400 North Columbus Street, Suite 201
Alexandria, VA 22314
p 703.684.5574
f 703.836.8503
www.ilma.org
ilma@ilma.org

June 30, 2016

Ms. Kristin Macey, Director
Division of Measurement Standards
California Department of Food & Agriculture
6790 Florin Perkins Road
Suite 100
Sacramento, California 95828

Re: Proposed Changes to California Code of Regulations, Title 4, Division 9, Chapters 6 & 7

Dear Ms. Macey:

The Independent Lubricant Manufacturers Association (ILMA) submits the following supplemental comments on and concerns with the Division of Measurement Standards' (DMS) pre-rulemaking draft of proposed changes to California Code of Regulations, Title 4, Division 9, Chapters 6 & 7. DMS' regulatory actions are intended to implement the provisions of AB 808. ILMA's submission focuses on engine oils and transmission fluids.

Chapter 6. Automotive Motor Vehicle Fuels, Lubricants and Automotive Products Specifications

In §4110.1(a) and §4110.2(2)(a), ILMA recommends the addition of a reference to the American Petroleum Institute's (API) Publication 1509. Sections 2 through 8 of API 1509 define the current (or active) API engine oil service categories and explain its Engine Oil Licensing and Certification System(EOLCS) licensing requirements, the use of API Marks on engine oil containers, and the EOLCS Aftermarket Audit Program. Engine oil manufacturers and marketers typically rely on both the API 1509 and SAE J183 publications, so API 1509 should be included in DMS' rule.

ILMA has lingering concerns with how a party demonstrates performance claims for its engine oils to DMS under §4110.2. On its face, what constitutes "documentation" is subjective and would largely be left to DMS enforcement officers to determine whether the threshold has been met on a case-by-case basis. The regulated community should have more certainty. In particular, DMS should address in its rule the extent to which engine oil manufacturers or marketers can rely on test data or related information provided by additive suppliers to demonstrate performance claims.

DMS should add "or exceeds" after "meets" in §4110.2(2)(d). Many ILMA members make and market engine oils with formulations they represent as "exceeding" current API or OEM specifications. Typically, these

President, Frank H. Hamilton III, South Atlantic Services, Inc.
Vice President, Beth Ann Jones, Hangsterfer's Laboratories, Inc.
Treasurer, Dave P. Croghan, Maxum Petroleum
Secretary, Barbara Kudis, Allegheny Petroleum Products Company
Immediate Past President, Barbara A. Bellanti, Battenfeld Grease & Oil Corporation of N.Y.
Chief Executive Officer, Holly Alfano
General Counsel, Jeffrey L. Leiter

products are not licensed with API. The issue becomes the amount of flexibility DMS will accord in the types of documentation one can submit upon request, showing that the engine oil meets or exceeds the requirements of a particular SAE J183 service classification.

The engine bench tests set forth in SAE J183 are expensive and are not typically run on a particular product made and sold by an individual engine oil marketer. Moreover, the availability of certain test engines and parts has become a problem for the lubricants industry. Strictly requiring the test methods set forth in SAE J183, particularly for non-API or OEM licensed engine oils would create economic barriers which would force many engine oil manufacturers and marketers to abandon their products. Even engine oil manufacturers and marketers who do license their products with API do not generally run all fired-engine tests itemized in SAE J183 for every product. Guidelines exist within the API licensing system to determine the extent to which test results may be applied from one product to the next. To a lesser extent, General Motors' dexos® engine oil program offers similar relief in test burdens.

As an aside, ILMA understands that it is API's position that, if any API category claim is made by an engine oil manufacturer or marketer, then a data package for the product must exist, even if the product is not licensed with API.

Alternatives to licensing approaches exist, including some based on validation. ILMA, since 2007, has conducted a random testing program for its members' non-API licensed engine oils. The Association's testing program for engine oils has two tiers. In the first tier, the engine oil is tested against industry specifications, including metals concentrations. In the second tier, ILMA's testing lab uses a proprietary infra-red scan developed by the American Chemistry Council's Petroleum Additives Panel to determine whether the particular engine oil meets the chemical characteristics expected from additive packages for current engine oils. In addition, ILMA benchmarks the results of its testing against the Institute of Materials' (IOM) database of reliable and unbiased data on the physical, chemical and performance-associated characteristics of more than 18,000 engine oil samples.

