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Re: Feedback on the CARB Initial Draft Proposal to “Sunset” the Two Percent Exemption for Fragrance in the Consumer Products Regulation

Dear Mr. Berghouse:

Fragrance Creators Association, Household & Commercial Products Association, and Personal Care Products Council (hereinafter referred to as “the Allied Trade Associations”) write jointly to urge the California Air Resources Board (“CARB”) to maintain the current two percent exemption for fragrance in the Consumer Products Regulation (“Two Percent Exemption”).

The initial draft proposal would eliminate the current Two Percent Exemption after January 1, 2027. As detailed below, eliminating this exemption would have significant consequences for the fragrance and consumer products industries, as well as for consumers.

As such, the Allied Trade Associations respectfully request that CARB reconsider its initial draft proposal to eliminate the Two Percent Exemption. We very much appreciate your time and consideration and look forward to continuing to discuss these issues with you. We request that we schedule a conference call at a mutually convenient time within the next two weeks.

I. The Allied Trade Associations Respectfully Request that CARB Withdraw the Initial Draft Proposal to “Sunset” the Two Percent Exemption.

A. Manufacturers Rely upon the Two Percent Exemption to Deliver Consumer Products that Satisfy Consumer Preferences and Signal Proper Product Use.

Fragrance is an important component of many consumer products: it encourages proper product use; covers base malodors; and creates a mechanism for product manufacturers to differentiate between brands and products. All fragrance oils contain volatile organic

compounds (“VOC”), which are necessary for the fragrance to achieve its intended effect because fragrance must evaporate to create a scent that the product user can perceive. For these reasons, among others, the Two Percent Exemption for fragrance is critical because it allows manufacturers to formulate consumer products that work as intended and comply with the VOC limits for the relevant product category, while still offering a reasonable exemption that allows manufacturers to formulate products that impart a scent. CARB’s initial draft proposal to “sunset” (*i.e.*, eliminate) the Two Percent Exemption after January 1, 2027 could eliminate the use of any fragrance in certain products, particularly those in product categories that are subject to very low VOC content standards (*e.g.*, general purpose cleaners and degreasers).

The Two Percent Exemption has been an integral part of the Consumer Products Regulation since 1990.¹ Thus, during the past 30 years, many manufacturers formulated products that included the exemption to achieve compliance with CARB’s stringent VOC regulatory standards. Therefore, “sunsetting” (*i.e.*, eliminating) the Two Percent Exemption after 2027 would reduce currently applicable VOC limits for a large number of products. The exemption is an important tool in the formulation toolkit to deliver efficacious products to the market that meet consumers’ needs. Without this tool, it is likely that some products (or products with certain scents) would no longer be technologically and/or commercially feasible, because they could not comply with the low VOC limits for the product category with fragrance included in the formulation. Moreover, loss of the exemption would also significantly alter the existing process for formulating and manufacturing consumer products.

B. “Sunsetting” the Two Percent Exemption Yields Minimal VOC Reductions While Imposing Significant and Costly Burdens on Product Manufacturers.

CARB’s data concludes that the total VOC reduction from all categories that would be achieved by “sunsetting” the exemption would produce 0.33 tpd VOC reduction from all product categories by 2031.² While we acknowledge CARB’s concerns about increased use of the exemption, as well as other rationales that are wholly unrelated to VOC reduction goals, ultimately, many product manufacturers will have to expend a significant amount of time, money and effort to reformulate products that were developed with the reasonable expectation that this long-standing exemption would remain in effect. And, assuming for the sake of argument that CARB accurately calculated the fact that the Two Percent Exemption is not widely used,³ manufacturers will still have to review a large number of product formulations to ensure that products comply with currently applicable VOC limits without the fragrance exemption. Either

¹ As explained in the CARB Staff’s Technical Support Document for the Phase 1 Rulemaking for Consumer Products (August 1990), “This exemption was established to allow manufacturers a de minimis level of these substances in various products such that the products may be marketed in an appealing manner to consumers.” See <https://ww3.arb.ca.gov/consprod/regact/ph1cptsd.pdf> at pp. 6-7.

