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Rick Dixon, Executive Director

Florida Building Commission

2555 Shumard Oak Boulevard

Tallahassee, Florida 32399-2100

Re: Florida Building Commission Proposed Rule Changes
R3814-R1; R3799-R1; and R3800-R1

Dear Mr. Dixon:

This firm represents Somay Products Inc., (“Somay”). Somay, founded in Miami in 1926, over 85 years ago, the oldest paint and waterproofing coating manufacturer in the State of Florida, manufactures and sells an elastomeric roof coating system known as SOMAY “ROOF MASTIC®” SEALER & PROTECTOR. This product was granted its original Miami-Dade County Product Approval on January 14, 1974, 37 years ago this month. For over 30 years SOMAY’s “ROOF MASTIC” has been approved for use on asphalt shingles and has met with complete customer satisfaction.

The Florida Building Commission (“Commission”) is scheduled to meet on February 1, 2011, in Tampa, Florida to consider the Roof TAC Committee Report and Recommendation on the following proposed rules: R3814-R1; R3799-R1; and R3800-R1.

Executive Summary

Somay is asking the Commission to adopt the proposed *Lower Cost Regulatory Alternative*, set forth below, which will strengthen the existing approval process and ensure that shingle manufacturers, county officials, state officials, roofers, applicators and coating manufacturers will all be satisfied that only elastomeric roof coatings that have been independently tested, utilizing an established standard and certified for quality and performance, will be allowed to be used on new or existing shingles in the State of Florida. The alternative language will have no fiscal impact on the sales of elastomeric roof coatings. Also, having one single agency conducting the independent testing will control and limit regulatory costs. Finally, utilizing the existing State police power for product approval will also ensure that there is appropriate due process, checks and balances and an appeals process associated with the approval.

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Proposed New Compromise Language – Lower Cost Regulatory Alternative

R3814-R1 – Non High Velocity Hurricane Zone (Non-HVHZ)

1507.15.3. Roof Coatings, Adhesives and Mastics. Only elastomeric and/or other roof maintenance coating systems which meet the Material Standards set forth in this Code and receive a product approval from the Department of Community Affairs shall be entitled to be applied to new and existing asphalt or other composition shingles.

R3799-R1 -- High Velocity Hurricane Zone (HVHZ), Commercial

1517.17.1. Roof Coatings, Adhesives and Mastics. Only elastomeric and/or other roof coating systems which meet the Material Standards set forth in this Code and receive a product approval from Miami-Dade County shall be entitled to be applied to new and existing asphalt or other composition shingles.

~~1521.18.1. No PUF and/or elastomeric coating systems shall be applied over existing composition shingles.~~

R3800-R1 -- High Velocity Hurricane Zone (HVHZ), Residential

4402.10.17.1. Roof Coatings, Adhesives and Mastics. Only elastomeric and/or other roof coating systems which meet the Material Standards set forth in this Code and receive a product approval from Miami-Dade County shall be entitled to be applied to new and existing asphalt or other composition shingles.

~~R4402.10.18.1 No PUF and/or elastomeric coating systems shall be applied over existing composition shingles.~~

INTRODUCTION

These Comments will follow the format used by the Commission staff for all previous rule workshop meetings: (1) summary & rationale, (2) fiscal impact (3) health, safety, and welfare of the general public, (4) strengthens or improves the code, (5) does not discriminate, and (6) does not degrade the effectiveness of the code.

The publicly available record of the Commission reflects that all stakeholders agree that elastomeric roof coatings products which meet a certain standard of quality and performance, should be permitted to be used on asphalt shingles in the High Velocity Hurricane Zone (“HVHZ”), and should continue to be permitted in the other sixty-six (66) counties in the State of Florida. While there is no dispute on this matter, there is a *dispute over the best means to achieve it*.

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Proponents of the proposed pending rules believe it is best to award the shingle manufacturers unbridled discretion to determine if and whose elastomeric product can be applied to shingles. Opponents of the proposed new language, and this writer, disagree and point out that such an approach is a restraint on trade in violation of Fla. Stat. §542.18, will cause the Florida coating manufacturing industry to *lose several million dollars in sales per year*, cause the loss of needed jobs, and cause an increase in the regulatory cost of compliance.

