

State of California
AIR RESOURCES BOARD

Notice of Public Availability of Modified Text

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

Public Hearing Date: January 22, 2009
Public Availability Date: April 9, 2009
Deadline for Public Comment: April 24, 2009

At its January 22, 2009, public hearing, the Air Resources Board (ARB or the Board) approved the adoption of California Code of Regulations, title 17, 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). This regulation is a discrete early action greenhouse gas (GHG) reduction measure, as described in the California Global Warming Solutions Act of 2006 (Assembly Bill 32, (AB 32); ch. 486, stats. 2006), and will reduce emissions resulting from non-professional (i.e., do-it-yourself [DIY]) recharging of motor vehicle air conditioning (MVAC) systems.

At the hearing, the Board adopted Resolution 09-1, in which it approved the originally proposed regulation and incorporated certification and test procedures. Resolution 09-1 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.

Attachment 1 to this notice contains the text of California Code of Regulations, title 17, sections 95360 through 95370, that shows the proposed 15-day modifications to the originally proposed regulatory language. Attachment 2 to this notice shows proposed 15-day modifications to "Certification Procedures for Small Containers of Automotive Refrigerant." The modifications are shown in underline to indicate additions to the original proposal and ~~strikeout~~ to indicate deletions. The rationale for the modifications to the regulation and the incorporated certification procedure is set forth below.

Modifications to the Originally Proposed Text

I. Modifications to Regulatory Text of California Code of Regulations, Title 17, Sections 95360 through 95370, Being Made Available for Comment

A. Adding definitions of “Small Container” and “Small Container of Automotive Refrigerant”

The terms “small container” and “small container of automotive refrigerant” were added in section 95361(a)(23), and these terms were defined to have the same meaning as “automotive refrigerant in a small container” as defined in section 95361(a)(2). The regulation, “Certification Procedures for Small Containers of Automotive Refrigerant”, and “Test Procedure for Leaks from Small Containers of Automotive Refrigerant” (TP-503) utilize each of the aforementioned terms interchangeably. Staff believes the context in which those terms are used conveys the requirements applicable to automotive refrigerant in a small container, a small container, or a small container of automotive refrigerant. However, it is proposing to add these clarifying definitions to insure that no misunderstanding occurs. As stated above, these terms are used in other sections of the regulation and in the certification and test procedures to determine if automotive refrigerant in a small container is in compliance with the provisions of the regulation.

B. Clarify Manufacturer Responsibilities Regarding Expenditure and Accounting of Unclaimed Deposits on Consumer Education Programs

The regulation currently requires manufacturers to retain funds from unclaimed deposits, to expend those funds only on enhanced educational programs for consumers, and to provide ARB an annual accounting of deposits retained and funds expended. However, these requirements are presently incorporated in three separate sections of the regulation, which has caused some confusion regarding the regulation’s provisions for unclaimed deposits. Prior section 95366(a)(4) and new section 95366(b)(5) have therefore been deleted and added, respectively, to clarify that manufacturers do not ultimately retain unclaimed deposits, but must expend and account for their expenditures of those deposits in accordance with sections 95366(b)(6) and 95367(a)(5) of the regulation.

Subsequent to the hearing, staff realized it had inadvertently omitted provisions requiring a manufacturer to describe and receive Executive Officer approval of its proposed enhanced educational program before it could expend funds on that program. Section 95366(b)(6) and the “Certification Procedures for Small Containers of Automotive Refrigerant” have been modified to remedy this oversight.

C. Modifications to Provisions Regarding Breached Containers and Container Deposit and Return Program Requirements

The regulation presently prohibits a retailer from returning a container deposit to a consumer who returns a container that is breached or structurally compromised. Staff has made the following modifications to the regulation's provisions regarding breached containers and the container deposit and return program.

1. Clarify Breached Container Recycling Provisions

The regulation currently specifies that breached containers should not be recycled, as breached containers do not contain any refrigerant for a manufacturer to recover. However, staff has subsequently realized that this language could be broadly interpreted to also apply to the recycling of the empty container itself, which is subject to applicable solid waste recycling laws. To clarify that this provision does not restrict the recycling of an empty container, section 95365(d) has been modified to clarify that that breached containers will not be counted as recycled containers for purposes of calculating the recycling rate of small containers of automotive refrigerant. Specifically, ARB will not include the number of returned small containers that have been breached in the numerator of containers returned, but will include that number in the denominator of containers sold to consumers during the applicable reporting period. This is also explained below in section D.3 of this notice.

