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September 4, 2014

Ms. Suzanne Davis and Ms. Evelia Rodriguez
Department of Toxic Substances Control
Attn: Comments on Draft Informal Regulations for Brake Friction Material Law
P.O. Box 806
Mail Station/Code: SPWP/MS 12A
Sacramento, California 95812-0806

Sent Electronically to: brakepad@dtsc.ca.gov

SUBJECT: Comments on Draft Informal Regulations for the Brake Friction Material Law

Dear Ms. Davis and Ms. Rodriguez:

We are writing on behalf of the members of the Association of Global Automakers, Inc.¹ (Global Automakers) and the Alliance of Automobile Manufacturers² (Auto Alliance), which include nearly every company selling new vehicles in the United States (U.S.). We appreciate the opportunity to provide the following comments on the pre-regulatory proposal for the Brake Friction Material Law.

OVERVIEW

The California Department of Toxic Substances Control (DTSC) has released informal draft regulations to implement the Brake Friction Material Law (Health and Safety Code sections 25250.50 et seq.) that became effective January 1, 2014.^{3,4} This new law will prohibit the sale of automobile brake pads sold in California containing more than trace amounts of certain heavy metals and asbestos by 2014. The law will also ban brake pads containing more than five percent copper by 2021. By 2025, the law reduces the amount of copper allowed to almost zero. In addition to restricting the content of brake friction material, the law requires that the brake material complies with laboratory testing and is marked with an environmental code that indicates proof of certification.

¹ Global Automakers' members include Aston Martin, Ferrari, Honda, Hyundai, Isuzu, Kia, Maserati, McLaren, Nissan, Subaru, Suzuki, and Toyota. Please visit www.globalautomakers.org for further information.

² Auto Alliance members include BMW, Chrysler, Ford, General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz, Mitsubishi, Porsche, Toyota, Volkswagen, and Volvo. See www.autoalliance.org for further information.

³ <http://www.dtsc.ca.gov/PollutionPrevention/BrakePads.cfm>.

⁴ Washington State passed a similar law earlier in 2010 and adopted regulations on October 19, 2012. <http://www.ecy.wa.gov/programs/hwtr/betterbrakes.html>.

DTSC's stated intent and scope of the proposal, provided in a presentation used in four workshops regarding the pre-regulatory proposal, is to:⁵

- Memorialize agreements made on testing, mark proof and certification
- Clarify the process used by DTSC to determine test method equivalency and testing laboratory accreditation equivalency
- Provide more specific detail on the process for DTSC to approve the certification process used by the testing certification agency
- Provide more specific detail on the process to be used to accept requests for an extension requests submitted for the January 1, 2025 restriction.

CONCERNS

While many of the proposed regulations are consistent with the statutory requirements of California's Brake Friction Material Law, Global Automakers and the Auto Alliance have concerns about the DTSC's proposed brake pad regulations. To prevent unnecessary regulatory burdens, harmonization between the Washington and California regulatory programs is essential, and where harmonization is not possible, reciprocity is essential. Given that the environmental goals for the two programs are nearly equivalent – to eliminate or reduce asbestos and heavy metals in brake friction material in order to prevent these substances from entering the environment -- California should make every effort to align its regulation as closely to the Washington regulation as possible. In cases where California is unable to fully harmonize all aspects of its regulation to Washington's due to statutory differences, both states should provide reciprocity. A lack of reciprocity between the two programs creates a difficult compliance regime for brake manufacturers and automakers. Harmonized programs will reach the same goals while reducing compliance costs, ensuring no duplication of efforts, and allowing manufacturers and suppliers to offer one consistent product in both states.

In particular, we are concerned about the inconsistent markings for the environmental compliance mark between California and Washington and believe the environmental compliance mark must be harmonized in order to maximize understanding of the mark and reduce confusion.

We also have concerns about the retroactive implementation date and potential issues it may have for these regulations and the precedent that may be set for future regulations.

Finally, we have additional concerns about the proposal's processes for certification, exemptions, and extensions and a number of issues the proposal does not address. Our concerns are explained in detail below.

⁵ DTSC Presentation, "CA Brake Pad Regulations Presentation July, 2014."
http://www.dtsc.ca.gov/PollutionPrevention/upload/CA_Brake_Pad_Regulations_2014_July.pdf.