1. Summary & Rationale in support of Proposed Compromise Language

This section will be divided into two parts: (A) support for the Lower Cost Regulatory Alternative language, and (B) the problems with the proposed pending rules as well as discuss the impact of no back-up for such rules.

A. Support for Compromise Language - Lower Cost Regulatory Alternative

The existing status quo under the State's police power (i.e. Department of Community Affairs ("DCA") and Miami-Dade County's Product Approval regime) provides due process, checks and balances and an adequate appeals process.

In Florida, the Miami-Dade County Product Approval process is considered the Gold Standard. Miami-Dade County requires all applicants to send their products to an independent laboratory of the County's choosing. The laboratory utilizes an existing product approval criteria found in the Florida Building Code that tests the product for quality and performance. The same testing standard is used for all product applicants. The standard cannot be changed month-to-month and the applicants cannot be discriminated against. Most importantly, if the approval is denied, the applicants can avail themselves of a fair and well recognized appeals process.

Presently, if Miami-Dade County fails to approve a product for the HVHZ, that decision can be appealed to the Board of Rules and Appeal. If the decision is not overturned, it can be appealed to the Circuit Court, the District Court and eventually the Supreme Court. At the State level, if the DCA fails to approve a product its decision can be appealed to the Division of Administrative Hearings. If the decision is not overturned, it can be appealed to the District Court and Supreme Court.

The Compromise Language strengthens this existing system. The only increased costs associated with the Lower Cost Regulatory Alternative language will be the costs associated with having the product tested - for those few companies, today, that do not otherwise presently have a Miami-Dade County Product Approval. This independent testing is necessary, logical and justified since the consensus from all stakeholders is that only elastomeric roof coatings that meet a certain standard for quality and performance should be permitted on asphalt shingles and/or other composition shingles. This additional cost, if any, will be limited and controlled by a single regulatory agency that is already charged with product approval testing.

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We submit that with the Compromise Language, *all interested stakeholders* (such as the shingle manufacturers, code officials, county officials, state officials, roofers, contractors, coating manufacturers, and consumers) *can be satisfied* that only roof coating systems that have been independently tested, utilizing an established standard, and certified for quality and performance, will be allowed to be used on new and existing asphalt and/or composition shingles in the State of Florida.

B. Problems With Pending Language - before the Commission

The proposed pending rules (i.e. R3814-R1; R3799-R1; and R3800-R1) adopted at the Commission meeting held on December 7, 2010, place “*another layer of approval*” on top of the existing approval process already in place.

The publicly available tape recording of the August 9, 2010, Roof TAC meeting contains the comments of certain associations whose members include shingle manufacturers. The purpose of the proposed pending rules was explained as follows: *To make sure that county officials and roofers would know that they need to get the written approval from the shingle manufacturer before any roof coating can be applied to the shingle.* Another comment suggested that the approval from the shingle manufacturers could be communicated by “a letter” or “other written correspondence.”

Notwithstanding, the “language” in the proposed pending rules fails to include the following safeguards:

1. Fails to contain any objective criteria for how the shingle manufacturers’ approval will be granted.
2. Fails to contain any requirement that all shingle manufacturers must establish the same process or criteria for providing an approval.
3. Fails to contain any safeguards to prevent the criteria (if such a criteria is ever established) from being changed from time-to-time, month-to-month, etc.
4. Fails to contain any safeguards to prevent discrimination against any one particular roof coating manufacturer.
5. Fails to contain any requirement that the roof coating manufacturer even obtain a product approval, for their own manufactured elastomeric roof coatings, before the shingle manufacturer will provide its approval.

This is important because some of the leading shingle manufacturers in the country actually manufacture and sell elastomeric products. CertainTeed manufactures the FlintCoat – W White Elastomeric Acrylic Roof Coating. GAF manufactures the TOPCOAT® Elastomeric Roofing Membrane. As a practical

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matter, there is nothing to prevent the shingle manufacturers from approving the use of their own products in the HVHZ and Non-HVHZ areas, even if these same products have not received a product approval from Miami-Dade County or DCA, respectively.