2. Clarify Retailer Responsibilities Regarding Handling and Reporting Returns of Breached Containers

The regulation currently prohibits retailers from accepting returns of breached or structurally compromised small containers from consumers, and from paying consumers deposits for such breached or structurally compromised containers. Section 95366(a)(3) has been modified to allow retailers to accept breached or structurally compromised small containers and to provide retailers the discretion to return deposits for breached containers. However, ARB is encouraging retailers not to pay deposits for breached containers, as this practice would be inconsistent with the regulation's objective of reducing emissions of regulated automotive refrigerant.

Sections 95366(a)(4) and 95367(a)(1) have been 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.

3. Clarify Manufacturer Responsibilities Regarding Handling and Reporting Returns of Breached Containers

New section 95366(a)(4) has been modified to require manufacturers to cooperate with retailers and distributors to facilitate retailers' and distributors' abilities to segregate breached from non-breached returned containers.

Section 95366(b)(4) presently prohibits a manufacturer or its designated return agency from accepting returned small containers that have been breached, or

from paying a retailer or distributor refunds from those breached containers. This section has been modified to require a manufacturer or its designated return agency to pay a retailer refunds for breached containers, and to count and document the number of returned breached containers.

4. Incorporate Flexibility Regarding Increasing or Decreasing Container Deposits

The regulation presently includes provisions allowing the Executive Officer to only increase the deposit on small containers of automotive refrigerant in \$5 increments if the annual return rate of containers does not meet or exceed specified return rates. Staff has modified sections 95366(a)(2) and added section 95367(d)(2) 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. The Executive Officer would base his or her decision on information and/or good engineering or scientific judgment regarding whether a proposed reduction would reasonably cause future return rates to not consistently or adequately exceed the target return rate.¹ Such a request must be submitted by March 1 following ARB's publication of that year's return rate, and a decision to approve or disapprove a request to reduce the deposit amount will be issued by May 31 following the request. If the Executive Officer increases the deposit amount pursuant to this provision, the effective date of the increase will be January 1 of the year following the Executive Officer's decision.

It should be noted that the two year average return rate specified in section 95367(d) refers to an industry-wide return rate. Therefore, although any manufacturer or retailer may request a reduction of the deposit amount under this provision, the Executive Officer would base his or her decision on the industry-wide return rate, and not on the requesting entity's return rates.

D. Modifications to Reporting and Recordkeeping Requirements

1. Modification of Reporting Periods to Calendar Year Basis

The regulation presently specifies an initial reporting period from January 1 through September 30, 2010, and subsequent annual reporting periods from October 1 to September 30 each calendar year, with reports due by December 1 of that calendar year. In response to comments, section 95367 of the regulation has been modified 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. The first annual report will cover the period January 1 through December 31, 2010, and is due March 1, 2011.²

1. For example, a proposed reduction in the deposit amount that is likely to only achieve a return rate of 95.3% would likely not satisfy the proposed criteria.

2. ARB prefers that manufacturers submit all the information required by sections 95367(a)(3), (4), and (5)

2. Deletion of Requirement to Report Recalled Containers

Sections 95367(a)(1) and (a)(4) have been modified to improve clarity by striking out “recalled” because recalled containers are already included in the category “returned unused containers.”

3. Modification of Timelines for ARB Action

Section 95367(b) has been modified to reflect the new reporting periods discussed above. Beginning in 2011, ARB will calculate and publish the return rate of small containers of automotive refrigerant by May 31 each year. This section has also been modified to clarify that ARB will not include breached small containers in calculating the annual return rate of containers. Specifically, in calculating the return rate of containers as specified in section 95367(b), ARB will not include the number of returned small containers that have been breached in the numerator of containers returned, but will include that number in the denominator of containers sold to consumers during the applicable reporting period.

Sections 95367(d), and 95367(d)(1) have been modified to clarify that beginning in 2012, ARB will evaluate the return rates calculated from the preceding two calendar year period³ 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. If the Executive Officer increases the deposit amount pursuant to this provision, the effective date of the increase will be January 1 of the year following the Executive Officer’s decision.

