

August 21, 2013

BY ELECTRONIC MAIL

Gina McCarthy, Administrator
United States Environmental Protection Agency
OPPT Document Control Office
EPA East Bldg., Room 6428
1201 Constitution Ave, NW
Washington, DC 20460

RE: Comments on EPA's Formaldehyde Emissions Standards for Composite Wood Products and Third-Party Certification Framework for the Formaldehyde Standards for Composite Wood Products; Docket Nos. EPA-HQ-OPPT-2011-0380, EPA-HQ-OPPT-2012-0018.

Dear Administrator McCarthy:

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments on the Environmental Protection Agency's (EPA) rulemakings on Formaldehyde Emissions Standards for Composite Wood Products and Third-Party Certification Framework for the Formaldehyde Standards for Composite Wood Products. Comments on the proposed Third-Party Certification rule follow comments on the proposed Formaldehyde Emissions Standards rule at the end of this letter.

Advocacy thanks EPA for extending the comment periods for both proposed rules. Advocacy has heard from many small businesses and small business representatives that additional time is needed to properly review and evaluate the proposed rules and to prepare comments. Advocacy also commends EPA for implementing an open-door policy and enhancing small business outreach since Advocacy's roundtable on July 19, 2013.

Summary

Many small businesses operating in the composite wood products industry were anticipating the publication of the proposed rules, but most were unprepared for the extent to which the proposed rules exceed the California Air Resources Board's (CARB) Airborne Toxic Control Measure (ATCM) on Composite Wood Products.¹ Small businesses believe that the proposed rules will impose greater burdens on them without EPA having shown that the ATCM provisions are underperforming.

To reduce the burden on small businesses Advocacy urges EPA to follow the recommendations made by the Small Business Advocacy Review (SBREFA) panel to the

¹ 17 CCR § 93120-93120.12 (April 18, 2008) [hereinafter ATCM].

EPA Administrator, especially the SBREFA panel's recommendation to "[a]dopt regulatory requirements that are consistent with the ATCM wherever possible."² Adopting the SBREFA panel's recommendations will help reduce the burden on small businesses of complying with the proposed rules while ensuring the agency achieves its intended goals.

The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. No. 94-305 to advocate the views of small entities before federal agencies and Congress. Because Advocacy is an independent body within the U.S. Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the position of the Administration or the SBA.³ The Regulatory Flexibility Act (RFA),⁴ as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),⁵ gives small entities a voice in the federal rulemaking process. For all rules that are expected to have a "significant economic impact on a substantial number of small entities,"⁶ EPA is required by the Regulatory Flexibility Act to conduct a SBREFA panel to assess the impact of the proposed rule on small entities,⁷ and to consider less burdensome alternatives.

History of the Rulemakings

In 2007, CARB issued an ATCM to reduce formaldehyde emissions from composite wood products. The California Office of Administrative Law approved the ATCM on April 18th, 2008 and the first standards came into effect on January 1, 2009.⁸ On March 24, 2008, 25 organizations and 5,000 individuals petitioned EPA under section 21 of the Toxic Substances Control Act (TSCA) to use its authority under section 6 to adopt the ATCM nationally and to extend the ATCM to composite wood products used in manufactured homes. In a June 27, 2008 Federal Register notice, EPA explained its decision to grant in part and to deny in part the petitioners' request.⁹ On December 3, 2008, EPA issued an Advanced Notice of Proposed Rulemaking (ANPRM).¹⁰

² Panel Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule Implementing the Formaldehyde Standards for Composite Wood Products Act (Title VI). U.S. Environmental Protection Agency, Office of Policy, Washington, D.C., p 28 [hereinafter Panel Report]. Available at http://www.epa.gov/rfa/documents/Report-SBREFApPanel_Formaldehyde.pdf.

³ 15 U.S.C. § 634a, *et. seq.*

⁴ 5 U.S.C. § 601, *et. seq.*

⁵ Pub. L. 104-121, Title II, 110 Sta. 857 (1996) (codified in various sections of 5 U.S.C. § 601, *et. seq.*).

⁶ See 5 U.S.C. § 609(a), (b).

⁷ Under the RFA, small entities are defined as (1) a "small business" under section 3 of the Small Business Act and under size standards issued by the SBA in 13 C.F.C. § 121.201, or (2) a "small organization" that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or (3) a "small governmental jurisdiction" that is the government of a city, county, town, township, village, school district or special district with a population of less than 50,000 persons. 5 U.S.C. § 601.