Unless a problem is found, ILMA members do not know that their non-API licensed engine oils have been collected and tested by the Association. However, as a member benefit, ILMA does provide access to its contracted testing lab for members to have their products independently tested using the Association's protocols. DMS should allow such test results to satisfy the performance claim requirements of §4110.2(2)(d).

DMS should specify the extent to which engine oil manufacturers and marketers can rely upon performance representations from their additive suppliers. Additive suppliers routinely provide their customers with technical information about the performance claims that can be made on a particular additive package. The additive suppliers typically will base these representations on the candidate data packages showing the results of the testing done to satisfy API 1509 and SAE J183. This kind of technical documentation obtained from the additive suppliers should be allowed by DMS.

ILMA remains concerned with DMS' primary reliance upon licensing. OEMs, in particular, could look to DMS' proposed language as a "green light" for raising licensing fees to a level that tilts in favor of their OEM-branded products. Most OEMs market their own line of lubricants, whether or not they maintain a licensing program or an active list of "approved" products that can include other engine oil manufacturers or marketers. Their simultaneous status as "keeper of the list/license" and "marketer" gives them power over what products are licensed or make it on the list. It was not the intent of the Legislature in enacting AB 808 that DMS create "winners" and "losers" in the engine oil marketplace through licensing programs. Instead, the purpose

of AB 808 is to eliminate "obsolete oils" that can damage engines in today's on-highway vehicles. DMS' implementing regulations should be as neutral as possible in terms of effects on competition.

DMS also should be aware that not all OEMs license engine oils that meet the specifications for their engines. For example, some diesel engine manufacturers maintain lists of "recommended" engine oils. Oil manufacturers and marketers submit test data to these OEMs that their products meet the particular manufacturer's specifications and the OEM then list the products. However, such listing does not equate to a license. Accordingly, ILMA suggests that §4110.2(2)(c) be reworded as follows: "or is licensed by or is on a recommended list by an OEM…"

ILMA remains seriously concerned with §4122 and DMS' approach to automatic transmission fluids (ATFs). DMS does not have a complete understanding of the marketplace for ATFs, and its proposed draft will not serve the motoring public in California. There is no U.S. specification for ATFs similar to API's engine oil service classifications. Many OEMs do not (and refuse to) publish the specifications for the fluids for their transmissions. Moreover, those ATF specifications that are "open to the public," are typically limited to one formula and are expensive and time consuming to get approved. DMS, thus, is creating a "Catch 22" for ATF manufacturers and marketers in its draft rule. Further, DMS' draft rule would force ATF installers and retailers in California to stock as many as 100 types of different ATFs to satisfy customer needs. Typically, "genuine" or "approved" ATFs are more expensive than suitable alternatives, including multi-vehicle ATFs.

ILMA recommends that DMS define what it means by "performance requirements" in §4122(b). On its face, DMS' proposed language means that a performance claim must be equal to meeting an OEM specification, even if that specification is not made public. DMS should provide a broader definition to allow the use of high-quality, multi-vehicle ATFs. At a minimum, and in the absence of an industry-wide specification, DMS should allow ATF manufacturers and marketers to document performance claims using their own testing or data provided by their additive suppliers. Further, "suitable for use" claims should be allowed by DMS based on appropriate field, bench and/or transmission rig testing by the ATF manufacturer or marketer, or provided by the ATF manufacturer or marketer's additive supplier. Many ATF manufacturers or marketers rely on such testing to provide warranties to customers for their products.

ILMA is encouraged that DMS is conducting a webinar next month to collect additional comments from stakeholders on ATFs.

<u>Chapter 7. Motor Vehicle Products Advertising, Labeling and Method of Sale Requirements</u>

ILMA appreciates the significant efforts made by DMS to narrow the scope of its draft rulemaking since the Association's March 25, 2016 letter on the implementation of AB 808. ILMA supports DMS' efforts to prevent and reduce consumer and marketplace confusion regarding inactive or obsolete engine oil service classifications for engine oils in on-highway passenger cars, light-duty vehicles and heavy-duty trucks. However, additional clarification is needed in the draft rule.