4. Modification of New Deposit Amount Requirements

The regulation currently provides that in the event a new deposit rate is required, the effective date of the deposit increase shall be January 1 of the year following the Executive Officer’s decision to increase the deposit rate, and that containers subject to existing deposit rates can be sold for up to six months after a new deposit rate takes effect. Section 95367(e) has been modified to state that if the Executive Officer decides to modify the deposit rate, small containers must have labels and SKUs that reflect the modified deposit amount by January 1 of the year following that decision.

New section 95367(f) has been added to specify that if the Executive Officer increases the deposit rate, small containers that are subject to existing deposit

in a single report.

3. The applicable period includes the period of time beginning January 1, two calendar years before the date of ARB’s calculation, up to and including December 31 of the calendar year immediately preceding the date of ARB’s calculation (i.e., calculations will be based on an incremental two year period, *not* a rolling two year period).

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, because existing containers will be subject to lower deposit amounts than newer containers, and consumers will therefore likely preferentially purchase existing containers over newer containers. This factor also explains why manufacturers are not required to recall existing containers if the deposit rate is increased.

New section 95367(g) has been added to provide for decreases in the deposit rate. 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 both recall any unsold existing containers by April 1 one calendar year after that decision and to report the total number of recalled containers as required by section 95367. Both a limited sell-through period and a recall requirement are warranted in this situation because current containers will be subject to higher deposit amounts than newer containers, and therefore, in contrast to the situation described above, existing containers would likely remain on retail shelves indefinitely as consumers would preferentially purchase newer containers (with lower deposit amounts) over current containers.

E. Enforcement Provisions

Section 95368(a) presently specifies that violations of this subarticle may subject a violator to revocation of an Executive Officer, penalties prescribed by Chapter 1.5 of Part 5, Division 26 of the Health and Safety Code commencing with section 42400, and/or the issuance of an injunction pursuant to section 41513 of the Health and Safety Code. For purposes of clarity this section has been segregated into three new sections that separately restate the revocation, penalty, and injunctive sanctions.

New section 95368(a) specifies 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. Although this new section appears to specify different penalty provisions than those currently in section 95368(a), this is not the case, as explained below. Health and Safety Code section 38580(b)(1) states, in pertinent part:

“[a]ny violation of any rule, regulation, order ... or other measure adopted by the [ARB] pursuant to [Division 25.5 of the Health and Safety Code] ... is subject to those penalties set forth in Article 3 (commencing with Section 42400) of Chapter 4 of Part 4 of, and Chapter 1.5 (commencing with Section 43025) of Part 5 of, Division 26.”

Subsequent to the hearing, staff realized it would be more accurate to cite Health and Safety Code section 38580, because section 38580(b)(2) specifies that violations of AB 32 regulations “. . . shall be deemed to result in an emission of an air contaminant

for the purposes of the penalty provisions of Article 3 (commencing with section 42400).” This provision alters the penalty structure set forth in Article 3, and it is therefore more accurate and informative to cite Health and Safety Code section 38580, instead of the Health and Safety Code sections contained in Article 3 (commencing with section 42400).

Sections 42400(e), 42400.1(c), 42400.2(d), 42400.3(d), 42402(d), 42402.1(c), 42402.2(c), and 42402.3(d) provide that “each day during any portion of which a violation ... occurs is a separate offense,” so the new section 95368(a) language stating that “each day during any portion of which a violation occurs is a separate offense” merely restates existing law.

New section 95368(b) restates the availability of injunctive relief pursuant to Health and Safety Code section 41513.

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

F. Other Minor, Non-Substantive Changes

The reference to “Title” 17, California Code of Regulations immediately following the “Proposed Regulation Order” has been capitalized.

The definition of “label” in section 95361(a)(11) has been modified to clarify that it applies to written, printed, or graphic materials affixed to a small container containing automotive refrigerant, as opposed to materials affixed to the refrigerant.

Section 95361(a)(7) has been modified by inserting “to” after “imports”.

Subsequent to the hearing staff realized it had inadvertently utilized the term “article” instead of the term “subarticle” throughout the regulation. Sections 95361(a)(5), 95361(a)(6), 95362(a), 95362(c), and 95370 have been modified to remedy this oversight.