⁸ See <http://www.arb.ca.gov/toxics/compwood/compwood.htm>.

⁹ 73 Fed. Reg. 36504 (June 27, 2008).

¹⁰ 73 Fed. Reg. 73620 (December 3, 2008).

On July 7, 2010, President Obama signed into law the Formaldehyde Standards for Composite Wood Products Act (Title VI).¹¹ Title VI amends TSCA by establishing the same limits for formaldehyde emissions from composite wood products as those established under the ATCM. The emission standards are set by statute but EPA was given the discretion to promulgate regulations that include provisions in a number of areas. In the fall of 2010, EPA convened a SBREFA panel for EPA's Planned Proposed Rule Implementing the Formaldehyde Standards for Composite Wood Products Act during which 17 small entity representatives (SERs) reviewed the planned proposed rulemaking and submitted comments and recommendations to EPA for consideration during the rulemaking development process. The Panel Report was signed on April 4, 2011 and is available in the docket¹² and on EPA's website.¹³ EPA published the proposed rules on June 10, 2013.¹⁴

Advocacy Involvement in the Rulemaking Process

Throughout the rule development process Advocacy has been closely engaged with EPA and the Office of Management and Budget (OMB) Office of Information and Regulatory Affairs (OIRA) as well as with small businesses. During the SBREFA panel process Advocacy interacted with EPA, OIRA and 17 SERs. Advocacy also worked with EPA and OIRA throughout the confidential interagency review of the draft proposed rules. During the development of the proposed rules and subsequent to their publication, Advocacy spoke or met with more than 30 small businesses and small business representatives. Advocacy held a roundtable on July 19, 2013 at which EPA presented. Advocacy also observed CARB's day-long discussion session titled "Discussion Session Regarding ARB's Airborne Toxic Control Measure to Reduce Formaldehyde Emissions from Composite Wood Products and Proposed U.S. EPA Regulations" (Discussion Session).¹⁵ Advocacy also made two site visits to potentially affected entities.

I. EPA Has Not Followed Many of the Panel Report Recommendations

The SBREFA panel for the proposed rules received comments from SERs on many provisions which are included in the proposed rules. The Panel Report includes comments and discussions on sell-through provisions, stockpiling, ultra low-emitting formaldehyde (ULEF) resins and no-added formaldehyde (NAF) resins, finished goods, third-party testing and certification, auditing and reporting for third-party certifiers, chain-of-custody and recordkeeping requirements, labeling, laminated products, products and components containing de minimis amounts of composite wood products, and hardboard. The Panel Report also includes 14 recommendations to EPA for consideration during drafting of the proposed rules.

¹¹ Formaldehyde Standards for Composite Wood Products Act of 2010. Pub.L. 11-199, 2010-7-7 [hereinafter Title VI].

¹² Panel Report, *supra* n. 2 at 28.

¹³ *Ibid.*, 14.

¹⁴ 78 Fed. Reg. 34796, 34820 (June 10, 2013).

¹⁵ California Air Resource Board (August 1, 2013). Discussion Session Regarding ARB's Airborne Toxic Control Measure to Reduce Formaldehyde Emissions from Composite Wood Products and Proposed U.S. EPA Regulations [hereinafter Discussion Session]. See <http://www.arb.ca.gov/toxics/compwood/compwood.htm>.

Table 1 below highlights each panel recommendation and compares the recommendation with EPA's treatment of the recommendation in the proposed rules.

Table 1. Comparison of SBREFA Panel Recommendations and EPA's Proposed Rule

Provision	Panel Recommendation	Proposed Rule	Accept Panel Rec
General	EPA should adopt regulatory requirements that are consistent with the CARB ATCM wherever possible. ¹⁶	Regulatory requirements are inconsistent with the ATCM.	No
Manufactured-by Dates	At least 180 days after the promulgation of the regulations. ¹⁷	One year after publication of the final rule in the Federal Register.	Yes ¹⁸
Stockpiling	The reference period against which purported stockpiling should be measured by the 12-month period prior to promulgation of the regulations, with annualized rates compared. ¹⁹	Reference period is the 2009 calendar year.	No
Green Seal Program for NAF and ULEF Resins	EPA should not pursue a green seal program. ²⁰	No green seal program in the proposed rule.	Yes
Alternative Testing Methods	EPA should consider CARB's method of establishing equivalency and evaluate any alternative test method. ²¹	EPA considered establishing equivalency and alternative test methods.	Yes ²²

¹⁶ Panel Report, *supra* n. 2 at 28.