² CARB Public Workshop for Proposed Amendments to the Consumer Products Regulation (Nov. 7, 2019) at slide #24.

³ *Id.* at slide #23.

way, the CARB initial draft proposal to “sunset” the Two Percent Exemption will impose a significant and costly burden on product manufacturers, while achieving an extremely small amount of additional VOC reductions.

C. Eliminating the Two Percent Exemption May Lead to Unintended Consequences.

Eliminating the Two Percent Exemption could also have a number of unintended consequences. For example, the Consumer Products Regulation defines “fragrance” to mean “a substance or complex mixture of aroma chemicals, natural essential oils, and other functional components with a combined vapor pressure not in excess of 2 mm of Hg at 20°C, the sole purpose of which is to impart an odor or scent, or to counteract a malodor.”⁴ The combined vapor pressure requirement (*i.e.*, 2 mm of Hg at 20°C) in the definition of fragrance imposes a meaningful constraint on how fragrance mixtures are formulated. If CARB eliminates the Two Percent Exemption, manufacturers would no longer be subject to the 2 mm of Hg constraint and may substitute higher vapor pressure molecules (*i.e.*, “top notes”) to achieve the intended scent, while still reducing overall VOC content. As another example, eliminating the Two Percent Exemption may cause manufacturers to reduce the quantity of fragrance in certain of their consumer products, which could in turn lead consumers to use more of the product per use in order to achieve the intended effect.

For these reasons, we respectfully request that CARB withdraw its initial draft proposal to eliminate the Two Percent Exemption for fragrance.

II. The Allied Trade Associations Believe that CARB’s Current Analysis Underestimates the Actual Use of the Two Percent Exemption.

During the March 10, 2020 work group meeting, CARB staff explained the methodology for determining the utilization of the Two Percent Exemption.⁵ By applying this methodology, CARB staff calculated that 95.6% of household products and 97% of insecticides, solvents and automotive products were not using the Two Percent Exemption.⁶ Allied Trade Association members believe that CARB may have underestimated the use of this exemption.

In the presentation, CARB staff cited as an example that when applying the 25% VOC fragrance speciation assumption, if a manufacturer used 2% fragrance in their product, this would equate to 0.5% VOC and concluded this 0.5% VOC only uses one quarter of the 2% allowed by the exemption. We believe that this conclusion is not accurate since the fragrance exemption applies to the entire fragrance, not just the VOC portion. Therefore, if a product contains 2% fragrance, the entire fragrance exemption is utilized regardless of the VOC content of the

⁴ 17 CCR § 94508(a)(54)

⁵ CARB Regulatory Strategies Work Group Meeting (March 10, 2020), at Slide # 40.

See https://ww2.arb.ca.gov/sites/default/files/2020-03/Work%20Group%20Presentation%203-10-20_0.pdf

⁶ *Id.*, at Slide # 44 [Refined Fragrance Speciation Assumption (100% VOC for cleaning, 25% others)].

fragrance. Thus, for these categories, the exemption utilized is four times greater than what CARB calculated. In addition, Enforcement Advisory 1996-07 #131 “Fragrance Exemptions” clearly states that companies may also exclude LVP-VOCs in addition to applying the Two Percent Exemption when determining compliance with applicable VOC limits. Several fragrance houses have reported that during the 2013-15 timeframe, their customers asked for percent VOC information, which may have included the Two Percent Exemption; thus, the actual utilization of the exemption may have even been higher.

Furthermore, when CARB conducted the consumer products surveys for 2013, 2014 and 2015, the agency requested information about the VOC content of product ingredients; fragrance ingredients were listed simply as “fragrance.” This approach was both reasonable and appropriate since the primary purpose of these surveys was to collect information about the VOC content ingredients used to formulate the 491 broad categories of consumer products. Moreover, as a general matter, fragrance represents a small percentage of the ingredients used to formulate the vast majority of the surveyed products.

