State of California
AIR RESOURCES BOARD

**Final Statement of Reasons for Rulemaking,
Including Summary of Comments and Agency Response**

PUBLIC HEARING TO CONSIDER THE ADOPTION OF A PROPOSED REGULATION FOR SMALL CONTAINERS OF AUTOMOTIVE REFRIGERANT

Public Hearing Date: January 22, 2009
Agenda Item No.: **09-01-02**

I. GENERAL

The Staff Report: Initial Statement of Reasons for Proposed Rulemaking ("Staff Report") entitled "Public Hearing to Consider Adoption of the Proposed Regulation for Small Containers of Automotive Refrigerant," released December 5, 2008, is incorporated by reference herein.

In this rulemaking, the Air Resources Board (ARB or Board) adopted a new regulation to reduce greenhouse gas (GHG) emissions associated with do-it-yourself (DIY) recharging of motor vehicle air conditioning (MVAC) systems. This regulation is a discrete early action GHG emission reduction measure, as described in the California Global Warming Solutions Act of 2006 (Assembly Bill 32, [AB 32], Núñez, Ch. 486, Stats. 2006), and helps reduce GHG emissions attributable to small containers of automotive refrigerant largely by establishing certification requirements that require containers to be equipped with self-sealing valves, and by establishing a small container deposit and return and refrigerant recovery program. Other components of the regulation include improved container labels and consumer educational materials to promote consumer education of proper MVAC charging practices and of the environmental consequences of releasing refrigerant to the environment.

On December 5, 2008, ARB published a notice for a January 22, 2009 public hearing to consider the proposed regulatory action. The Staff Report was also made available for public review and comment beginning December 5, 2008. The Staff Report provides the rationale for the proposed regulation and incorporated certification and test procedures. The text of the proposed regulation to be added to title 17, California Code of Regulations (CCR) Subchapter 10, Article 4, Subchapter 5, sections 95360 through 95370, and the incorporated "Certification Procedures for Small Containers of Automotive Refrigerant", "Test Procedure for Leaks from Small Containers of Automotive Refrigerant" (TP-503), and "Balance Protocol for Gravimetric Determination of Sample Weight using a Precision Analytical Balance" (BP-A1) were included as Appendices to the Staff Report. These documents were

also posted on the ARB's Internet website for the rulemaking at http://www.arb.ca.gov/regact/2009/hfc09/hfc09.htm.[1]

On January 22, 2009, the Board conducted the public hearing and received oral and written comments. At the conclusion of the hearing, the Board adopted Resolution 09-1, in which it approved the originally proposed regulation and incorporated certification and test procedures. In accordance with section 11346.8 of the Government Code, the Resolution directed the Executive Officer to adopt the proposed regulation and the documents incorporated by reference therein, "Certification Procedures for Small Containers of Automotive Refrigerant", "Test Procedure for Leaks from Small Containers of Automotive Refrigerant" (TP-503), and "Balance Protocol for Gravimetric Determination of Sample Weight using a Precision Analytical Balance" (BP-A1), along with such other conforming modifications and technical amendments as may be appropriate, and to make such modifications available for a supplemental comment period of at least 15 days. The Executive Officer was then directed either to adopt the amendments with such additional modifications as may be appropriate in light of the comments received, or to present the regulations to the Board for further consideration if warranted in light of the comments. Resolution 09-1 is available at ARB's Internet web page for rulemaking: http://www.arb.ca.gov/regact/2009/hfc09/res091.pdf

Subsequent to the hearing, staff proposed modifications to the regulatory text and the incorporated certification procedures that largely clarify the regulation's provisions and provide manufacturers and retailers additional flexibility to comply with the regulation. The most significant of these post-hearing modifications were: (1) allowing retailers to accept breached containers from consumers and providing retailers discretion to return deposits to consumers for such breached containers, (2) requiring manufacturers or designated return agencies to accept breached containers from retailers and to account for such returned breached containers, (3) providing manufacturers and retailers the flexibility to request the Executive Officer to reduce the retailer-consumer deposit on small containers, (4) specifying that the regulation's reporting period is based on a calendar year basis, instead of the proposed October to September basis, and (5) clarifying that funds resulting from unreturned deposits must be expended by manufacturers on approved enhanced educational programs for consumers. These post-hearing modifications were incorporated into the text of the proposed regulation and incorporated documents.

The text of all the modifications to the originally proposed regulation and incorporated documents was made available for a supplemental 15-day comment period by issuance of a "Notice of Public Availability of Modified Text." This Notice was mailed on April 9, 2009 to all stakeholders, interested parties, and to other

[1] The Statutory Authority and References section of the Notice of Public Hearing initially stated that this regulatory action was proposed under the authority granted in Health and Safety (H & S) Code sections 38501, 38505, 38510, 38550, 38551, 38560, 38560.5, 38580, 39600, and 39601. Staff subsequently decided not to cite H & S Code sections 38505, 38550, 38551 as authority for this rulemaking, and removed these citations from the proposed regulatory language (Appendix A to the Staff Report). Since December 5, 2008, the Agency has consistently not cited these H & S Code sections as authority for this rulemaking action.

persons generally interested in the ARB's rulemaking concerning requirements applicable to automotive refrigerant in small containers. The "Notice of Public Availability of Modified Text" listed the ARB Internet website from which interested parties could obtain the complete text of the incorporated documents that would be affected by the modifications to the original proposal, with all of the modifications clearly indicated. These documents were also published on ARB's Internet web page for this rule making http://www.arb.ca.gov/regact/2009/hfc09/hfc09.htm on April 9, 2009. One written comment was received during the 15-day comment period.