1. Harmonization of Regulatory Programs

Global Automakers and the Auto Alliance believe that it is of the utmost importance for the states of California and Washington to harmonize their individual state requirements for brake friction materials, as any regulatory differences can result in unnecessary burdens on industry, when the ultimate goals of each state are the same. To this end, we appreciate that the two departments, California DTSC and Washington Department of Ecology, have been in discussions throughout the stakeholder process. With the Washington Department of Ecology's regulations completed and DTSC now developing its regulations, it appears that the statutory differences between the two states programs could unnecessarily complicate the compliance process. Inasmuch as the goals and requirements of the programs are aligned and will provide the same environmental benefit, California should make every effort to also align its regulations to Washington's. In the interim time period leading up the effective date of these regulations, DTSC could provide reciprocity with Washington, whose regulations are in place, by allowing any brake pads that comply with Washington's regulations to comply in California as well.

While Washington and California may not be able to harmonize all aspects of their regulations due to diverging state laws, our associations believe that at a minimum both states can provide reciprocity through agreements or other mechanisms (i.e. "deemed-to-comply") to accept compliance with one state's programs as compliance with the other. A reciprocity agreement would mean that the two states would agree to allow the use of a single edge code marking, certification mark, and compliance documentation.

2. Harmonization of the environmental compliance marks between the California and Washington program is necessary to maximize understanding, minimize confusion and ensure the regulation can be practically implemented by the regulated parties.

While the California statute has no requirement to mark exempted brakes (or brakes for which an approved extension has been obtained), the Washington state regulations do require additional markings (either "WX" or "X") for exempt brakes. It is unclear how these markings will be treated in California. During an August, 2014 stakeholder workshop, DTSC indicated that the "X" marking "would not be useable in California" and acknowledged the confusion surrounding this issue.

The statute states that the proof of certification on brake friction materials shall identify the brake friction material manufacturer, be easily applied, be easily legible, and "not impose unreasonable additional costs on manufacturers due to the use of additional equipment or other factors."⁶ However, it would be extremely impracticable and costly for brake manufacturers to apply

⁶ Article 13.5 Section 25250.60(a).

different markings to brakes destined for Washington vs. California and perhaps even more impracticable and costly for vehicle manufacturers to somehow predict where the vehicles will be sold and sort these parts in their factories to ensure they are assembling the correctly marked brakes on vehicles headed for the two different states. Considering that the brakes will have the same formulations designed to meet the environmental requirements of both states, DTSC needs to ensure that brakes with Washington markings (*i.e.*, “WX” or “X”) are allowed to be sold in California, either through the regulations, a reciprocity agreement, or some other legally binding means.

The statute also states that the certification and mark of proof shall show a consistent date format, designation, and labeling “to facilitate acceptance in all 50 states and U.S. territories” for purposes of demonstrating compliance with all applicable requirements.⁷ Through its use of the SAE J866 standard, which includes markings for hot and cold coefficients, DTSC is already making allowances for markings required by other states. DTSC needs to find a way to make the same allowance for the Washington state markings either through harmonized regulations or by providing reciprocity with Washington.

3. Retroactive Implementation Dates

We are concerned about the potential issues that a retroactive implementation date may have for these regulations and the precedent that may be set for future regulations. The question is whether DTSC can/should include the retroactive date of January 1, 2014 for the restrictions on the non-copper constituents and the beginning of labeling for brake friction materials or whether a compliance date consistent with the issuance of the final regulations is more appropriate. This issue of retroactive requirements has two major aspects, the first being an issue of compliance with the California Administrative Procedures Act (APA) and the second being operational implementation issues.

While the statute began certain requirements on January 1, 2014, use of this date in the regulation would result in a retroactive application of regulation. Although the DTSC has worked with brake friction material manufacturers to implement the requirements starting with January 1, 2014, we do not believe that it is appropriate regulatory practice, nor in compliance with the California APA, to implement and enforce regulations retroactively.

DTSC is attempting to implement the January 1, 2014 compliance requirements⁸ through regulations that may not be effective until late 2015. While it is our understanding that the

⁷ Article 13.5 Sec 25250.60(j).