Somay also manufactures and sells an elastomeric roof coating system known as SOMAY "ROOF MASTIC®" SEALER & PROTECTOR - WHITE, which was granted its original Miami-Dade County Product Approval on January 14, 1974, and recently its renewal from Miami-Dade County Product Control Division referenced as NOA No.: 08-0717.04. Somay's product has also earned the coveted US Energy Star® Certification – issued by the Environmental Protection Agency (EPA) which maintains a rigorous product approval regime for white elastomeric roof coatings. Under the pending rules, the shingle manufacturers will be empowered to deny Somay the right to have its elastomeric product placed on shingle roofs – despite its independently tested Miami-Dade County Product Approval and US Energy Star® Certification.

6. Fails to provide an appeals process.

No Back-Up for proposed pending rules

The Roof TAC has failed to produce any data or other study to support why the existing status quo under the State's police power which provides due process, checks and balances and an adequate appeals process *is somehow inferior to a system* that awards unbridled discretion to one industry segment (i.e. shingle manufacturers) to determine if and whose elastomeric product can be applied to any shingles in the State of Florida. *In the absence of any necessary back-up*, the proposed pending rules will be deemed an invalid exercise of delegated legislative authority pursuant to Fla. Stat. §120.52(8) – which provides that a rule is arbitrary or capricious if *it is not supported by logic or the necessary facts*.

Fla. Stat. §120.595(2), provides that if a challenge to a proposed rule is successful the prevailing party shall be entitled to recover its reasonable attorney's fees and costs up to Fifty Thousand (\$50,000.00) dollars. This reimbursement of attorney's fees and costs is not covered by risk management and will be required to be paid out of the budget of the Florida Building Commission.

It is prudent for the Commission to seek consensus, adopt the suggested Compromise Language and move to strengthen the State's existing police power.

2. Fiscal Impact Statement & Statement of Estimated Regulatory Costs

This section will be broken into two sections: (A) the increased regulatory costs and fiscal impact associated the proposed pending rules, and (B) the immaterial, if non-existent, costs and fiscal impact associated with the Lower Cost Regulatory Alternative language.

It is important to note, first, however, that the Commission is obligated, as a matter of law, to prepare a Statement of Estimated Regulatory Costs considering the impact of the proposed pending rules on small business.

Fla. Stat. §120.54(3)(b)1., provides that “an agency shall prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541, if the proposed rule will have an impact on small business.”

Fla. Stat. §120.54(3)(b)2.a., provides that “[e]ach agency, before adoption, amendment, or repeal shall consider the impact of the rule on small business as defined by s. 288.703. . .”

Fla. Stat. §288.703(1) defines small business to mean a business that employs fewer than 200 permanent full-time employees and has a net worth of not more than \$5 million dollar in the State of Florida.

Somay meets the definition of “small business” as defined in Florida law. The failure of the agency to prepare a Statement of Estimated Regulatory Costs is a material failure to follow the applicable rulemaking procedures and requirements and grounds to invalidate the proposed pending rules. *See* Fla. Stat. §120.541(1)(b).

A. Increased Regulatory Cost of Compliance

The proposed pending rules will be *too costly* due to the imposition of additional and unnecessary tests costing thousands of dollars. It must be remembered that the premise in support of the pending proposed rules is that the elastomeric roof coating must meet a certain quality and performance before it can be used. The premise is good. The pending “language” is not - and does not achieve this limited objective.

Somay, and others similarly situated, will now be forced to approach each and every shingle manufacturer in the country which may sell shingles in the State of Florida and ask for their approval. Again, the request for approval must be requested without any criteria, checks and balances or due process of any kind to govern the process for obtaining this approval. Some shingle manufacturers may grant the approval and others may not. This will result in a “patch-work” of approvals dotting the State.