After considering the comments received during the 15-day comment period, the Executive Officer issued Executive Order R-09-005, adopting Article 4, Subchapter 5, Title 17, California Code of Regulations sections 95360 through 95370 and the incorporated documents.

This Final Statement of Reasons (FSOR) updates the Staff Report by identifying and providing the rationale for the modifications made to the originally proposed regulatory text, including non-substantial modifications and clarifications made after the close of the 15-day comment period. This FSOR also contains a summary of the comments received by the Board on the proposed regulation and the modifications and ARB's responses to those comments.

Incorporation of Test Procedures and Federal Regulations. The regulation approved by the Board incorporates by reference new certification procedures, "Certification Procedures for Small Containers of Automotive Refrigerant". This certification procedure in turn incorporates ARB test procedure TP-503, "Test Procedure for Diurnal Leaks from Small Containers of Automotive Refrigerant," which in turn incorporates Balance Protocol (BP–A1) "Balance Protocol for Gravimetric Determination of Sample Weights using a Precision Balance." Each of these documents was identified by title in the informative digest of the notice of proposed action (no date of publication or issuance was specified as the procedures were proposed for adoption in the notice). The certification procedures are identified by title and date in title 17, CCR sections 95362(b), 95365(c), 95366(e), and 95368(d); TP-503 is identified by title and date in title 17, CCR section 95368(d), and BP-A1 is identified by title and date in TP-503. These documents are readily available from ARB upon request, and were made available in the context of this rulemaking in the manner specified in Government Code Section 11346.5(b).

The test procedures and balance protocol are incorporated by reference because it would be impractical to print them in the CCR. Existing ARB administrative practice has been to have such test procedures and protocols incorporated by reference rather than printed in the CCR because these procedures and protocols are highly technical and complex. They include the "nuts and bolts" laboratory practices required for certification of small containers of automotive refrigerant and have a very limited audience. Because ARB has never printed complete test procedures or protocols in the CCR, the affected public is accustomed to the incorporation format utilized therein. The ARB's test procedures and protocols as a whole are extensive and it would be both cumbersome and expensive to print these lengthy, technically

complex procedures with a limited audience in the CCR. Printing portions of the ARB's test procedures that are incorporated by reference would be unnecessarily confusing to the affected public.

Fiscal Impacts. The Board has determined that this regulatory action will not create costs or savings, as defined in Government Code section 11346.5(a)(6), to any state agency or in federal funding to the state, costs or mandate to any local agency or school district whether or not reimbursable by the state pursuant to part 7 (commencing with section 17500), Division 4, title 2 of the Government Code, or other nondiscretionary costs or savings to state or local agencies.

Consideration of Alternatives. The new regulatory language proposed in this rulemaking resulted in large part from extensive discussions and meetings between staff and the affected automotive refrigerant industry, retailers, governmental agencies, and others. In the Staff Report, staff evaluated and ultimately rejected two alternatives, including: (1) banning the sale of small containers of automotive refrigerant, and (2) requiring consumers to complete a consumer education training course and obtain a certificate before they could purchase small containers of refrigerant. Staff also discussed, but did not consider as alternatives to the regulation: applying a mitigation fee to compounds with high global warming values, such as automotive refrigerants, and using equipment (currently still in the developmental stage) to extract and recharge refrigerant into a motor vehicle air conditioning system.

For the reasons set forth in the Staff Report, and based on staff's comments and responses at the hearing and in this FSOR, the Board has determined that no alternative considered by the agency or brought to the attention of the agency would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective and less burdensome to affected private persons than the action taken by the Board.

II. MODIFICATIONS TO THE ORIGINAL PROPOSAL

As previously discussed, the Board adopted the proposed regulation. Subsequent to the hearing, staff proposed modifications to the regulatory text and the incorporated certification procedures that largely clarify the regulation's provisions and provide manufacturers and retailers additional flexibility to comply with the regulation. These modifications were explained in detail in the Notice of Public Availability of Modified Text that was issued for a 15-day public comment period that began on April 9, 2009, and ended on April 24, 2009. In order to provide a complete FSOR for this rulemaking, these modifications and clarifications are summarized below:

A. Modifications to Title 17, California Code of Regulations Sections 95360 through 95370

1. Definitions for the terms “small container” and “small container of automotive refrigerant” were added in section 95361(a)(23). Although the regulation utilizes each of the aforementioned terms interchangeably, these terms were specifically defined in order to provide clarity and to insure that no misunderstanding occurs.

2. Prior section 95366(a)(4) was deleted, and new section 95366(b)(5) was added to clarify that manufacturers do not ultimately retain unclaimed deposits, but must expend those funds on enhanced educational programs and account for the expenditures of unclaimed deposits in accordance with sections 95366(b)(6) and 95367(a)(5) of the regulation.

3. Section 95366(b)(6) and Section 2.4(A)(8) of the “Certification Procedures for Small Containers of Automotive Refrigerant” were modified to require manufacturers to describe the enhanced educational program and to receive Executive Officer approval of the proposed enhanced educational program before expending funds on that program.

4. Section 95365(d) was modified to clarify that this provision does not restrict the recycling of an empty container, and that breached containers will not be counted as recycled containers for purposes of calculating the recycling rate of small containers of automotive refrigerant.