Section 95367(c) has been modified to reflect the new reporting periods discussed above in section D.1, by inserting “small” before “container of automotive refrigerant”, and to incorporate minor grammatical corrections.

Section 95366(e) has been modified by substituting “small containers” for “cans”. This section has also been modified to delete the term “recovered” in front of “refrigerant” to remedy a staff oversight.

Sections 95367(a)(1) and (a)(4) have substituted the term “breached” for “damaged”

II. Modifications to Text of Certification Procedures for Small Containers of Automotive Refrigerant Being Made Available for Comment

A. Clarify Manufacturer Responsibilities Regarding Describing Enhanced Consumer Education Program in Application for Certification

Subsequent to the hearing, staff realized it had inadvertently omitted provisions requiring a manufacturer to describe and receive Executive Officer approval of its proposed enhanced educational program before it could expend funds on that program. Section 2.4(A)(8) of the Certification Procedures has been modified to remedy this oversight.

B. Require Manufacturers to Include Bill of Materials in Application for Certification for Small Containers of Automotive Refrigerant

Subsequent to the hearing, staff realized it had inadvertently omitted provisions requiring a manufacturer to supply the bill of materials for a small container of automotive refrigerant in its application for certification. The Executive Officer would utilize this information to evaluate the application and to certify small containers. Section 3.2 of the Certification Procedures has been modified to remedy this oversight.

C. Clarify that Educational Materials Must be Published in Both English and Spanish

Section 2.4 of the Certification Procedures specifies the format and content of educational materials that manufacturers are required to publish on Internet web pages and on brochures suitable for distribution to consumers. Subsequent to the hearing, staff realized it had inadvertently omitted provisions requiring such educational materials to be published in both English and Spanish, and has modified Section 2.4(A) to correct this oversight.

D. Other Minor, Non-Substantive Changes

Subsequent to the hearing staff realized it had inadvertently utilized the term “article” instead of the term “subarticle” throughout the Certification Procedures. Sections 2.1(F), 2.3(C), and 2.3(D) have been modified to remedy this oversight.

Section 2.1(E) has been modified by substituting “provisos” for “conditions” to improve readability.

The term “Title” 17 has been capitalized in Section 2, and has also been inserted in Sections 2.3(B)(1), 2.3(B)(3), and 4.3.

Section 2.3(A)(1)(c) has been modified to incorporate a grammatical correction.

The regulatory documents for this rulemaking, including Resolutions 09-1, are available online at the following ARB internet site:

<http://www.arb.ca.gov/regact/2009/hfc09/hfc09.htm>

In accordance with section 11346.8 of the Government Code, the Board directed the Executive Officer to adopt new sections 95360, 95361, 95362, 95363, 95364, 95365, 95366, 95367, 95368, 95369, and 95370, Title 17, CCR, 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), after making the modified text available to the public for comment for a period of at least 15 days. The Board further provided that the Executive Officer shall consider such written comments as may be submitted during this period, shall make such modifications as may be appropriate in light of the comments received, and shall present the regulations to the Board for further consideration if warranted.

Written comments will only be accepted on the modifications approved by the Board and may be submitted by postal mail, electronic mail, or facsimile as follows:

Postal mail: Clerk of the Board, Air Resources Board
1001 I Street, Sacramento, California 95814

Electronic submittal: <http://www.arb.ca.gov/lispub/comm/bclist.php>

Facsimile submissions are to be transmitted to: (916) 322-3928

Please note that under the California Public Records Act (Gov. Code § 6250 et seq.), your written and oral comments, attachments, and associated contact information (e.g., your address, phone, email, etc.) become part of the public record and can be released to the public upon request. Additionally, this information may become available via Google, Yahoo, and any other search engines.

In order to be considered by the Executive Officer, comments must be directed to the ARB in one of the three forms described above and received by the ARB by 5:00 p.m., on the deadline date for public comment listed at the beginning of this notice. Only comments relating to the above-described modifications to the text of the regulations shall be considered by the Executive Officer.

For individuals with sensory disabilities, this document and other related material can be made available in Braille, large print, audiocassette, or computer disk. For assistance, please contact the Clerk of the Board at (916) 322-5594 or by Fax at (916) 322-3928 as soon as possible.

Attachments