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Some shingle manufacturers may require *additional tests costing tens of thousands of dollars* – in addition to those tests already performed by independent laboratories chosen by Miami-Dade County. Some shingle manufacturers may require *testing by multiple labs for multiple disciplines* such as breathability, survivability and/or other environmental standards. The shingle manufacturers can make securing this additional approval too costly and drive some competitors out of the marketplace, all without any available remedy. As already noted, the existing pending rules do not provide for any appeal of the shingle manufacturers' refusal to provide the approval. In fact, there are no means to object to any unreasonable, prejudicial and/or discriminatory approval criteria which the shingle manufacturers may dictate.

Under Florida law, a proposed rule may be invalidated if it vests unbridled discretion in the agency charged with enforcing the proposed rule. The law reads as follows:

Fla. Stat. §120.52(8)(d): “The rule is vague, fails to establish adequate standards for agency decisions or *vests unbridled discretion* in the agency.” (Emphasis added).

The Commission could never adopt a rule conferring upon itself such unbridled powers and thus it follows that no such power could ever be conferred on one segment of the industry of a particular market.

By any objective measure, the “language” in the proposed pending rules will have a ***huge fiscal impact causing*** the Florida coating manufacturing industry to ***lose several million dollars in sales per year*** and result in the loss of needed jobs - due to the impediments and obstacles of obtaining additional approvals which the shingle manufacturers, themselves, will not be required to comply with.

A traffic metaphor is appropriate. After the adoption of the proposed pending rules, sales of the elastomeric roof coating systems produced by the shingle manufacturers will race along at 70 mph as if they were driving in traffic-free speed lanes, while Somay, and other similarly situated coating manufacturers, will crawl at 20 mph as if stuck in late afternoon rush-hour traffic.

The proposed pending rules will also have ***immediate and substantial negative effect on the sales*** on Somay and other similarly situated coating manufacturers. This is an unnecessary restraint on trade – especially when there is an obvious Lower Cost Regulatory Alternative available to this Commission to be adopted, as the one proposed herein.

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B. Lower Cost Regulatory Alternative

The only increased costs associated with the Lower Cost Regulatory Alternative language will be the costs associated with having the product tested - for those few companies, today, that do not otherwise presently have a Miami-Dade County Product Approval. Presently, elastomeric roof coating manufacturers pay the costs of having their product tested by an independent testing facility chosen by Miami-Dade County Product Control Division. This independent testing is necessary, logical and justified since the consensus from all stakeholders is that only elastomeric roof coatings that meet a certain standard for quality and performance should be permitted on asphalt shingles and/or other composition shingles. This additional cost, if any, is limited and controlled by a single regulatory agency that is well respected in the industry and marketplace.

The Compromise Language will have *no fiscal impact on the sales* of elastomeric roof coatings. Having one single agency conducting the independent testing will control and limit costs. Utilizing the existing State police power will also ensure that there is appropriate due process, checks and balances and an appeals process associated with the approval.

The Compromise Language will ensure that all elastomeric roof coating manufacturers can fairly compete, with the only limiting factor being how well a particular company can market its product.

3. Reasonable and substantial connection with health, safety and welfare

The proven science establishes that the use of a high quality elastomeric will protect and extend the life of a shingle roof. It is the policy of the Federal Department of Energy (DOE) to encourage the use of light-colored material or white roof coatings on all roof types to reflect the sun's heat, lowering the cost of air conditioning, improving building efficiency and saving energy – a national priority. On July 19, 2010, DOE Secretary Steven Chu issued a press release on “Steps to Implement Cool Roofs at DOE and Across the Federal Government.” The Environmental Protection Agency (EPA) has a rigorous product approval regime for white elastomeric roof coatings. The approval is known as US Energy Star® Certification. Indeed, the DOE's own Guidelines state that “cool roofs are recommended most strongly for buildings in Zones 1-3, where cooling loads are most significant.” DOE Zone 1 includes Miami-Dade, Broward and Monroe Counties.

The DOE also distinguishes between paints and elastomeric roof coating systems stating that “roof coatings are not the same as exterior paints and ordinary paints are not designed to last on roof surfaces and will not provide protection.” CertainTeed and GAF, two of the largest shingle manufacturers in the country, both manufacture and sell white roof coatings that have received the US Energy Star® Certification. Somay also manufactures and sells an elastomeric white roof coating system that has earned the coveted US Energy Star® Certification. Of critical importance here is that these white roof coating systems can be and have been used successfully on asphalt shingles in Florida for many decades.