¹⁷ Ibid.

¹⁸ Proposed rule provides flexibility beyond the SBREFA panel recommendation.

¹⁹ Panel Report, *supra* n. 2 at 28.

²⁰ Ibid., 29.

²¹ Ibid.

²² Proposed manufactured-by date is later than the SBREFA panel recommendation.

Noncompliant Lots	EPA should provide clear direction to third-party certifiers (TPCs) on product decertification and recertification procedures and clear direction to producers regarding the recall of noncompliant products. ²³	EPA has proposed specific provisions on what actions are required and permitted in the event of a failed test result, including requiring panel producers to hold lots selected for testing until the test results are received.	Yes
Third Party Certification	EPA should continue to explore how to capitalize on expertise of international accrediting bodies, while maintaining control over design and implementation of its certification system. ²⁴	EPA has proposed a third party certification rule that delineates the implementation and functioning of the third party certification system.	Yes
Labeling	EPA should consider closely aligning the two labeling systems to allow downstream purchasers to verify that they are purchasing compliant composite wood products. If possible, label should contain same information required by CARB and EPA should allow for labeling by bundle. ²⁵	Requirements generally follow the approach taken in the ATCM.	Yes
Laminated Products	EPA should continue to seek available information, and exempt those laminated products that can be exempted consistent with the direction given in TSCA section 601(b)(1). ²⁶	EPA continues to seek information but has not proposed an exemption for laminated products from the definition of “hardwood plywood.”	No
Laminated Products – Small Businesses	EPA should work with small businesses, especially those laminating on a made-to-order basis, to design a testing scheme that is practical for those businesses. EPA should consider basing the number and frequency of required quality control testing on production volume. ²⁷	There is no proposed testing scheme for smaller and specialty manufacturers.	No

²³ Panel Report, *supra* n. 2 at 29.

²⁴ *Ibid.*

²⁵ *Ibid.*, 30.

²⁶ *Ibid.*

²⁷ *Ibid.*

Fabricators	Where possible, makers of finished goods should be regulated in harmony with CARB, including harmonizing the labeling and record keeping requirements for fabricators. ²⁸	Requirements generally follow the approach taken in the ATCM.	Yes
Hardboard	EPA should develop a definition of “hardboard” that takes the revised ANSI standard into account while ensuring similar products are similarly regulated. ²⁹	A panel composed of cellulosic fibers made by dry or wet forming and hot pressing of a fiber mat, either without resins, or with phenolic resin or a resin system in which there is NAF as part of the resin cross-linking structure, as determined under of the following ANSI standards. ANSI A135.4 (Basic Hardboard), ANSI A135.5 (Prefinished Hardboard Paneling), or ANSI A135.6 (Hardboard Siding).	Yes
Interior Use	EPA should develop a clear definition of “interior use.” Definition should be based on the intent of the statute and consider how the hardwood plywood is likely to be used and stored once incorporated into a finished good. ³⁰	“Intended for interior use” intended for use or storage inside a building or recreational vehicle, or constructed in such a way that is not suitable for long-term use in a location exposed to the elements.	Yes
Panel	EPA should develop a definition of “panel” that is based on the intent of the statute, and considers trade usage and the limitations of current test methods. ³¹	EPA’s proposed definition is a “Flat or raised piece of composite wood.”	No

Following the publication of the Panel Report, Advocacy was contacted by SERs who were disappointed by EPA’s treatment of the SBREFA panel’s recommendations in the proposed rule. A review of Table 1 illustrates that EPA accepted only about two-thirds of the SBREFA panel’s recommendations. EPA almost always follows the SBREFA Panel consensus recommendations, unless there are “subsequent data findings or circumstances that warrant a

²⁸ Ibid., 31.

²⁹ Ibid., 30.

³⁰ Panel Report, *supra* n. 2 at 30.

³¹ Ibid.

change in the EPA's position."³² It is quite rare when EPA deviates from the consensus recommendations, and it is even rarer in the final rule. Advocacy urges EPA to promulgate a rule that is consistent with the consensus panel recommendations of the SBREFA panel. The following are the recommendations EPA did not accept.