As ILMA mentioned during the May 12 workshop, DMS should add language to §4202.9(a), carving out an exemption for purpose-built engine oils for antique cars, classic cars and muscle cars. Section 259 of California's Vehicle Code provides guidance to DMS on such an exemption:

> "Collector motor vehicle" means a motor vehicle owned by a collector, as defined in subdivision (a) of Section 5051, and the motor vehicle is used primarily in shows, parades, charitable functions, and historical exhibitions for display, maintenance, and preservation, and is not used primarily for transportation.

Similarly, in the same section, DMS should make regulatory distinctions for purpose-built lubricants for specialty vehicles and applications, such as racing (including street hot rods). Engine oil formulations for these uses do not necessarily meet active API or ACEA specifications, in part, because of the particular application. Purpose-built oils are not targeted at the on-highway passenger car engine oil market. There is a legitimate risk of damage to California consumers' specialty vehicles if forced to operate using "standard" engine oils. These specialty vehicles typically are not warrantied and any engine damage would have to be borne by the vehicle owner. In a number of instances, the customer requesting the purpose-built engine oil specifies by contract that the lubricant's manufacturer not label the product with a current API service classification.

DMS also should clarify that recreational off-highway vehicles (e.g., all-terrain vehicles), lawn and garden equipment, farm and construction equipment, boats, jet skis, golf carts and golf course maintenance vehicles and similar vehicles and motorized equipment not intended to be operated on and registered for use on public highways, streets or roads are not covered by §4202.9(a) because such vehicles or equipment might occasionally traverse a public highway, road or street. Many of the engines or motors for these off-highway vehicles and equipment are subject to other engine specifications or rely on inactive API service classifications that have not been updated. Further, in most instances, these products are clearly labeled for their intended use.

DMS should include regulatory language that non-engine applications are not covered by the draft rule. For example, some ILMA members have customers in California who use lubricants with obsolete API services categories (e.g., API SA or SB) in non-engine, non-detergent applications, such as construction and farming equipment. Oil marketers should be allowed to continue to market these products so long as their intended use is clearly displayed on the product package or label.

DMS also should make regulatory distinctions for lubricants for internal-combustion engines requiring use of inactive API categories for which no existing category is backward compatible. California customers use inactive API categories of heavy-duty or diesel engine oils in construction and other equipment. Many of these diesel-powered engines call for the use of a monograde SAE 30 or SAE 40 engine oil currently in the market. When API made the CF-2 service category inactive, it did not provide a revised or subsequent service category that covered these monograde applications. API was forced to make this category inactive because of the unavailability of the 6V92TA engine test, rather than because the category was no longer market relevant.

For §4202.11 (Transmission Fluid), ILMA recommends that the language for "duty type classification" be changed as follows:

> The duty classification shall specify the primary performance level or levels for the fluid, representing the transmission manufacturer's core requirements for the applications claimed and would include identification such as, but not limited to, GM Dexron® XX, Ford Mercon® XX, Honda XXX, JATCO XXX, JASO XXX, and other combinations.

Because of the absence of a U.S. specification for ATFs similar to API's engine oil service classifications, DMS

should use broader regulatory language for ATF performance requirements, including performance levels for "suitable for use" claims with multi-vehicle ATFs.

Enforcement

There was confusion at the May 12 workshop about DMS' enforcement of AB 808. ILMA requests that DMS issue a statement that any enforcement will be prospective from the effective date of its adopted regulations and not retroactive to January 1, 2016.

ILMA renews its request that DMS define the regulatory treatment of web-based sales of engine oils. For example, is it illegal for end-use consumers in California to purchase engine oils that do not meet the requirements in the draft regulations from web-based, online retailers outside of the State?

Lastly, DMS should specify that it will not be a violation for an engine oil marketer or distributor to manufacture or warehouse engine oils that do not meet the new California regulations when those oils are intended for shipment outside the State. At a minimum, DMS should provide a rebuttable presumption to a notice of violation for those engine oils intended for sale outside of California.

* * * * *

ILMA appreciates this opportunity to provide the above comments on the draft regulations.

Sincerely,

Holly Alfano
Chief Executive Officer

cc: Kevin Schnepp, DMS
Clark Cooney, DMS
ILMA Board of Directors
Jeffrey L. Leiter, Esq.