5. Section 95366(a)(3) was modified to allow retailers to accept breached or structurally compromised small containers from consumers and to provide retailers the discretion to pay consumers deposits for such breached containers.

6. Originally proposed Section 95366(a)(5) was modified to Section 95366(a)(4) which, along with Section 95367(a)(1), was modified to clarify that retailers are not required to segregate breached returned containers from non-breached returned containers or to report sales and returned can data from breached returned containers. In addition, the new Section 95366(a)(4) requires manufacturers to cooperate with retailers and distributors to facilitate their ability to segregate breached from non-breached returned containers.

7. Section 95366(b)(4) was modified to require manufacturers or their designated return agencies to pay a retailer refunds for breached containers, and to count and document the number of breached containers.

8. Section 95366(a)(2) was modified and section 95367(d)(2) was added to allow a manufacturer or retailer to request the Executive Officer to reduce the deposit amount if the two calendar year average return rate of containers exceeds the specified return rate.

9. Section 95367(a) of the regulation was modified to specify that annual reporting periods are now based on a calendar year basis (January 1 through December 31 reporting period), with annual reports due by March 1 of the following year. The first annual report will cover the period January 1 through December 31, 2010, and is due March 1, 2011.

10. Sections 95367(a)(1) and (a)(4) were modified to no longer require retailers, manufacturers or recyclers to report sales and returned can data for recalled cans, since recalled containers are already included in the category "returned unused containers."

11. Section 95367(b) was modified to reflect the new reporting periods discussed above in Section 95367(a). Beginning in 2011, ARB will calculate and publish the return rate of small containers of refrigerant by May 31 of each year. This section was also modified to clarify that ARB will not include breached containers in calculating the annual return rate of containers.

12. Sections 95367(d) and 95637(d)(1) were modified to clarify that beginning in 2012, ARB will evaluate the return rates calculated from the preceding two calendar year period against the target return rate to determine if the deposit amount on containers should be increased. ARB's Executive Officer may consider information submitted by manufacturers or retailers by March 1 of that calendar year, and will issue a decision whether to increase the deposit amount by May 31 of that calendar year.

13. Section 95367(e) was modified to state that if the Executive Officer decides to change the deposit rate, small containers must have labels and stock-keeping units (SKUs) that reflect the modified deposit amount by January 1 of the year following that decision.

14. New Section 95367(f) was added to specify that if the Executive Officer increases the deposit rate, small containers that are subject to existing deposit rates can continue to be sold, supplied, or offered for sale in California. No limitation of the sell-through period for existing cans is specified.

15. New Section 95367(g) was added to specify that if the Executive Officer decides to decrease the deposit rate, small containers that are subject to existing deposit rates can continue to be sold until February 1 one calendar year after that decision, and manufacturers would be required to recall any unsold existing containers no later than April 1 one calendar year after that decision. In addition, manufacturers must report the total number of recalled containers as required by section 95367.

16. Section 95367(c) was modified to indicate that the specified target return rates of small containers will be compared against returned container data reported on a calendar year period, rather than against the proposed October through September periods.

17. Section 95368(a) was modified to specify that penalties may be assessed for violations of this subarticle pursuant to Health and Safety Code section 38580, and that each day during any portion of which a violation occurs is a separate offense.

18. New section 95368(b) states that any violation of this subarticle may be enjoined pursuant to Health and Safety Code section 41513.

19. New section 95368(c) states that the Executive Officer may revoke any Executive Order based on a violation of this subarticle.

Staff also made minor, non-substantive modifications throughout the regulation to provide additional clarity. Other non-substantive changes include correcting formatting and grammatical errors, and minor administrative changes and corrections.

B. Modifications to the Certification Procedures for Small Containers of Automotive Refrigerant

1. Section 2.4(A) of the Certification Procedures was modified to clarify that each manufacturer seeking an Executive Order for small containers of refrigerant must develop educational materials in both English and Spanish.

2. Section 2.4(A)(8) of the Certification Procedures was added to require a manufacturer to describe and receive Executive Officer approval of its proposed enhanced educational program before it can expend any funds on that program.

3. Section 3.2 of the Certification Procedures was modified to require a manufacturer to supply the bill of materials for a small container of automotive refrigerant in its application for certification.

Staff made minor, non-substantive modifications in the certification procedures to provide additional clarity. Other non-substantive changes include correcting formatting and grammatical errors, and minor administrative changes and corrections.

III. MODIFICATIONS MADE SUBSEQUENT TO THE 15-DAY PUBLIC COMMENT PERIOD

During the 15-day public comment period, the Automotive Refrigeration Products Institute (ARPI) submitted a comment requesting that manufacturers be permitted to use an alternative Internet website rather than the specified website www.staycoolcalifornia.com to provide required safety precautions and usage instructions. Staff has reviewed and agrees with this comment, and has modified Section 2.3(A)(3)(f) of the Certification Procedures for Small Containers of

Automotive Refrigerant to allow a manufacturer to publish required safety precautions, vehicle operating parameters, and vehicle air conditioning recharging procedures on a designated Internet website. Specifically, Section 2.3(A)(3)(f) substitutes the phrase "'*a website address' "* [the website will contain information as described in Certification Procedures 2.4 (A)(6)] for "www.staycoolcalifornia.com".

This modification constitutes a non-substantial change to the regulatory text because it only clarifies the requirements or conditions as set forth in the original text (or in the original text as modified in the Notice of Public Availability of Modified Text) and does not materially alter those requirements or conditions.