⁸ Prohibit the sale of any motor vehicle brake friction materials exceeding the following concentrations:

- Cadmium exceeding 0.01% by weight.
- Chromium (VI) salts exceeding 0.1% by weight.
- Lead and lead compounds exceeding 0.1% by weight.

statutory requirements have been implemented in a collaborative manner with Motor & Equipment Manufacturers Association (MEMA) and Autocare (formerly the Automotive Aftermarket Industry Association or AAIA), the lateness of these implementing regulations has caused a great deal of confusion around what is acceptable to DTSC, which will not be completely resolved until these regulations are finalized. Automakers and brake manufacturers have been acting in good faith, relying on DTSC's advice and website, as well as Washington state regulations to determine how to implement the California law. However, it is unknown whether these good faith actions, taken in an attempt to comply, will actually fulfill the DTSC regulation once it is finalized. This reality puts the regulated community in a precarious compliance situation. Additional time will be necessary to fully understand and implement the final regulations even though we expect that all major brake pad suppliers now have formulations that meet the requirements DTSC has established for environmental protection and are complying with the major provisions required for the January 1, 2014 deadline. We recommend that DTSC adopt a compliance deadline at least 18 months after the finalization of the regulation.

In addition, if DTSC believes that the regulations must follow the statutory date, then we urge California to delay enforcement of the regulations until 18 months after the effective date of the regulations. It is of the utmost importance that DTSC establish an enforcement policy with enforcement discretion of statutory provisions that became effective prior to the establishment of the implementing regulations and thereby ensure manufacturers have sufficient time to ensure their testing, certification, markings and other compliance actions meet the requirements once the regulations are final. The absence of any discussion of the enforcement mechanisms puts the regulated community at risk of arbitrary DTSC enforcement, and generally results in a lack of clarity on what non-compliance means under these regulations.

4. Additional specificity is needed to clarify requirements under the certification process.

The certification process is unclear and varies from the Washington process enough to cause significant uncertainty. In an effort to harmonize these regulations, reduce confusion, duplicative effort and unnecessary compliance risk, we urge DTSC to duplicate the steps in the Washington "Self-Certification of Compliance" process as much as possible.⁹

In its proposed Section 66275.3, DTSC has also adopted a "Self-Certification of Compliance" process sufficiently similar to Washington's, and yet it contains enough differences to produce confusion among the regulated community. Even if the requirements were identical (which they are not), the inconsistencies in the way they are presented will cause considerable perplexity and

- Mercury and its compounds exceeding 0.1% by weight.
- Asbestiform fibers exceeding 0.1% by weight.

⁹ Washington Administrative Code (WAC) 73-901-060.

may lead to misunderstandings between what is required by each of the two regulations. An obvious difference is that Washington's process has seven steps, while DTSC's has only six -- indicating that the two processes are not adequately aligned. Inasmuch as the Washington regulations already exist, California should make every effort to conform its process steps for self-certification as closely to the Washington process as possible.

In one example of this inconsistency, Washington's Step 2, requires manufacturers to ensure that the laboratory provides laboratory testing results for each brake friction material directly to an industry-sponsored registrar, while DTSC's Step 2 requires manufacturers to receive confirmation from the laboratory that all testing results were submitted to the "testing certification agency" and if they do not receive this confirmation, they must contact the testing agency and confirm that all testing results were received from the laboratory. One difference here, which may cause confusion, is that Washington refers to the Registrar, and California refers to the "testing certification agency." Furthermore, the addition of the requirement for the manufacturer to make an inquiry to the testing agency may seem to be a small difference, however, it varies from Washington, is overly prescriptive, and not required by the California statute.

Another example of inconsistency with the Washington certification process is the added certification language required by in the California proposal in Step 5. The regulatory language in Section 66275.3(5) states that:

A manufacturer may use the same certification document to certify compliance with other state's laws regulating the content of brake friction material. If a manufacturer chooses to create a single certification document for multiple states, they may add additional language to the statement, as required by those states, however any additions shall not alter the meaning or effect of the statement above.

As evidenced by this language, DTSC is acknowledging that this will be an area of divergence among states with brake pad regulations. Again, this requirement varies from Washington's, is overly prescriptive, and is not required by the statute. In addition, while California states that this language can be used in other states, it has no authority to ensure that is the case. California should align its certification statement with Washington in order to reduce the compliance burden by allowing the same documents and information in those documents.

These examples show the potential for confusion to occur if the California regulatory language for self-certification varies from the Washington language. There are many other similar examples. Therefore, to minimize complexity and unnecessary compliance risk, DTSC should

not only change its language in Steps 2 & 5 to closely match the Washington language, but it should align the language throughout the entire self-certification process.