1. EPA should adopt regulatory requirements that are consistent with the CARB ATCM wherever possible.

Small businesses believe that the intent of Title VI was to direct EPA to implement the California regulation nationally, not to give EPA the authority to impose additional burdens on businesses. Of the 14 SBREFA panel recommendations, the principal SER recommendation is that EPA adopt regulatory requirements consistent with the ATCM wherever possible. Although EPA has made an effort to align certain regulatory provisions, small businesses have expressed frustration with how EPA is proposing to exercise its statutorily delegated authority, indicating that it is not necessary for EPA to propose different regulatory provisions for many of the provisions where the regulatory requirements are inconsistent.

Recordkeeping requirements

Recordkeeping is a provision small businesses have identified as receiving unnecessarily stricter treatment under the proposed rule. The ATCM requires the retention of records for a minimum of two years in either electronic or hard copy. Under EPA's proposed rule, entities are required to retain records for three years. CARB has told Advocacy that it is pleased with the implementation of its recordkeeping provision, and has found no reason to revise the retention time frame. In its Discussion Session, referred to above, CARB even recommended that EPA follow the ATCM's two-year record retention period.

Small businesses have also expressed to Advocacy that they see no reason to extend the recordkeeping requirement to three years. Further, EPA has failed to show a compelling reason to justify increasing the recordkeeping burden on small businesses. Because formaldehyde has a half-life of 1.5 years, the chances of experiencing high levels of formaldehyde emissions three or four years after manufacture are unlikely. Advocacy suggests that EPA align its regulatory requirements with the ATCM and propose a 2-year recordkeeping requirement.

Other regulatory requirements which are inconsistent with the ATCM

The proposed rule contains a number of other inconsistencies between the ATCM and the proposed rules, including core types included in the definition of "hardwood plywood"; the

³² This point is consistent with the EPA discussion in Section 5.8.4 of the 2006 EPA Final Guidance for EPA Rulewriters: Regulatory Flexibility Act, "Since an EPA program office representative signs the Panel Report, it is generally recognized that any recommendations agreed upon by the entire Panel are acceptable to the Agency, whether as modifications to the regulatory proposal, or as issues to be discussed in the preamble. Even if there are subsequent data findings or circumstances that warrant a change in EPA's position after the Panel closes, it is important to discuss the Panel's recommendations and the Agency's response in the NPRM" (Emphasis in original) p. 67. Available at www.epa.gov/rfa/documents/Guidance-RegFlexAct.pdf.

definition of “veneer”; the definition of “retailer”; the requirements for additional quality control testing when changes are made to mill production apply to different entities; retention of lots selected for testing; and the inclusion of laminated products in the definition of “hardwood plywood.”

Many of these inconsistencies in the proposed rules capture additional entities and products for regulation. For example, the ATCM applies to laminated products made by fabricators while EPA’s proposed rule applies to laminated products made by manufacturers and fabricators. The ATCM does not include raised panels in the definition of “panel,” while EPA’s proposed rule incorporates raised panels into the definition of “panel.” The ATCM imposes emission standards for hardwood plywood with veneer or composite cores only, while EPA’s proposed rule imposes emission standards on all hardwood plywood core types. Finally, the ATCM’s definition of “veneer” only includes wood-based materials, while the definition of “veneer” in EPA’s proposed rule expands the definition to include woody grass materials.

There is concern that the inconsistencies between the ATCM and the proposed rules may grow as CARB is considering amending certain ATCM regulations. For example, in its Discussion Session CARB indicated that it may exempt additional products from the ATCM, including molded products, cellulosic fiber insulating boards (ASTM C208), and cross-laminated timber structural panels. In order to ensure regulatory consistency, EPA should work closely with CARB so that any amendments to the ATCM are captured in EPA’s regulations. CARB and EPA should also consider granting reciprocity to decisions made by each agency as they arise in the future.

2. The reference period against which purported stockpiling should be measured should be the 12-month period prior to the promulgation of the regulations, with annualized rates compared.

The SBREFA panel recommended that the reference period against which alleged stockpiling ought to be measured should be the 12-month period prior to the promulgation of the regulations. EPA has instead proposed the 2009 calendar year as the 12-month reference period. Small businesses object to the choice of the 2009 calendar year. In 2009, manufacturing levels were uncharacteristically low because of the recession and do not reflect the most up-to-date industry information. Setting the reference period as the 2009 calendar year will not accurately reflect the period that businesses were at full capacity. Advocacy suggests that EPA adopt the SBREFA panel’s recommendation and fix the stockpiling reference period as the 12 calendar months immediately before the promulgation of the final rule.

3. EPA should continue to seek available information, and exempt those laminated products that can be exempted consistent with the direction given in TSCA section 601(b)(1).