IV. SUMMARY OF COMMENTS AND AGENCY RESPONSE

The ARB received written comments during the 45-day comment period in response to the December 5, 2008 public hearing notice. One written comment was received during the 15-day comment period in response to the notice of proposed modified text made available for comment on date. Listed below are persons and organizations that submitted comments.

During the 45-day comment period, the Board received written comments from:

	Name and Affiliation (If Any)	Written Comment Date Submitted
1	Automotive Refrigeration Products Institute (ARPI)	December 17, 2008
2	Heidi Sanborn, California Products Stewardship Council (CPSC)	January 5, 2009
3	Heidi Sanborn, (CPSC)	January 13, 2009
4	One written comment was submitted on behalf of the following organizations and public citizens: Rowland J. Hwang, Natural Resources Defense Council and Don Anair, Union of Concerned Scientists	January 21, 2009

At the January 22, 2009, Board meeting, the ARB received the following written or oral comments:

	Name and Affiliation (If Any)	Written Comments	Oral Testimony
1	Norm Plotkin, Plotkin & Assoc.	NO	YES
2	Michael Klein, IDQ, Automotive Refrigerant Producers Institute (ARPI)	NO	YES
3	Diana Hull, AutoZone	NO	YES
4	Jeff Hove, Napa Auto Parts	NO	YES
5	Doug Stanley, Levins	NO	YES
6	Aaron Lowe, Automotive Aftermarket Industry Association (AAIA)	YES	YES

During the 15-day comment period, the ARB received the following written comment:

	Name and Affiliation (If Any)	Written Comment Date Submitted
1	Tom Brown, ARPI	April 22, 2009

Set forth below is a summary of each objection or recommendation made regarding the specific regulatory action proposed, together with an explanation of how the proposed action was changed to accommodate each objection or recommendation, or the reasons for making no change. The comments have been grouped by topic whenever possible. Comments not involving objections or recommendations specifically directed toward the rulemaking or to the procedures followed by the ARB in this rulemaking are not included.

The comments by ARPI, CPSC, Norm Plotkin, Autozone, and AAIA generally supported the regulation with some recommendations. The Natural Resources Defense Council, the Union of Concerned Scientists, Napa Auto Parts, and Doug Stanley of Levins provided comments in support of the regulation without making any objections or recommendations for changes. Their comments are therefore not included in the summary.

The comments are summarized below into two subsections: (A) General Comments, and (B) Specific Comments.

A. General Comments

1. **Comment:** ARB staff estimates that non-professionals (DIY) purchase and use 95% of small containers of automotive refrigerant, and that professionals purchase and use the remaining 5% of small containers. This apportionment of small container usage is based on the MACS, 2008 and Atkinson, 2008a references cited in the Staff Report.

   However, in a White Paper (revised on July 14, 2008), staff acknowledged that DIY purchase and use 83% of small containers of automotive refrigerant. The Atkinson and MACS reports are based on a "small select sampling" of specialty professional shops that are not representative of overall professional small can usage and that do not represent general repair shops. ARPI's data from 17,000 retails stores indicates that professionals use 26% of small containers of refrigerant.

   ARPI questions why its "large-sample research inputs" were "factored and then discarded in favor of anecdotal, small-sample survey data from a competing commercial special-interest group." **(ARPI)**

   Agency Response: No change was made in response to this comment. The use of 95% for the DIY share of the small container market in the Staff Report reflects the use of best available data and evolving data analysis.

When the Agency prepared the White Paper, two data sources had been identified: a MACS 2004 Survey for professional MVAC servicing facilities, and an NPD sales dataset supplied by ARPI that shows the percentage of small containers sold to commercial entities. For the White Paper, the Agency used the average estimates from the two datasets, or 83%, as the percentage of the small container market sold to DIY users. The Agency had concerns that a commercial entity as defined in the NPD dataset may not necessarily be a professional MVAC servicing facility and therefore may not have the required equipment and trained personnel to perform professional MVAC service, and thus may use practices similar to a DIY individual when using small containers to recharge an MVAC. After completion of the White Paper, the Agency identified two additional data sources that reinforced the professional market share estimate from the MACS 2004 Survey. During this process the Agency requested input from ARPI on the exact constitution of "commercial entities", but did not receive additional information that supported revising the estimate. Therefore, the Agency used the estimate from the MACS 2004 Survey, or 95%, as the DIY market share of small containers in the Technical Support Document of the Staff Report.

2. **Comment:** Alternative refrigerants (to HFC-134a) with low global warming potentials will soon be commercially available, which will effectively render this rulemaking a short term program "with limited benefits and great complexity, particularly in the cost/benefit of its recycling component which should remain subject to continued review and sunset of its provisions." **(ARPI)**

   Agency Response: No change was made in response to this comment. The Agency disagrees with the statement's characterization of this regulation's costs, benefits and complexity, and disagrees that the regulation should include review and sunset provisions of the recycling component of the regulation. The Agency wishes to point out, however, that in developing the regulation, it was fully aware that future automotive refrigerants will likely be introduced soon that will have much lower global warming potentials than HFC-134a, and in fact has designed the regulation to encourage the adoption of such future refrigerants (Section 95363, Section I., p.1, ISOR), which constitutes a sunset provision for the regulation.