When CARB staff used the Consumer Products Survey data to analyze the use of the Two Percent Exemption, they assumed that if a product reported the maximum allowable VOC limit and also listed fragrance as an ingredient, then the product must have been using the exemption. On its face, this assumption appears to be reasonable. However, members of the Allied Trade Associations have serious concerns that this assumption is not mathematically correct. Since we do not have access to the data, we cannot comment on the correctness of the assumptions, calculations, or results. Regulatory staff from several different fragrance suppliers stated that based on their experience, they are aware that some categories extensively use the Two Percent Exemption, yet the data presented by CARB essentially shows none, or almost none, in those categories.

CARB’s consumer product surveys that were used to extract this data were not designed to determine where the Two Percent Exemption is used. Any conclusions on exemption utilization are based solely on the ingredient data submitted by manufacturers. It is likely that in some cases, fragrance data or ingredient information was not entered correctly by survey participants which could also account for some of the discrepancies noted by the fragrance industry. The most direct way to determine if the Two Percent Exemption would have been taken is to ask the question during the surveys. Instead, CARB is now considering “sunsetting” this exemption based on assumptions instead of facts.

While our member companies appreciate the CARB staff’s effort to explain in great detail the basis for calculating the utilization of the Two Percent Exemption, the Allied Trade Associations respectfully assert that these calculations do not appear to be accurate. Therefore, we would appreciate the opportunity to further discuss this matter with CARB staff via conference call at a mutually convenient time in early April.

III. The Allied Trade Associations Urge CARB Against Speciating Fragrance Used in a Large Number of Cleaning and Degreasing Products as 100% VOC.

In July 2019, industry presented technical presentations that included, among other things, facts about the VOC content of fragrance ingredients that are used to formulate consumer products. Based on the information presented to CARB at that time, and in subsequent data submissions and discussions, CARB determined that fragrance ingredients were not 100% VOC but rather are composed of an average of 25% VOC.

However, during the work group meeting held on September 20, 2019, CARB staff presented an initial draft proposal that 35 cleaning and degreasing products would retain the 100% VOC speciation for fragrance ingredients.⁷ CARB staff explained that the fragrance ingredients in these products typically contain a high concentration of monoterpenes, namely limonene (d-limonene and l-limonene) and pinene (α -pinene, β -pinene). In addition, CARB cited a guidance document dated April 19, 2016, stating that the agency believes these monoterpenes are not used solely for the purpose of imparting fragrance as they can aid in the cleaning process and are therefore not eligible for the Two Percent Exemption.⁸

It is possible to use other fragrance ingredients to impart a scent that resembles the odor profile of these monoterpenes. Without using limonene and pinene, it is very likely that the reformulated fragrance would be about 25% VOC by weight, just as fragrance ingredients used in other product categories. Therefore, there is no justification for assuming that all fragrance ingredients used in the 35 broad categories of cleaning and degreasing products are 100% VOC.

Conclusion

In addition to the arguments above, the Allied Trade Associations ask that CARB consider the impact of COVID-19. Our member companies are dramatically shifting resources and personnel to address this pandemic, while also ensuring that cleaning, disinfecting, sanitizing, and personal hygiene products are available. Many of the same people who would be engaging with CARB on this rulemaking are working around the clock on COVID-19. Entire supply chains have been disrupted, and the far-reaching implications from the spread of COVID-19 are still unfolding. What is commercially and/or technologically feasible has changed over the past two weeks. Understanding the constraints CARB has under the *Clean Air Act*, the Allied Trade Associations ask that CARB recognize this extraordinary situation.

Thank you again for your time and consideration. We appreciate CARB staff’s transparency and open communication throughout this rulemaking process. We request a

⁷ CARB Evaluation of Fragrance Speciation (Sept. 20, 2019) at Slides # 7-9. See https://ww3.arb.ca.gov/consprod/regact/webinar_9202019_adav3.pdf.

⁸ CARB “Guidance Pertaining to the Two Percent Fragrance Exemption and Limonene” (April 19, 2016). See https://ww3.arb.ca.gov/consprod/regact/prog_guide/frag_exempt_guide.pdf.

Feedback on the Initial Draft Proposal to “Sunset” the Two Percent Exemption for Fragrance

March 27, 2020

Page 6 of 6

follow-up conversation in early April to discuss issues presented in this letter. Please do not hesitate to contact us if you have any questions or if there is additional information the Allied Trade Associations can provide.

Respectfully,

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