5. Section 66275.4 Testing Certification Agency for Brake Friction Material

This section raises a number of questions about the availability of accredited laboratories, incentives for laboratories to become accredited, requirements that the laboratory be accredited by California and the process for becoming a certification agency.

a) Burdensome Approach to Verifying Certification

During the first of DTSC's August, 2014 workshops, stakeholders commented that the certification through the NSF International website is cumbersome. The site itself is not user-friendly and requires the user to create an excel spreadsheet to interface with the data on the website. We recommend that DTSC create an industry user group to test the utility and functionality of the site. If the site proves difficult to navigate, we recommend that DTSC and the industry group find an alternative.

b) Availability of Accredited Laboratories

The availability of an adequate number of accredited laboratories is critical to the effective implementation of these regulations. It is not clear that DTSC has done the required research to determine that there will be an adequate number of accredited laboratories to perform the certifications. It is unclear whether incentives are in place to encourage laboratories to become accredited. The program will be unworkable if the infrastructure to support the program is not in place. DTSC should verify that an adequate number of laboratories will be available in time to ensure effective implementation.

c) Requirements that the Laboratory be Accredited by California

The California statute's definition of "Testing Certification Agency" is "a third-party testing certification agency that is utilized by a vehicle brake friction materials manufacturer and that has an accredited laboratory program that provides testing in accordance with the certification agency requirements that are approved by the department."¹⁰ However, the DTSC draft language requiring the testing certification agency be notified back in writing by DTSC is overly restrictive. Instead DTSC could meet the statutory intent by publishing a list of criteria that the testing certification agency must meet without requiring an application and reply cycle with the

¹⁰ Chaptered Senate Bill No. 346, Article 13.5: Motor Vehicle Brake Friction Materials, California Health and Safety Code section 25250.50 through 25250.65, available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0301-0350/sb_346_bill_20100927_chaptered.pdf.

agency. These criteria could include allowing approvals and lab accreditations from other states to apply to California. What is the rationale from excluding other states' lab accreditation programs from qualifying? If in fact DTSC is trying to ensure maximum harmonization among states, then including other states in this program would be an effective way of working towards that harmonization. DTSC has stated in Section 66275.4, Testing Certification Agency for Brake Friction Material, that "The Department [DTSC] shall approve the certification requirements used by the 'testing certification agency' to facilitate the acceptance of the mark of proof in all 50 states."

DTSC must work collaboratively with its state partners to create a seamless lab accreditation and certification program. DTSC should also consider allowing a national standard or accreditation, such as an ISO standard, that laboratories could certify to in lieu of DTSC approval. This could be accomplished easily as the proposed regulation already requires the testing certification agency to maintain accreditation to the ISO/IEC 17065:2012 standard.

6. Section 66275.5 Certified Laboratories for Brake Friction Materials

This section defines the requirements that must be met for a laboratory to become "certified" and how to request approval to use a non-certified laboratory. This section raises an important question about whether DTSC will accept testing performed by a laboratory not certified by California before the effective date of these regulations. As stated above, manufacturers have acted in good faith using the Washington state testing and certification process and DTSC discussions to try to comply with the January 1, 2014 statutory deadline. However, it would have been impossible to use a California-certified lab or testing certified agency prior to DTSC establishing the certification process through these regulations. DTSC must provide clarity and allow enforcement discretion to ensure manufacturers that have complied ahead of the promulgation of these regulations are not penalized or required to repeat the entire testing and certification process.

7. Section 66275.6 Testing Methodology for Brake Friction Materials

Section 66275.6 states that the "manufacturer of brake friction material is responsible for the accuracy of the laboratory testing results reported to the testing certification agency." How can manufacturers be held accountable for the work of a certified laboratory if they make an error? DTSC also references a "margin of error" in Section 66275.6, but it is not clear what margin of error is considered acceptable or may occur. How would this allowance for additional testing due to the margin of error be checked and enforced? We urge DTSC to reconsider the provisions in this section and to be clear on what is feasible and necessary to meet the requirements of the authorizing legislation.

8. *Edge Codes*

DTSC defines and uses the term “edge code” throughout the draft regulations. While we agree with the definition of “edge code” in general, we have concerns about using the term in the regulation. Edge code is an industry term and is used for far more than identifying compliant brake friction formulations, including the hot and cold coefficients and other manufacturer specific information. While DTSC believes that this term is used interchangeably with “environmental compliance mark,” “mark of proof,” or “proof of certification,” in actuality it is not. “Environmental compliance marking,” which is the term used by the Washington Department of Ecology, refers specifically to the “last letter or last two letters in the unique identification code marked on brake friction materials...and it allows a person to determine the level of environmental compliance of the brake friction material.”¹¹ The California statute refers to the “mark of proof,” and is the only part of the marking where DTSC has authority. For consistency, DTSC should use the term identified in the statute for the marking used to identify compliant brake friction material (Mark of Proof of Certification) and use it consistently throughout the regulation.