3. **Comment:** The regulation should be revised to support a robust Extended Producer Responsibility (EPR) system that shifts "California's product waste management system from one focused on government funded and ratepayer financed waste diversion to one that relies on producer responsibility in order to reduce the public costs and drive improvements in product design that promotes environmental sustainability." The regulation should require manufacturers to "develop, underwrite and implement a take back system built on the Framework Principles of Product Stewardship (see attached)."

   "As written, the draft policy framework is inconsistent not only with the CPSC's Guidelines and principles for implementation of EPR (see attached)

but also the Extended Producer Responsibility (EPR) model recently adopted by the California Integrated Waste Management Board (CIWMB). … the CPSC firmly believes that State-imposed disposal bans do nothing to reduce the toxicity or total volume of waste and places an undue financial burden on retailers, haulers, recyclers and other entities in the product chain, including ratepayers." **(CPSC).**

Agency Response: No change was made in response to this comment. The Agency disagrees that the regulation is inconsistent with CPSC's guidelines regarding EPR and with the CIWMB's EPR model, because the regulation requires manufacturers to implement steps to reduce emissions of refrigerant, consistent with the spirit of EPR. CARB staff met twice with CIWMB staff in order to learn about EPR and incorporate its principles in the regulation. CIWMB concurs that several of the regulation's key components align with EPR. First, costs for implementing the regulatory program requirements are borne primarily by the manufacturers and consumers of the products. Second, green design is encouraged via the exemption for low GWP refrigerants. Third, manufacturers are responsible for the collection and recovery of the returned containers and for providing data to the state. Finally, the state is responsible for overall program oversight and enforcement.

The refrigerant, HFC-134a, is generally not considered to be toxic to humans, so it does not pose an undue hazard to retailers that handle it. Although manufacturers have taken the responsibility of redesigning small containers of refrigerant, they cannot reformulate the product, since it must necessarily be the refrigerant currently used in automotive air conditioners. However, the Agency anticipates that automotive manufacturers will soon adopt and utilize automotive refrigerants that have much lower global warming potential than HFC-134a in new vehicles.

4. **Comment:** The Agency should consider AB 2347 as a model for development of the regulation. This law in part requires manufacturers to engage in an EPR system for recycling mercury-containing thermostats. **(CPSC)**

Agency Response: No change was made in response to this comment. The Agency believes that this regulation already incorporates many provisions that mirror the obligations placed on manufacturers by AB 2347 (2007-2008 Reg. Sess.), the "Mercury Thermostat Collection Act of 2008." Specifically, this regulation specifies that small container manufacturers are responsible for: coordinating the collection of used containers from retailers, identifying each retailer's most complementary manner of transporting returned containers to recovery facilities, recovering refrigerant, developing public educational materials, maintaining and submitting records of sold and returned containers, and certifying small containers of refrigerant. These responsibilities largely track the duties imposed on manufacturers by AB 2347.

As mentioned in the response to the previous comment, CARB staff met twice with CIWMB staff and worked closely with them to incorporate the principles of EPR in the regulation. CIWMB concurs that several of the regulation's key components align with EPR.

5. **Comment:** The definition of "small container" should be included in the definitions section of the regulation because this term is used throughout the regulation and the incorporated Certification Procedures and Test Procedure. **(ARPI)**

   Agency Response: The Agency agrees with this comment and has modified the regulation to accommodate this recommendation. See Section I.A (p.2) of the Notice of Public Availability of Modified Text.

6. **Comment:** "Address online purchases in the regulation, and ensure there are provisions to enforce the same regulations for out-of-state retailers as there are for California retailers." Section 95366(a)(1) should be modified to state that "online purchases are included within this provision of collecting a deposit or charging the consumer's account for each small container of automotive refrigerant at the time of sale." **(CPSC)**

   Agency Response: No change was made in response to this comment. The commenter's concern is addressed because each provision of this regulation expressly applies to any person selling, supplying, offering for sale, or advertising in California small containers of automotive refrigerant, thereby including any sales made from out-of-state retailers (including out-of-state purchases made online).

B. Specific Comments

Reporting Period Basis

7. **Comment:** Table 1 of the Staff Report (Section V.D, p. 17, ISOR) states that after September 30, 2010, manufacturers, retailers, distributors and recyclers must report sales and returned container data over an October-September reporting period. The prescribed reporting periods should all be 12 month periods commencing on January 1, 2010. The summary report due date should be changed to March 1 of the following calendar year. **(ARPI)**

   Agency Response: The Agency agrees with this comment and has modified the regulation to specify that annual reporting periods are now based on a calendar year (i.e., a January 1 through December 31 reporting period), with annual reports due by March 1 of the following year. See section D.1 (p. 4) of the Notice of Public Availability of Modified Text. All reports are due to the Executive Officer March 1 every year starting March 1, 2011. Each annual report documents the number of small containers of automotive refrigerant

sold and returned during the prior calendar year, January 1 through December 31.

Staff realizes that a certain number of containers purchased during a given year may be returned in the following year, and that this reporting period will not completely account for those containers sold in one year and returned in the following year. However, after the first year, any carryover of containers returned beyond the calendar year should be minimized by the preceding year.

Container Deposit and Return Program

8. **Comment:** Table 1 of the Staff Report (Section V.D, p. 17, ISOR) provides that the target return rate for used containers increases from 90% to 95% on October 1, 2011, which is inconsistent with the statement in the Executive Summary section of the Staff Report, which states the target return rate rises to 95% beginning January 1, 2012. **(ARPI)**

   Agency Response: The Agency agrees with this comment and has modified Section 95367(c) of the regulation to specify that the target return rate for small container increases from 90% to 95% on January 1, 2012.