Under the ATCM, the regulation of laminated products extends to fabricators only in so far as requiring fabricators to use a compliant platform and to retain records showing the platform is compliant. There are no testing requirements for fabricators. Title VI also includes laminated

products in the definition of “hardwood plywood,” thereby subjecting laminated products to the same testing requirements as hardwood plywood. However, Title VI grants discretion to the EPA Administrator to determine “whether the definition of the term ‘hardwood plywood’ should exempt engineered veneer or any laminated product.”³³

Advocacy respectfully disagrees with EPA’s position that Title VI requires laminated products to meet the emissions standards. As mentioned directly above, Title VI gives the Administrator discretion over whether to include laminated products in the definition of “hardwood plywood.” If the Administrator exempts laminated products from the definition of “hardwood plywood,” laminated products would not be subject to the proposed rule. Section 601(d) only requires the Administrator to implement the section 601(b) standards “in a manner that ensures compliance with the emissions standards described in subsection (b)(2),” and include provisions relating to laminated products (meaning provisions either including or exempting laminated products).³⁴ However, section 601(b)(4) provides that the emission standard in 601(b)(1) applies to hardwood plywood, medium-density fiberboard, or particleboard in the form of an unfinished good or incorporated into a finished good. Advocacy interprets this section to require panels of hardwood plywood, medium-density fiberboard, or particleboard, as generally defined in the industry, to meet the emission standard whether the panel is unfinished or incorporated into a finished good. This is in conflict with the intent of section 601(b)(4), which is not to apply the emission standard to component parts or finished goods.

During the SBREFA panel discussions, many SERs opposed the regulation of laminated products under the ATCM testing model. As a result, the SBREFA panel recommended that EPA “continue to seek available information, and exempt those laminated products that can be exempted consistent with the direction given in TSCA section 601(b)(1).”³⁵ Despite small businesses’ concerns, in the proposed rule EPA chose not to exempt laminated products from the definition of hardwood plywood.

Small businesses oppose EPA’s proposed approach because the ATCM testing and quality control program is unsuitable for laminated products. The ATCM regulates major panel manufacturers and applies to the manufacture of panels, not component parts. Title VI

³³ Title VI, *supra* n. 10.

³⁴ *Ibid.*

³⁵ Panel Report, *supra* n. 2. TSCA s 601(b)(1) IN GENERAL.—Except as provided in an applicable sell-through regulation promulgated pursuant to subsection (d), effective beginning on the date that is 180 days after the date of promulgation of those regulations, the emission standards described in paragraph (2), shall apply to hardwood plywood, medium-density fiberboard, and particleboard sold, supplied, offered for sale, or manufactured in the United States.

³⁵ Title VI section 601(1)(c)(2) specified that “the term ‘laminated product’ means a product— “(I) in which a wood veneer is affixed to—

“(aa) a particleboard platform;

“(bb) a medium-density fiberboard platform; or

“(cc) a veneer-core platform; and

“(II) that is—

“(aa) a component part;

“(bb) used in the construction or assembly of a finished good; and

“(cc) produced by the manufacturer or fabricator of the finished good in which the product is incorporated.”

specifies that laminated products are “component parts,” but the proposed rule will effectively treat laminators as panel producers. Fewer than 100 laminators in the U.S. are making panel products.³⁶ Should EPA include laminated products in the definition of hardwood plywood, the agency will be holding component parts to the standard set for panels. Small laminators will have a very difficult time or will be unable to meet a standard not meant to apply to their industry.

Further, by regulating laminated products as hardwood plywood, EPA is subjecting 7,000 to 14,000 additional businesses, mostly small, to the proposed rules.³⁷ Many of these small businesses may not be familiar with the ATCM or its testing and quality control requirements. Increased costs to small businesses as a result of costs to replace equipment and to experiment with different resin systems involving NAF resins greatly increases the cost of the proposed rule. Small businesses argue that the increase in cost is not accompanied by a corresponding increase in the reduction of emissions to justify the costs.

EPA should reconsider its approach to regulating laminated products. CARB has suggested a potential alternative approach for regulating laminated products that requires low-formaldehyde-emitting resin use and the retention of records showing which resins are used to affix veneers. CARB advises against testing or certification unless urea formaldehyde (UF) resin is used.³⁸ Advocacy suggests EPA work closely with CARB to develop a program that reflects CARB’s alternative approach. However, Advocacy is aware that some small businesses, for performance reasons, cannot switch over to low-formaldehyde-emitting resins. In this case, EPA should consider regulatory alternatives in the form of reasonable testing based on production volume or exemption from testing requirements altogether in the appropriate situation.