In addition, DTSC refers to the SAE J866:2012 standard in the definition in Section 66275.1(e) for “edge code.” This reference is too descriptive, as this code changes by version of the standard, and we suggest referring to the more general SAE J866.

9. *Issues not addressed in the Proposal*

A number of key implementation issues, as described below, have not been addressed in the proposal, and we are concerned that DTSC is rushing to get a final proposal out at the expense of clear and workable guidance.

a) 25250.54 Extensions

California Health and Safety Code Section 25250.54 is not addressed in the proposed regulation. Section 25250.54(b) states:

The advisory committee shall recommend to the secretary that the extension be approved if the advisory committee determines that there are no brake friction materials that are safe and available for individual or multiple vehicle models, classes, platforms, or other vehicle-based categories identified in the application.

At issue here is that DTSC has not had the time to develop the guidance necessary to inform the regulated community of what is expected in an “alternatives screening” process. While the

¹¹ WAC 173-901-100, Environmental compliance marking.

proposal discusses using the Toxics Information Clearinghouse and that fate and emissions needs to be evaluated, it provides no other details or direction. At the first brake pads webinar held in July/August 2014, DTSC staff stated that they “decided to stay silent on the issue,” because the Alternatives Assessment process for the Safer Consumer Products (SCP) Regulations was still in the preliminary stages and could not be used to inform the guidance on the alternatives screening process. The guiding statute for the brake friction material regulations references use of the Toxics Information Clearinghouse and a screening analysis.¹² It does not reference using the Alternatives Assessment required by the SCP Regulations; the SCP Alternatives Assessment process is complex, multi-stepped and far more in-depth than a “screening analysis.” Therefore, we believe that DTSC should be able to provide additional clarity regarding the Alternative Assessment at this point in time, rather than deferring to the SCP process. In addition, how can anyone request an extension based on the lack of “safe and available” materials if the assessment process is unknown? We strongly recommend that DTSC delay the implementation of these regulations until a complete and thorough set of implementing regulation can be issued.

10. Section 25250.55 Exemptions

The issue of any potential exemptions is not addressed in the proposed regulations. We recognize that there are differences between California’s and Washington’s legislation. However, the confusion that is being created by the different processes must be addressed. The Exemption/Extension comparison chart developed by DTSC highlights the areas of confusion.¹³ We request that DTSC work closely with Washington to create as much harmonization as possible in this area.

CONCLUSION

Global Automakers and the Alliance of Automobile Manufacturers appreciate DTSC’s effort to provide a workable implementation of the Brake Friction Material Law. We urge DTSC to prevent unnecessary regulatory burdens by solidifying harmonization between the Washington and California regulatory programs, and where harmonization is not possible, providing reciprocity. A lack of reciprocity between the two programs creates a very difficult compliance regime for brake manufacturers and automakers. Harmonized programs will reach the same goals while reducing compliance costs (which ultimately will borne by the consumer in the form

¹² Chaptered Senate Bill No. 346, Article 13.5: Motor Vehicle Brake Friction Materials, California Health and Safety Code section 25250.50 through 25250.65, available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0301-0350/sb_346_bill_20100927_chaptered.pdf.

¹³ DTSC, Diagram on the California Exemptions versus the State of Washington Exemptions, http://www.dtsc.ca.gov/PollutionPrevention/upload/Diagram_comparing_Ca_and_WA_exemptions_plainlanguage.pdf.

of increased retail prices), ensuring no duplication of efforts, and allowing manufacturers and suppliers to offer one consistent product in both states.

In addition, we ask that DTSC address our concerns regarding the inconsistent markings for the environmental compliance mark between California and Washington, as well as our issues with the proposal's processes for certification, exemptions, extensions, and a number of issues the proposal does not address.

We thank you for considering the comments presented herein, and we look forward to additional opportunities to comment on the regulations. Please do not hesitate to contact us with questions or if we may provide additional information. We look forward to working with DTSC as it moves forward.

Sincerely,



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