9. **Comment:** The regulation currently states that a retailer must not refund a consumer the container deposit if the container has been breached or structurally compromised, which indicates the retailer must make the determination if a container is breached. Manufacturers or packagers should be responsible for identifying breached or damaged containers, not retailers. **(Autozone, AAIA).**

   "Autozone's operating systems … do not support a damaged can inspection process, much less offer any assurance that a store employee could distinguish between an intentionally damaged can versus an unintentionally damaged can." **(Autozone)**

   Agency Response: The Agency agrees with this comment and has modified Section 95366(a)(3) of the regulation to allow retailers to accept damaged containers and to provide retailers the discretion to refund deposits for damaged containers. The Agency also modified sections 95366(a)(4) and 95367(a)(1) to clarify that retailers are not required to segregate damaged containers from non-damaged containers, and to require manufacturers to cooperate with retailers and distributors to facilitate retailers' and distributors' abilities to segregate damaged from non-damaged containers. Finally, the Agency modified section 95366(b)(4) to require a manufacturer or its designated return agency to pay a retailer refunds for damaged containers and to count and document the number of returned damaged containers. These modifications shift the burden of identifying breached or damaged containers from retailers to manufacturers or packagers.

10. **Comment:** Unreturned consumer deposits should accrue to the benefit of consumers, and not manufacturers. **(Autozone, AAIA)**

    Agency Response: The Agency agrees with this comment and has therefore deleted prior section 95366(a)(4), and added new section 95366(b)(5) to clarify that manufacturers do not ultimately retain unclaimed deposits, but must expend and account for their expenditures of those deposits only on enhanced educational programs previously approved by the Agency's Executive Officer.

11. **Comment:** The regulation requires retailers to refund the retailer-consumer deposit when consumers return used containers in good condition within a specific time period. Include language in section 95366 that "requires retailers to notify customers that they are charging a $10 deposit, and that they need to keep that receipt and return the item to the same retailer location, within 90 days, to ensure they can get a refund." **(CPSC)**

    Agency Response: No change was made in response to this comment. Sections 2.4(C) and (D) of the "Certification Procedures for Small Containers of Automotive Refrigerant" already require retailers to display a placard that describes the container deposit and recycle program, and to provide materials supplied by manufacturers. Moreover, the proposed amendment does not reflect the provisions of section 95366(a)(3) that provides retailers the discretion to refund deposits to consumers that do not have receipts, or that return containers within 90 days, or that return containers to locations other than the place of purchase.

12. **Comment:** "Address the fact that a percentage of customers will lose their receipts. There needs to be a mechanism to handle those cans." **(CPSC)**

    Agency Response: No change was made in response to this comment. As CPSC itself acknowledges in its comments of January 13, 2009, section 95366(a)(3) already provides retailers the discretion to refund deposits to consumers that do not have receipts. "The CPSC is pleased with the accommodation that, 'retailers may return the deposit <u>at its discretion</u> if more than 90 days have elapsed, the consumer does not have the receipt, or if the consumer returns the container to a location other than the place of purchase."

13. **Comment:** Include language within section 95366(a)(2) that states "the amount of deposit on each small container is exempt from sales tax." **(CPSC)**

    Agency Response: No change was made in response to this comment. The deposit that a retailer collects from and refunds to a consumer for each small container of refrigerant pursuant to section 95366(a) of the regulation is exempt from sales tax. State of California Board of Equalization Regulation 1589 (Containers and Labels) provides that deposits (defined as amounts "charged to the purchaser of the contents of the container with the

understanding that such amount will be repaid when the container or a similar container is delivered to the seller"), are not taxable.

14. **Comment:** The return rate for used containers should be set at 100% to accommodate a 100% disposal ban. Specifically, section 95367(c) should state "Effective January 1, 2010, the target return rate for containers [is] 100% in order to accommodate the 100% disposal ban." **(CPSC)**

    Agency Response: No change was made in response to this comment. The Agency agrees that establishing a 100% return rate would theoretically ensure that all refrigerant is recaptured and recovered, but recognizes and acknowledges that it would be impossible to attain this rate in reality. For example, if only a minute number of consumers do not return containers (e.g., they misplace or deliberately do not return used containers), the 100% return rate would not be achieved. In light of these considerations, the Agency has instead established the target return rates at 90% and 95%.

15. **Comment:** The 90% can return rate established in the regulation will be very challenging to meet for packagers and retailers. "AAIA hopes that the staff will continue to monitor implementation and will be open to discussing changes in the program that might be necessary based on our member's 'real world' experience in operating the recycling program." **(AAIA)**

    Agency Response: No change was made in response to this comment. The Agency believes that the regulation's container deposit and return program will provide sufficient financial incentive for consumers to return containers in excess of either the 90% or 95% return rates specified in section 95367(c). Moreover, section 95367(d) allows the Executive Officer the flexibility to either increase or decrease the deposit amount if the target return rate is not achieved or if it is consistently and adequately exceeded.

