collect economic data from facilities to grasp this fact. Yet another well-established fact is that the exodus from California is because of the existing regulatory requirements and concerns about the future regulatory climate.[19] If CARB cannot comprehend these stark realities, it is unlikely economic data from individual facilities is going to help them understand the risk of leakage any better. Leakage has already occurred. It is happening every day. As the regulatory burdens in California increase, leakage will increase.

Therefore, CARB should drop the proposed collection of facility-level economic data and seek input from stakeholders on how leakage can be monitored without costly burdens.

Second, the proposed collection of facility-level economic data includes value or cost of products/commodities, annual payroll before deductions, total capital expenditures for new and used buildings, machinery, fuels, electricity, number of production workers and other employees, and additional sensitive data points. All of these requests involve extremely confidential business information and market-sensitive data. In fact, NAIMA in its meetings with members will not even allow discussion of these very topics because of concerns about antitrust violations. All of NAIMA's companies are subject to antitrust laws. NAIMA, through these comments, is going on record that the collection of this information raises antitrust concerns. Therefore, NAIMA must object to the collection of this data on the grounds that it may result in antitrust violations. Furthermore, NAIMA feels compelled to bring this proposed collection activity to the attention of the Federal Trade Commission ("FTC") to avoid compliance issues with that Agency.

NAIMA's concerns in this regard are driven in part by the fact that the FTC has previously submitted comments to the U.S. Environmental Protection Agency ("EPA") warning them about collecting market-sensitive information. NAIMA believes the FTC needs to be made aware of CARB's proposal.

The specific type of data contemplated by CARB is the very type of data to which the FTC identified as having possible antitrust implications in its September 30, 2010 comments to EPA on the Agency's "Proposed Confidentiality Determinations." Specifically, the FTC stated, "The FTC is concerned, however, that the proposal may allow for the public release of competitively sensitive information."[20]

The FTC explains why public disclosure of sensitive information creates antitrust concerns:

> [S]haring information among competitors may increase the likelihood of collusion or coordination on matters such as price or output.[21] Coordinated interaction among competitors includes collusive agreements, but it can also include conduct

[19] Ross C. Devol, Perry Wong, Armen Bedroussian, Candice Flor Hynek, and David Rice, "Manufacturing 2.0: A More Prosperous California," Milken Institute, June 2009, p. 9.
[20] *See* 75 Fed. Reg. at 39,108-09.
[21] FTC/DOJ GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS §3.31(b).

> not necessarily condemned by the antitrust laws.[22] Firms that engage in coordinated interaction are better able to predict, even absent explicit agreement, how rivals will react to price changes.[23]
>
> The potential for information disclosure to harm competition will depend on the structure of the affected market and the type of information disclosed.[24]

Given these antitrust concerns, NAIMA urges CARB to abandon the collection of competitively sensitive data. Antitrust concerns for NAIMA and its members are of a serious nature. The industry is comparatively small as far as the number of companies. NAIMA members are also the industry leaders with the largest share of the insulation market. Because of these two facts – small number of companies and industry leaders – NAIMA and its members are scrupulously careful about any type of activity or discussion that might involve confidential business information. As the FTC so effectively illustrated in its comments to EPA, the mere collection of confidential business information creates potential antitrust issues.

The issue of antitrust laws and collection of market-sensitive data is confounded by the simple fact that government agencies have a poor track record of preserving the confidentiality of market-sensitive information. (See http://community.seattletimes.nwsource.com/archive/?date=19961124&slug=2361468.) Even more troubling is that CARB has offered nothing concrete about the security measures that would be employed to protect this confidential information. Provisions stating that CARB will maintain the confidentiality of information "to the extent possible" (see Section 95830(g)) is unacceptable.[25] This lack of accountability and responsibility makes CARB's collection of facility-level economic data all the more troubling.

Third, leakage cannot be corrected by monitoring the exodus from California of jobs and economic investment to other locations. CARB's proposed leakage monitoring is not unlike a doctor watching a patient's vital signs slowly diminish and when those vital signs cease, the doctor tries to revive the patient. Here is the fact that CARB needs to recognize: Leakage will happen when companies operate in markets that can be supplied from another source at a lower cost. This is simply a tenant of business. U.S. manufacturers have suffered because China and

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[22] This includes parallel accommodating conduct by rivals in which "each rival's response to competitive moves made by other is individually rational, and not motivated by retaliation or deterrence, nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms." FTC/DOJ HORIZONTAL MERGER GUIDELINES §7.

[23] The FTC recognizes that rivals in the petroleum and other industries collect market intelligence to anticipate and respond to rivals' output and pricing decisions. *See, e.g.*, *In re* Chevron Corp., FTC Docket No. C-4023, Analysis of Proposed Consent Order to Aid Public Comment (Sept. 7, 2001) ("Integrated refiner-marketers carefully monitor the prices charged by their competitors' retail outlets, and therefore can readily identify firms that deviate from a coordinated or collusive price.").

[24] *See* Todd v. Exxon Corporation, 275 F.3d 191, 199 (2d. Cir. 2001) (quoting U.S. v. United States Gypsum Co., 438 U.S. 422, 441 n. 16 (1978)) ("A number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the precompetitive or anticompetitive effects of [the information disclosed.]"); *see also* FTC/DOJ GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS §3.31(b).

[25] California Air Resources Board, "Amendments to California's Cap-and-Trade Program: Final Statement of Reason," July 2012, p. 26.

other countries have found ways to supply the U.S. market at lower costs than U.S. manufacturers are able to do. California is not immune to this basic principle of supply and demand. The fact that California intends to operate a state-only Cap-and-Trade Program, with no other states participating, places California at an even greater risk of leakage than it has previously experienced. Adding even more costs to that Program will not help the situation.

All of these highly relevant and pertinent facts are available to CARB without collecting market-sensitive data from individual California facilities.

Fourth, even the broadest and most intensive monitoring program cannot minimize leakage after the Program is underway because the damage to business and industry will have already been done. Once a business has moved out of California, what will it take to get it to move back? There is a very real likelihood that it will cost the State more to get the business back than it would have cost the State to keep it from moving in the first place. CARB's monitoring will simply serve as an historical record of those events.

Fifth, CARB's proposed monitoring fails to take into account the economic activity by other states. NAIMA's companies do not operate in a vacuum. As noted above, NAIMA's companies can easily transfer production capacity to other locations in the United States, some as close to California's borders as Arizona. They do not have to build a new facility; they simply need to turn a switch. Already, many states are promoting themselves as alternatives to California.

Sixth, CARB should recognize that regulatory costs in California come from various statutory and regulatory requirements. Therefore, all the regulatory requirements of AB 32, plus the Cap-and-Trade Program, and the many other regulatory programs contribute to leakage. CARB should evaluate the combined effects of all regulations on leakage.

CONCLUSION

Fiber glass insulation manufacturing is highly trade-exposed, clearly subject to high leakage risk, and therefore in need of a 100 percent assistance factor in all three compliance periods under the AB 32 Cap-and-Trade Program. Fiber glass insulation manufacturing should also be afforded a 100 percent assistance factor because insulation strongly promotes energy efficiency in buildings, and CARB has in the Scoping Plan formally recognized the critical importance of energy efficiency in achieving the state-wide greenhouse gas emissions goals of AB 32.

NAIMA looks forward to discussing these issues with CARB in a face-to-face meeting to be scheduled as soon as possible. As always, if you have any questions, please do not hesitate to contact me.

Sincerely,

Angus E. Crane
Executive Vice President, General Counsel