4. EPA should work with small businesses, especially those laminating on a made-to-order basis, to design a testing scheme that is practical for those businesses. EPA should consider basing the number and frequency of required quality control testing on production volume.

The SBREFA panel recommended that EPA work with small businesses to design a practical testing scheme based upon production volume. EPA is proposing separate testing requirements for panel producers producing fewer than 100,000 square feet per product type at one time. For these panel producers EPA will require one quality control test per product type per production run or lot produced.

Stakeholders have indicated that EPA’s testing requirements are similar to the ATCM. While Advocacy generally supports consistency between the ATCM and the proposed rules, the fact that CARB’s program was created for major manufacturers, as discussed above, means that it

³⁶ Composite Panel Association, July 2, 2013. Phone call with the U.S. Small Business Administration Office of Advocacy on Formaldehyde Emissions Standards for Composite Wood Products and Third-Party Certification Framework for the Formaldehyde Standards for Composite Wood Products. Washington, D.C.

³⁷ 78 Fed. Reg. 34844 (June 10, 2013).

³⁸ California EPA (August 1, 2013). Discussion Session: U.S. EPA Proposed Formaldehyde Rules and ARB Existing ATCM, California Environmental Protection Agency, Air Resources Board, slide 19.

is unlikely to work for smaller producers and fabricators, such as custom shops making hardwood plywood and for a majority of laminators.

Small businesses are concerned the testing requirements are too stringent and costly and particularly burden laminators making made-to-order items. For example, custom shops are unlikely to produce close to 100,000 square feet of any product in a year. Testing for custom shops undertaking a single job at a time could cost between \$2,500 and \$3,500 or more. Small businesses believe they will have difficulty conducting the testing and quarterly audits and that costs will have a significant impact on their business and their downstream customers. One hardwood plywood manufacturer has estimated that their testing costs will fall somewhere between \$50,000 to \$100,000 per year, which is equivalent to 20 to 40 percent of their bottom line.³⁹ Every dollar spent on testing is a dollar less toward new product development, more efficient technology, and employee skills development. Advocacy reiterates its suggestion above urging EPA to work with small and custom shops to exempt products if appropriate, or to develop a testing scheme that will not unduly burden these shops.

5. EPA should develop a definition of “panel” that is based on the intent of the statute and considers trade usage and the limitations of current test methods.

The SBREFA panel recommended that EPA base its definition of “panel” on trade usage and the statutory intent of Title VI. The ATCM defines a panel as “any particleboard, medium density fiberboard, or hardwood plywood board produced for sale, supply, or distribution by a composite wood manufacturer.”⁴⁰ The ATCM is based on ASTM standard E1333 – 10⁴¹, a standard for testing large panels using UF resin products. The ATCM establishes formaldehyde emission standards for panels of hardwood plywood with a veneer core, hardwood plywood with a composite core, particleboard, and medium density fiberboard. Fabricators of finished goods, component parts and laminated products are only required to purchase compliant panels.⁴²

EPA’s proposed rule regulates panels, as well as raised panels and component parts. Small businesses are concerned with the regulation of component parts because CARB did not contemplate the regulation of either component parts or laminated products when it established the ATCM emissions levels. Further, ASTM E1333 – 10 was not intended to apply to laminated products. Section 601(a)(1)(A) of Title VI defines the term “finished good” by excluding panels and component parts implying that component parts, many of which are raised, are not panels.

³⁹ Rutland Plywood Corporation. July 24, 2013. Comments made during meeting with the U.S. Small Business Administration Office of Advocacy on EPA’s proposed Formaldehyde Emissions Standards for Composite Wood Products and Third-Party Certification Framework for the Formaldehyde Standards for Composite Wood Products rules. Rutland, VT.

⁴⁰ ATCM, *supra* n. 1.

⁴¹ ASTM E1333 - 10 Standard Test Method for Determining Formaldehyde Concentrations in Air and Emission Rates from Wood Products Using a Large Chamber.

⁴² ATCM, *supra* n. 1 at 3. In the ATCM laminated products are considered to be finished goods. CARB defines “finished goods” as, “any good or product other than a panel, containing HWPW-VC, HWPW-CC, PB, MDF or thin MDF. Finished goods include, but are not limited to furniture, cabinets, shelving, countertops, flooring, moldings, caskets, base boards, rosettes, corbels, etc.”