16. **Comment:** [Received during the 15-day public comment period]. The Board should establish a minimum amount for the deposit specified in section 95366(b)(1) of the regulation (the deposit a manufacturer collects from a distributor or retailer at the time of sale), as it has done for the deposit specified in section 95366(a) (the deposit a retailer collects from a consumer at the time of sale). A minimum manufacturer-retailer deposit is needed "to assure fair administration of manufacturer deposits, remove the possibility of 'competing' deposit sums and avoid effectively 'forcing' manufacturers into post-regulation pricing conversations that could be in violation of antitrust laws." **(ARPI)**

    Agency Response: No change was made in response to this comment. In developing the container deposit and return component of the regulation, staff was fully aware that the container deposit program would consist of two separate deposits, the deposit a retailer would pay a manufacturer when purchasing new containers, and the deposit a consumer would pay the retailer at the time of purchase. Both these deposits would be refunded when

the used containers were returned for recycling. However, the Agency elected to only establish a minimum amount for the retailer-consumer deposit because it believed that manufacturers and retailers are better situated to establish and administer the manufacturer-retailer deposits. As explained in section VIII.D of the Staff Report (p. 23), the 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 retailers when the used cans are collected and returned.*" *Ibid.*

This comment appears to reflect a concern that in the absence of a specified manufacturer-retailer deposit, manufacturers would likely establish deposits at increasingly lower amounts to solicit business from retailers. However, deposits that are too low will not provide sufficient incentive for retailers to return used containers back to the manufacturers, which would adversely affect the container return rate and potentially trigger an increase in the retailer-consumer deposit (and associated new labeling costs) pursuant to section 95367(d).

The Agency is aware of this concern, but the commenter has not presented a sufficiently compelling explanation of how a mandated minimum manufacturer-retailer deposit would resolve the concern. For instance, if the Agency required that manufacturer-retailer deposits be not less than $3, this difference might not provide sufficient financial incentive for retailers to return used containers to manufacturers (given that they are holding the $10 deposit paid by the consumer), and this rationale also extends to mandated minimum deposits of $2, $1 or $0.01. The Agency therefore continues to believe that it is more appropriate that manufacturers, who possess much more extensive knowledge and experience of the market for small containers of refrigerant than it does, to establish manufacturer-retailer deposits. The adopted regulatory provisions allow manufacturers to rapidly and flexibly respond to marketplace conditions to ensure that the manufacturer-retailer deposits provide adequate incentives for retailers to return used containers.

The Agency also disagrees with the assertion that the absence of a minimum deposit would result in "unfair" administration of manufacturer deposits and lead manufacturers to engage in "post-regulation pricing conversations" and "competing" deposit sums that could violate antitrust laws. Business transactions between manufacturers and retailers are, and have long been subject to the provisions of antitrust laws that prohibit contracts, combinations, and conspiracies that unreasonably restrain interstate trade. As discussed above, the provisions pertaining to manufacturer-retailer deposits merely require manufacturers to collect and refund deposits from retailers, but provides manufacturers and retailers the flexibility to ultimately establish and administer the details of the manufacturer-retailer deposit. The Agency therefore believes that it is entirely appropriate that manufacturers and retailers bear the responsibilities of ensuring that their business

agreements and transactions are in compliance with applicable antitrust laws.

This comment also implies that the Agency's establishment of a minimum deposit would immunize manufacturers and retailers from federal antitrust liability pursuant to the "state action doctrine". Under this doctrine, private parties engaging in anticompetitive conduct pursuant to a state regulatory scheme are nevertheless immune from federal antitrust laws if the anticompetitive conduct was authorized pursuant to a "clearly articulated and affirmatively expressed state policy" to displace competition with regulation, and if the conduct is subject to active state supervision. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* 445 U.S. 97, 105 (1980). Assuming, without deciding that the Agency could establish and implement a regulatory scheme that satisfies the *Midcal* criteria for the proposed minimum manufacturer-retailer deposit, it elects not to do so because it believes it is more appropriate that manufacturers and retailers assume the responsibility of conducting their business in compliance with applicable antitrust laws.

Certification Procedures for Small Containers of Automotive Refrigerant

17. Comment: Subsection 2.4(A)(4) of the Certification Procedures. Remove the phrase "due to lack of professional diagnostic techniques." Both professionals and DIYers are subject to overcharging or undercharging vehicle air conditioning systems "depending on their level of attention to detail and experience. It is sufficient to educate about the risks of over/undercharging and provide instruction on how best to do neither. The rest of the statement is unnecessary. ARPI members understand the spirit of this phrase and, in all educational materials, have made specific reference to seeking professional A/C service for major or recurring problems." **(ARPI)**

Agency Response: No change was made in response to this comment. The Agency disagrees that professionals are as likely to overcharge or undercharge vehicle air conditioning systems as non-professionals, especially as professionals have been trained as to the risks and consequences of over- or undercharging an MVAC system, have access to more sophisticated equipment, and are likely to have much greater experience performing MVAC recharges than a non-professional.

18. Comment: Subsections 3.2 and 3.4 of the Certification Procedures, Submitting an Application. Manufacturers should be allowed to submit one set of documents (i.e., engineering drawings and test results) for product groups of sufficiently similar construction and/or chemistry as part of the individual SKU application/certification process. **(ARPI)**

Agency Response: No change was made in response to this comment. The certification program requires a manufacturer to submit information that both identifies a small container of automotive refrigerant with particularity and that demonstrates that container of refrigerant fully complies with all requirements needed by the Agency to certify that container. The comment

conflicts with this concept because it would in essence nullify the first goal of the certification program. The Agency therefore requires a manufacturer to submit a separate certification application for each small container SKU. If a container design and construction is identical for different products, a manufacturer may supply the same engineering drawings, bill of materials, and test data for those products, but must submit separate certification applications for each product.