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It is well settled that a high quality elastomeric roof coating system, applied in accordance with the coating manufacturer's installation instructions, allows moisture vapor to escape, prevents liquid water from entering, and will protect and extend the life of a shingle roof, including withstanding Category 5 Hurricane Force winds of 155+ mph.

In 1995, the American Society for Testing and Material first adopted ASTM D-6083 which is the standard used to test elastomeric roof coatings for quality and performance. This standard has already been incorporated into the Code under §1507.15.2. This section is entitled "Material standards" and reads as follows: "Liquid-applied roof coatings shall comply with ASTM C 836, ASTM C 957, ASTM D 1227 or ASTM D 3468, *ASTM D 6083* or ASTM D 6694." (Emphasis added). Somay's "ROOF MASTIC," and other high quality elastomeric roof coatings, is a waterborne, 100% acrylic roof coating. The specifications of ASTM D 6083 is intended to define the laboratory properties of a successfully performing roof coating, where the coating uses an "all-acrylic polymer" as the binder. More importantly, since the acrylic coatings are waterborne, they are inherently "breathers."

Publicly available literature regarding how ASTM D-6083 came into existence includes this "conclusion:"

"ASTM D-6083 is the product of literally hundreds of hours of concerted efforts by participants to establish a minimum laboratory standard that can serve as a general proxy for actual field performance. Selection of tests and minimum standards was based on the actual, successful, in-service performance of acrylic roof coatings sold by numerous manufacturers on over 20 roofs ranging in age from a few to 20 years old, located throughout the US and applied on various roofing substrates. Thus, anyone using this standard in specifying or installing an acrylic roof coating *will have additional confidence that the particular coating should perform successfully when properly applied.*" (Emphasis added).

The Compromise Language suggested herein achieves the publicly stated objective of all stakeholders.

4. **Strengthens or improves the code, and provides equivalent or better products, methods or systems of construction**

The Compromise Language strengthens the Code requiring all elastomeric roof coatings to undergo independent testing for quality and performance as a condition precedent to being used in the HVHZ or any other areas in Florida.

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5. Does not discriminate against materials, products, methods, or systems of construction of demonstrated capabilities

The Compromise Language will ensure that all approvals will be determined by an existing state or local agency utilizing objective criteria. All stakeholders can feel confident that only elastomeric roof coatings systems that have been independently tested and certified for quality and performance will be allowed to be used on new and existing asphalt and/or composition shingles in the State of Florida.

6. Does not degrade the effectiveness of the code

The Compromise Language enhances the Code and its effectiveness by recognizing the objective and rigorous product approval regime followed by the Miami-Dade County Product Control Division.

The proposed pending rules (R3814-R1; R3799-R1; and R3800-R1), reduce the effectiveness of the Code. They add another layer of approval and there is no available remedy if any one of the shingle manufacturers refuses to provide the additional approval. In fact, there are no means to object to any unreasonable, prejudicial and/or discriminatory approval criteria which the shingle manufacturers may dictate.

CONCLUSION

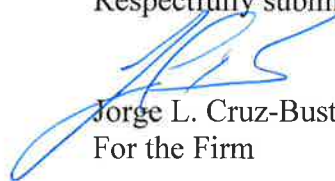
The best means for implementing the new rule in the HVHZ, and the rest of the State of Florida, is to adopt the Compromise Language set forth herein which strengthens the existing approval process.

This Lower Cost Regulatory Alternative will ensure that shingle manufacturers, county officials, state officials, roofers, applicators and coating manufacturers will all be satisfied that only elastomeric roof coatings that have been independently tested, utilizing an established standard and certified for quality and performance, will be allowed to be used on new or existing shingles in the State of Florida.

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Thank you in advance for your prompt and serious consideration of this matter. We look forward to the hearing scheduled to take place in Tampa, Florida on February 1, 2011.

Respectfully submitted,



Jorge L. Cruz-Bustillo
For the Firm

JCB:mm

cc: Garth Parker, President
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