Small businesses have told Advocacy that throughout the industry “panel” is understood to mean a flat 4 ft X 8 ft board. Further, CARB does not regulate raised panels in the ATCM and recognizes that the bulk of raised panels are cut from flat panels. In EPA’s proposed rule, “panel” is defined as a “flat or raised piece of composite wood.”⁴³ Nothing in Title VI requires, or suggests, that the definition of “panel” should include raised panels. Contrary to the Panel recommendations, EPA’s definition is neither based on trade usage nor statutory intent.

Additionally, Advocacy has been told repeatedly that the purpose of the ATCM and Congressional intent behind Title VI was to impose emissions standards on “panels,” not on component parts or finished products, such as a cabinet door.

In their Discussion Session, CARB suggested to EPA that raised panels be included in the definition of “laminated products.” Advocacy believes that capturing raised panels as laminated products would avoid confounding these products with actual panels.

II. Small Businesses are Concerned with the Formaldehyde Emissions Standards for the Composite Wood Products Proposed Rule.

Advocacy has also heard from small businesses and their representatives on several other matters, some of which were discussed during the SBREFA panel process, but not subject to the recommendations made in the Panel Report, and others arising only following the publication of the proposed rule.

1. EPA should propose a *de minimis* exemption.

EPA did not propose a *de minimis* exemption. Although this approach is consistent with the ATCM, small businesses do not support the lack of a *de minimis* exemption in the ATCM and had expected EPA to propose an exemption. Although under the statute EPA cannot provide exemptions to the formaldehyde emission standards, EPA has the authority to provide exemptions from certain regulatory requirements, for example finished goods that contain very small amounts of composite wood products.

The *de minimis* exemption was the subject of discussion during the SBREFA panel. EPA indicated that it was considering the following options:

- “Establishing a *de minimis* exception to certain regulatory requirements (e.g., labeling, recordkeeping, or TPC requirements) if the product or component meets specified criteria such as:
 - If product or component contains less than 1% composite wood by volume or weight
 - If product or component contains less than 3% composite wood by volume or weight

⁴³ 78 Fed. Reg. 34825.

- If product or component contains less than 5% composite wood by volume or weight
- If the composite wood product or component is less than a certain total weight or volume.”⁴⁴

De minimis amounts of composite wood in products will have very little or no impact on formaldehyde exposure levels. However, not proposing a *de minimis* exemption may present both labeling, recordkeeping and testing challenges for finished goods, including retailers and importers of finished goods from abroad that must now comply with TSCA section 13.⁴⁵

Advocacy recommends that EPA adopt a *de minimis* exemption for finished goods containing small amounts of composite wood that have very low emissions profiles. Regulating such products increases the cost of the rule but is unlikely to lead to any tangible benefits. Exempting such products from labeling, testing and recordkeeping requirements would reduce the burden on small businesses.

Some small businesses also expressed concern with goods containing *de minimis* amounts of composite wood produced in foreign mills that may not comply with the emissions standards. To ensure that finished products are made with compliant panels, EPA may consider requiring importers to retain records showing that imported finished products are made with compliant panels. EPA should not require labeling of the finished products.

2. No-added formaldehyde and ultra low-emitting formaldehyde resins exceptions appropriately encourage a performance-based standard.

EPA proposes to provide producers of panels made with NAF-based resins or ULEF resins an exemption from TPC oversight and formaldehyde emissions testing after an initial testing period of 3 months for each product type made with NAF-based resins and 6 months for each product type made with ULEF resins.

Advocacy supports EPA’s proposed NAF and ULEF exemptions. Advocacy strongly believes that EPA’s regulations should adopt a performance-based standard to encourage technological innovation. As long as a product meets the emission standard the technology used should be immaterial.

Doing otherwise may severely limit the choices for small businesses and consumers and may leave small businesses relying on a limited number of technologies that do not meet their needs and with the potential for increased costs.

⁴⁴ Panel Report, *supra* n. 2 at 12.

⁴⁵ TSCA Section 13 requires that any chemical substance, mixture, or article containing a chemical substance or mixture be refused entry into the customs territory of the United States if it fails to comply with any rule in effect under TSCA or is offered for entry in violation of Sections 5, 6, 7, or Title IV of TSCA. Certification is required for substances that are imported and are received by mail or commercial carrier, including those intended for research and development. U.S. Customs and Border Protection may detain or refuse entry of shipments if certification is not made or if the shipment is believed not to be in compliance with TSCA. See <http://www.epa.gov/opptintr/import-export/pubs/sec13.html>.