19. **Comment:** Subsection 3.3 of the Certification Procedures, Submitting an Application. This provision should be modified to allow a manufacturer to either defer submitting a sample of the small container or to submit artwork of the small container in lieu of providing a sample. "Finished goods are not customarily available to ship at the time of SKU planning and may not be actually produced until a customer purchase order initiates such." **(ARPI)**

    Agency Response: No change was made in response to this comment. An actual sample of the small container is needed by Agency staff to ensure that the container is equipped with a self-sealing valve and clearly displays all labeling requirements before issuing a manufacturer an Executive Order for that small container. Without an actual sample, staff will not be able to adequately make such determinations.

20. **Comment:** [Received during the 15-day public comment period]. Manufacturers should be permitted to use alternative Internet websites rather than the website www.staycoolcalifornia.com specified in section 2.3 of the "Certification Procedures for Small Containers of Automotive Refrigerant" to provide required safety precautions and usage instructions. **(ARPI)**

    Agency Response: Staff has reviewed and agrees with this comment, and has modified Section 2.3(A)(3)(f) of the Certification Procedures to allow a manufacturer to publish required safety precautions, vehicle operating parameters, and vehicle air conditioning recharging procedures on an alternative designated Internet website. Specifically, Section 2.3(A)(3)(f) substitutes "'*a website address' "* [the website will contain information as described in Certification Procedures 2.4 (A)(6)] for "www.staycoolcalifornia.com".

21. **Comment:** [Received during the 15-day public comment period]. Section 2.4(A) of the "Certification Procedures for Small Containers of Automotive Refrigerant" was amended to require manufacturers to develop educational materials in both English and Spanish. Manufacturers may need additional time to include the Spanish educational materials into their Internet websites. **(ARPI)**

    Agency Response: No change was made in response to this comment. The Agency believes that manufacturers have sufficient time to comply with this requirement, especially since manufacturers have already provided samples of educational material printed in both English and Spanish. Given

present technological capabilities and the amount of lead time available, manufacturers should be able to include the educational materials in Spanish on their websites within the presently prescribed timeframe.

Test Procedure for Leaks from Small Containers of Automotive Refrigerant (TP-503)

22. Comment: Section 7. Can Preparation; 7.5 and Section 8. Can weighing, 8.3. While discharging cans to a half-full content, there will be substantial condensation on the cans, and four hours of equilibration time may not be sufficient to discharge such condensation, especially at higher ambient room humidity levels. Therefore, the procedures should be modified to provide for close observation and adjustment, if necessary. **(ARPI)**

Agency Response: No change was made in response to this comment. The Agency agrees that condensation could occur and require additional time for container weights to equilibrate, but TP-503 already allows for such additional time. Specifically, Section 3.2 of TP-503 states:

> "Weight determinations can be interfered with by moisture condensing on the can and by thermal currents generated by temperature differences between the can and the room temperature. The small cans cool during discharge and could cause condensation. For these reasons, cans must be equilibrated to balance room temperature *for at least four hours* before weighing." (Emphasis supplied).

Because Section 3.2 specifies a minimum can equilibration time, it already provides a manufacturer the flexibility to utilize additional time needed because of can condensation.

23. Comment: The Calculations section of TP-503 no longer includes standard deviation formulae. If the Agency intentionally removed these, please explain why. **(ARPI)**

Agency Response: The Agency intentionally removed provisions regarding standard deviation calculations from TP-503. The Agency originally envisioned that the Test Procedure would be applied against a small container population that was assumed to be reasonably approximated by a normal distribution. In that case, a Student T-Test could be used to determine whether the mean leak rate of a small batch of containers passes or fails a given leak rate criteria with a specified confidence. For example, if 30 cans were measured and found to have a mean leak rate of 3.5 g/y and a standard deviation of 1.0 g/yr, the Agency could, with 99% confidence, reject a hypothesis that the true leak rate is less than the prescribed standard of 3.0 g/yr.

However, can leak test data provided by ARPI indicates that the population consists mostly of cans with leak rates distributed about a low value as described above, together with a few extreme outliers. In that case, the T-Test is no longer applicable. For example, add one more can with a leak rate of 100 g/yr to the hypothetical data set discussed above. The mean leak rate now becomes about 6.6 g/yr, which is well above the standard and should fail. The standard deviation becomes about 17 g/yr, which is so large that the mean leak rate of 6.6 g/yr is no longer statistically different from the leak rate standard of 3.0 g/yr. It would be impossible for a batch of cans containing a few outliers to fail by the T-Test. This happens because the assumption of a nearly normal data distribution is no longer valid.

Technical Support Document

24. Comment: Section 2.2.2 (p. G-5) of the Technical Support Document states: "For purpose of analysis the delayed emissions of 0.54 MMTCO_2E per year are assumed to remain the same and will be addressed through other regulatory approaches, such as improving professional servicing and identifying and repairing leaky MVAC systems via the smog check program." "ARPI supports staff's inclusion of support for identifying and repairing leaky MVAC systems via the smog check program." **(ARPI)**

Agency Response: This comment is not specifically directed at the proposed regulation or to the certification procedures, test procedures, or balance protocol incorporated by reference therein. Specifically, this comment is addressed to a measure that staff has identified as a possible future regulatory approach to controlling refrigerant emissions generated from leaking MVAC systems. Because this rulemaking only imposes requirements on the sale, use, and disposal of small containers of automotive refrigerant, this comment is beyond the scope of the rulemaking.