3. Entity categorization is unclear in the proposed rule.

Through conversations with small businesses and their representatives at the Advocacy roundtable held on July 19, 2013, Advocacy has learned there is confusion over EPA's classification of business types in the proposed rule. For example, some businesses that make and install custom wood cabinetry are surprised that adding a veneer to a substrate makes them a hardwood plywood manufacturer. Other businesses may be either fabricators or retailers or both depending on whether they install pre-made wood cabinets or shelving or make and install the shelving themselves before selling the vehicle. It is unclear whether businesses that alter a compliant panel, without using a resin, are fabricators and, therefore, subject to the proposed rule.

Small businesses need to know if they are going to be regulated by the final rule. EPA should clarify the language in the proposed rule, particularly with regards to the definition of "fabricator" to more clearly identify how small businesses are covered by the rule. EPA should also consider including an extensive, non-exhaustive list of examples to help further delineate the categories.

4. A TSCA section 13 certification is overly burdensome for products containing *de minimis* amounts of composite wood.

EPA's proposed rule imposes another burden above the ATCM, by requiring importers of products containing any amount of composite wood products – panels, component parts and finished goods – to certify the products as meeting all applicable rules and orders under TSCA.⁴⁶ Such products are considered "articles" under TSCA and as such would generally be exempt from the TSCA section 13 certification requirements.⁴⁷ However, regulations at 19 CFR 12.121(b) recognize that EPA has the authority to make the section 13 requirements applicable to articles.

EPA has chosen to set aside the "articles exemption" available under TSCA in order to capture panels, component parts and finished products containing composite wood. A failure to certify the products will expose small importers to the TSCA criminal penalties. Without a *de minimis* exemption any amount of composite wood product in an imported product will trigger the section 13 certification, whether it exposes workers and consumers to measureable formaldehyde emissions or not. Imposing section 13 import certification requirements on products that contain only *de minimis* amounts of composite wood imposes a significant cost burden on small importers but will do nothing to increase the benefits of the proposed rule. Advocacy suggests that EPA promulgate a *de minimis* exemption so imported products containing small amounts of composite wood are not unnecessarily subject to section 13.

⁴⁶ 19 CFR 12.121.

⁴⁷ "Articles" is defined in 19 CFR 12.120(a)(i) is formed to a specific shape or design during manufacture, (ii) has end use functions dependent in whole or in part upon its shape or design during the end use, and (iii) has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article and that may occur as described in § 12.120(a)(2); except that fluids and particles are not considered articles regardless of shape or design.

III. Small Business are Concerned with the Third-Party Certification Proposed Rule.

Small businesses are most concerned with two aspects of the proposed TPC rule. First, that allowing TPCs to grant exemptions to the entities they oversee is a conflict of interest. EPA has proposed to have the TPC determine whether to exempt an entity from testing and approve data that exempts mills from TPC oversight. The ATCM requires entities to apply to CARB for review of test results for exemptions. Small businesses have indicated, and Advocacy agrees, that TPCs have a disincentive to exempt entities from oversight if reduced oversight and testing means reduced income for the TPCs. It is not in a TPC's financial interest to grant exemptions. Small businesses have suggested that EPA conduct the review to avoid this conflict of interest. CARB also recommends that EPA conduct the review.

Second, small businesses have indicated that there is variability in quality and practice among TPCs. Some small businesses are particularly concerned with the practices of some foreign TPCs. EPA's proposed rule designates accreditation bodies (AB) to approve TPCs. The ABs would be approved by EPA. Small businesses have suggested that EPA approve the TPCs in order to ensure consistency in practices worldwide. Once TPCs are approved by EPA, ABs could proceed with the audits of the TPCs.

Conclusion

The proposed rules impose unnecessary burdens beyond what the ATCM requires and what small businesses were anticipating. Small businesses believe that EPA has not provided justification to support imposing a higher burden. Advocacy urges EPA to follow the recommendations made by the SBREFA panel, particularly to adopt regulatory requirements that are consistent with the ATCM. Advocacy looks forward to continuing to work with EPA during the interagency review of the draft final rule and strives to be a resource to the agency for all small business-related concerns.

If my office can be of any further assistance, please contact me or Sarah Bresolin Silver at (202) 205-6790 or sarah.bresolin@sba.gov.

Sincerely,



Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy



Sarah Bresolin Silver
Assistant Chief Counsel
Office of Advocacy

Copy to: The Honorable Howard Shelanski, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget