

Safer Consumer Product Regulations

Public Comments on Revised Initial Statement of Reasons (ISOR)

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January 22, 2013

VIA EMAIL

gcregs@dtsc.ca.gov

VIA MAIL

Kryisia Von Burg, Regulations Coordinator

Regulations Section

P.O. Box 806

Sacramento, CA 95812-0806

Re: Comments on December 20, 2012 Revised Initial Statement of
Reasons for Draft Safer Consumer Products Alternatives
Regulations

Dear Ms. Von Burg:

On behalf of the Alliance of Automobile Manufacturers (“Alliance”), I am pleased to submit the following comments in response to the latest draft of the Department of Toxic Substances Control’s (“Department” or “DTSC”) Initial Statement of Reasons (the “Revised ISOR”) for the Safer Consumer Product regulations (the “July 2012 Proposal”). The Alliance is a trade association of 12 car and light truck manufacturers, consisting of BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda North America, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota Motor North America, Inc., Volkswagen Group of America, and Volvo Cars of North America. As indicated in prior letters, the Alliance appreciates the complexity of the task at hand, and the efforts put forth to date in preparing the July 2012 Proposal and the Revised ISOR. The Alliance

embraces the goals and vision for safer consumer products embodied in California's Green Chemistry Statute (the "Statute").

It is apparent from the July 2012 Proposal and the Revised ISOR that the Department has considered some of the many comments made by the Alliance and other concerned industry groups. Even so, the Alliance has concerns with the manner in which the Department is proceeding, releasing revised segments of the July 2012 Proposal for public comment and review in a piecemeal manner. By not providing an opportunity to review and comment on the proposed rulemaking as a whole, the Department deprives the public of meaningful participation as these ambitious and far-reaching regulations are adopted.

The Alliance also has concerns with definitions that remain in the Revised ISOR. Many definitions are inconsistent with meanings of such terms as they appear in other federal and state statutes and regulations. Keeping these definitions inconsistent with existing laws, or enacting regulations counter to the intent of definitions in existing statutes and regulations, will lead to regulations that are difficult to implement and follow, and will frustrate the Statute's goals.

Among the most critical constraints the Statute places on the Department's authority to regulate is its prohibition on duplicative regulation. Section 25257.1 of the Statute provides that "[t]he department shall not duplicate or adopt conflicting regulations for product categories already regulated or subject to pending regulation consistent with the purposes of this article." While the definition of "consumer product" is very broad and more inclusive than the same term in other statutes and regulations, the prohibition in section 25257.1 acts as a strong boundary on the ability of the Department to include any product category that is heavily regulated by other agencies, such as automobiles which have an entire federal agency devoted to the regulation of their safety

Since it is unclear how this Revised ISOR comment period relates to both the previous comment period and to the Department's proposed regulatory text, the Alliance hereby incorporates all of its extensive comments on all prior versions of draft regulations by reference in this letter. Due to their volume and the fact that the Department has all of our previous letters and their CD-ROM attachments in its possession, we do not attach them again to this letter.

Throughout the regulatory development process, the Alliance has consistently advocated for revisions that will render the Green Chemistry Regulations more effective, efficient and expedient, while maximizing the potential for public health and environmental benefits envisioned by the Statute.

I. EXECUTIVE SUMMARY

This letter identifies a few areas of concern raised by the Revised ISOR but does not exhaustively review the Revised ISOR since the time is short, overlaps with the previously segmented comment period regarding the ten scientific peer review reports, and it is not clear how this document relates to the whole of the proposed implementation of the Statute or the draft regulations as a new version is expected to be released for review in late January 2013.

1. Violations of the California Administrative Procedure Act

The California Administrative Procedure Act (“APA”), Cal. Gov. Code §11346 *et seq.*, establishes basic minimum procedures agencies must follow when adopting new regulations. The minimum procedures include providing to the public a copy of the express terms of the regulations and an initial statement of reasons for proposing the regulations. Cal. Gov. Code §11346.2. Agencies must also give the public at least 45 days to comment on the proposed regulations and initial statement of reasons. Cal. Gov. Code §11346.4. Thus, any re-release and revision of the ISOR should be accompanied by a release of the draft regulatory text language that the ISOR purports to explain. The Department released its July 2012 proposal, receiving comments from July 27, 2012 to October 11, 2012. Subsequently, and before releasing its next proposal for the regulations, the Department released a set of ten external scientific peer review reports on November 30, 2012, requesting comments by January 4, 2013. Three weeks later, the Department released the Revised ISOR on December 20, 2012, seeking comments by January 22, 2013. By releasing segments of this complex and ambitious regulatory proposal for public review in a piecemeal fashion, the Department effectively deprives the public of an opportunity to understand and provide meaningful input on the totality of the Department’s plan to implement the Statute, depriving the public of due process of law.

2. Many Definitions in §69501.1 of the Proposed Regulatory Text Remain Inconsistent with Definitions in Existing Laws

In its revisions to section §69501.1 in the Revised ISOR, the Department specifies under many definitions that the meaning for that term is “necessary” to “conform” the “usage and definition” for such terms to the meanings found in other existing regulations. Although we appreciate the Department’s efforts to make certain thoughtful changes to the definitions based on the Alliance’s and other industries’ comments, we remain seriously concerned that many of the definitions are still inconsistent with meanings found in other federal and California statutes and regulations. The Alliance strongly urges the Department to make further revisions to the regulation’s definitions found in section 69501.1, including incorporating references to definitions in other statutes and regulations. Providing definitions that are consistent with existing regulatory schemes will facilitate the Department’s implementation of and industries’ compliance with the regulations once adopted.

II. PROCEDURAL DEFICIENCIES

In addition to textual concerns that are described in Section III, the Revised ISOR suffers from a number of significant procedural deficiencies under the APA, as described below.

1. Thwarting the APA’s Purpose under Government Code §11346

The APA establishes “basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations.” Cal. Gov. Code §11346(a). By establishing such minimum procedural requirements, the APA’s purpose is to “advance meaningful public participation in the adoption of administrative regulations by state agencies and to create an administrative record assuring effective judicial review.” *Voss v. Superior Court*, 46 Cal.App.4th 900, 908 (1996) (internal citations omitted).

The very purpose of the APA requirements is to inform the public on how it may be regulated and to allow members of the public a meaningful opportunity to participate in the formation of such regulations. The release of the Revised ISOR, months after the release and close of the public comment period of the draft regulatory text of the July 2012 Proposal it

purports to explain, coupled with the release of ten scientific peer review reports three weeks prior, and separated from the next revised regulatory text comment period, results in the effective denial of providing the public with a meaningful opportunity to participate in the adoption of the regulation. The Department's piecemeal pattern of releasing segments that are important to the proposed regulations denies the public due process of law. The public cannot provide meaningful insight to the Department on the Revised ISOR without understanding fully how the Revised ISOR relates to the proposed rulemaking text and the Statute as a whole. Thus, the Department's piecemeal approach thwarts the very purpose of the APA.

2. Violating the APA's Requirements under Government Code §11346.2

The APA requires every agency adopting a new regulation to make available to the public upon request "an initial statement of reasons for proposing the adoption," to include "the specific purpose of each adoption" and the "rationale for the determination by the agency" that such adoption is "reasonably necessary to carry out the purpose and address the problem for which it is proposed." Cal. Gov. Code §11346.2(b).

The Department has released the Revised ISOR as an orphan, without any explanation as to why it released the revised initial statement of reasons or how the Revised ISOR fits in with the larger proposed rulemaking. The Department has forced the public to review the Revised ISOR in a blind fashion, without any assurance as to what the Department will release next. Also, it appears now that the Alliance was asked to review the initial draft regulations in July under false pretenses, spending countless hours reading and reviewing the initial ISOR closely and carefully to better understand what the Department was trying to accomplish with its draft regulatory text and to provide helpful, thoughtful comments. As it turns out, with the piecemeal release of the Revised ISOR the Department implies the Alliance and other stakeholders spent that time reviewing language that did not actually capture what the Department meant to say. Without a clear picture of how the Revised ISOR relates to the draft regulations or the Statute as a whole, the Department essentially denies the public a true statement of initial reasons, violating this requirement of the APA.

3. Providing Insufficient Time for Review under Government Code §11346.4

The APA requires a public agency to give the public a minimum of 45 days to provide comments on proposed regulations. *See* Cal. Gov. Code §§11346.4, 11346.2.

The Department released the Revised ISOR on December 20, 2012 and will close the public comment period on January 22, 2013. This provides the public with only thirty days to review and comment on the Revised ISOR, violating the APA's 45-day comment period requirement. The Department cannot circumvent the APA's notice and comment requirements by releasing segments of the regulation for notice and comment in this piecemeal manner. Pursuant to the APA, the public deserves its full 45-day period to comment on a segment essential to a larger piece of ambitious and complex regulation.

III. REVISED ISOR REGULATION TEXT

While the Alliance appreciates certain revisions in the Revised ISOR, the Alliance is concerned over many definitions that remain in section 69501.1, as described below.

1. The Alliance Appreciates Certain Revisions in the Revised ISOR

The Alliance appreciates the Department for considering many comments from the Alliance and other industry groups. The Alliance takes special note the Department revised the definition of "component" in section 69501.1(a)(21) to delete the example referencing a catalytic converter in a vehicle as something the DTSC could identify as a component that must undergo an Alternatives Analysis. This revised definition of "component" will better help the Department implement, and industry groups comply with, the proposed regulations.

2. Many Definitions Remain Inconsistent with Meanings in other Statutes

The APA requires that agencies state in the initial statement of reasons why the proposed adoption is "reasonably *necessary* to carry out the purpose and address the problem for which it is proposed." Cal. Gov. Code §11346.2(b)(1) (emphasis added). The Department has attempted to meet this necessary requirement in the Revised ISOR by incorporating revisions throughout the Revised ISOR explaining a definition is "necessary in order for the regulations to conform to

the usage and definition” of that term in “other regulatory programs.” Revised ISOR §69501.1(a)(19)(B).

Merely stating such a definition is “necessary,” however, does not satisfy the agency’s requirement to explain its proposed definitions. Likewise, stating a definition is consistent with meanings in other statutes does not make it so. Many definitions in the Revised ISOR remain unworkable, as they are inconsistent with meanings found in existing statutes and regulations. Below we do not provide an exhaustive review, but merely highlight a few of the definitions in section 69501.1 of the draft proposed text that provide illustrative examples of the inconsistencies between the definitions found in the Revised ISOR and existing federal and regulatory regimes.

- a. **“Adverse ecological impacts”** – Section 69501.1(a)(4): the Revised ISOR defines “adverse ecological impacts” as impacts “direct or indirect” on “living organisms and their environments.” The definition is inconsistent with important existing regulatory schemes. It swallows whole the federal and state Endangered Species Acts and renders them irrelevant. 16 U.S.C §1531 *et seq.*; Cal. Fish and Game Code §2050 *et seq.* It is inconsistent with similar definitions under the California Environmental Quality Act (“CEQA”), Cal. Public Resources Code §21000 *et seq.*, which require adverse ecological impacts to be “significant” and “substantial,” not just any change. Also, CEQA uses “effects” and “impacts” synonymously, defining “effects” to include “(1) [d]irect or primary effects which are caused by the project and occur at the same time and place, [and] (2) [i]ndirect or secondary effects which are caused by the project and are later in time or further removed in distance, but are still reasonably foreseeable. . . .” 14 C.C.R. §15358. The Revised ISOR definition provides no such clarification for what causation constitutes a direct or indirect impact, nor does the definition require an indirect impact be “reasonably foreseeable.” The Alliance urges the Department to revise this definition to align better with meanings in existing laws and regulations.

- b. **“Water conservation”** – Section 69501.1(a)(42)(A): the Revised ISOR defines “water conservation” by stating the following: “Freshwater is the most fundamental of resources . . . existing technologies offer great potential for improving on the efficiency of its use.” This definition is inconsistent with meanings in existing state laws, including the California Water Code. The Agricultural Water Conservation and Management Act of 1992, Water Code §10520 *et seq.*, defines “water conservation” as “the reduction of the amount of water consumed or irretrievably lost in the process of satisfying beneficial uses which can be achieved either by improving the technology or the method for diverting, transporting, applying, reusing, salvaging, or recovering water, or by implementing other conservation methods.” Cal. Water Code §10521(a). Likewise, the Agricultural Water Management Planning Act, Cal. Water Code §10800 *et seq.*, defines “water conservation” as the “efficient management of water resources for beneficial uses, preventing waste, accomplishing additional benefits with the same amount of water.” Cal. Water Code §10817. Unlike the definitions found in the Water Code, the definition for “water conservation” in the Revised ISOR provides no real definition for what water conservation entails. Instead, the definition merely states freshwater supplies are dwindling, and technologies exist to improve water’s efficient use. The Revised ISOR definition is overly broad and entirely inconsistent with meanings in other regulatory regimes.
- c. **“Energy efficiency”** – Section 69501.1(a)(42)(A): The Revised ISOR defines “energy efficiency” by stating “energy efficiency reduces the use of nonrenewable fossil fuels and their air impacts” This definition is overly broad and provides no clear guidance for industry groups to achieve energy efficiency. Other regulatory regimes, such as the National Energy Conservation Policy Act (“NECPA”), 42 U.S.C. 8251 *et seq.*, define “energy efficiency” as a measurable concept, informing regulated entities how they can strive to achieve energy efficiency. For instance, NECPA’s implementing regulations define “energy efficiency” as “the ratio of the useful output of

services in air transportation to the energy consumption of such services.” 14 CFR 313.3. The federal Energy Star program as well as the California Energy Commission’s energy efficiency specific statutes set globally established and well-regarded definitions of energy efficiency. The Revised ISOR definition is inconsistent with such definitions that provide better guidance. The Alliance urges the Department to revise this definition to be consistent with other laws and regulations.

- d. **“Release”** – Section 69501.1(a)(51): The Revised ISOR defines “release” as an “intentional or unintentional liberation, emission, or discharge of a chemical into the environment.” The Revised ISOR continues to state this “new definition’ will allow for a more appropriate definition when evaluating releases of Chemicals of Concern in consumer product use and the potential exposures.” Yet this new definition is entirely inconsistent with the meaning of “release” in other statutes. The Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §9601 *et seq.*, defines “release” as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment” 42 U.S.C. §9601(22). Title 22 of the California Code of Regulations uses a consistent definition. *See* 22 C.C.R. §66260.10. Neither Title 22 nor the CERCLA definition uses the word “liberation” to define a release, as “liberation” is overly broad and confusing. The definition for “release” as it stands in the Revised ISOR is not consistent with the meaning of “release” in other statutes, nor is it sufficient to provide guidance to manufacturers seeking to comply with the proposed regulations.

3. **Definitions Should Reference Consistent Meanings in Existing Regulations**

The Alliance strongly urges the Department to incorporate cross references to existing definitions of all state and federal statutes or regulations to ensure clarity and consistency. For example, the Department has done so in at least one instance where in section 69501.1(a)(15) the

Revised ISOR asserts the definition for “aqueous hydrolysis half-life” is “necessary to ensure consistency with the definitions for hydrolysis and half-life found in section 796.3500 of Title 40 of the Code of Federal Regulations (40 CFR).”

Given the inconsistencies as summarized above, the Alliance suggests the Department incorporate analogous references where appropriate to foster consistency between existing regulatory regimes. Definitions that conform to usage and definition in other regulatory programs will facilitate implementation and compliance, which will better lead to achieving the Statute’s goals.

IV. CONCLUSION

The Alliance seeks only to have a meaningful opportunity to provide thoughtful comments to the Department’s proposed regulations. The Alliance will continue to work with the Department in hopes of helping the Department promulgate regulations that will implement the goals of the Statute.

As always, thank you for your time and consideration of our comments. If you have any questions, please feel free to contact me at (202) 326-5551 or frio@autoalliance.org.

Sincerely,



Filipa Rio
Senior Manager, Environmental Affairs



JUDAH PRERO
ASSISTANT GENERAL COUNSEL

January 22, 2013

BY ELECTRONIC MAIL

Ms. Krysia Von Burg
Regulations Coordinator
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

**RE: 30 DAY PUBLIC NOTICE AND COMMENT PERIOD
NOTICE OF PUBLIC AVAILABILITY OF POST-HEARING CHANGES
SAFER CONSUMER PRODUCT ALTERNATIVES**

**Department Reference Number: R-2011-02
Office of Administrative Law Notice File Number: Z-2012-0717-04**

Dear Ms. Von Burg:

The American Chemistry Council (“ACC”)¹ appreciates the opportunity to provide comments on the revision of the Initial Statement of Reasons (“ISOR”) for the Safer Consumer Product Regulations. ACC is an active member of the Green Chemistry Alliance.

The Department of Toxic Substance Control (“DTSC”), in its public notice, states that it is revising the ISOR to correct: typographical, spelling, cross-referencing, punctuation and other formatting errors. In addition, DTSC states that it has revised the ISOR to address some substantive drafting issues raised regarding the ISOR. These include, but are not limited to, making more explicit the necessity statement for each provision.

¹ The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people’s lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy is designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$720 billion enterprise and a key element of the Nation’s economy. It is one of the Nation’s largest exporters, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the Nation’s critical infrastructure.



It may appear that these changes are mainly ministerial in nature, ensuring that the ISOR satisfies Administrative Procedure Act (“APA”) section 11346.2(b), which requires that the ISOR include a “statement of the specific purpose of each adoption . . . and the rationale for the determination by the agency that each adoption . . . is reasonably necessary to carry out the purpose and address the problem for which it is proposed.” However, the manner in which DTSC has re-issued the ISOR conflicts with the very purpose for procedures governing the adoption of regulations in the State of California.

The Legislative findings contained in §11340 of the California Administrative Procedure Act contains pronouncements of how “the language of many regulations is frequently unclear and unnecessarily complex... (and) often confusing to the persons who must comply with the regulations.” Therefore, the Legislature established an Office of Administrative Law and administrative procedures to, as APA §11340.1 states, “improve the quality of those regulations that are adopted.” The California courts have articulated the purpose for administrative procedure as well. The Court, in *Morales v. CA Dept. of Corrections and Rehabilitation* (App. 1 Dist. 2008, 85 Cal. Rptr. 3d 724) stated “A major purpose of the Administrative Procedures Act is to provide a procedure for persons or entities affected by a regulation to be heard on its merits in its creation...” It is clear the intent underlying California administrative procedure law is that affected entities be able to understand the what, how, when, and why of any proposed regulation.

APA §11346.2 provides that an agency, when proposing a regulatory action, needs to make available a copy of the express terms of the regulation. Furthermore the agency must also provide an initial statement of reasoning for the regulatory action. The initial statement must at least contain information concerning the purpose of each provision, rationale for the agencies determining that the proposed provisions are necessary, and descriptions of reasonable alternatives and the reasons for the rejection of those alternatives, as well as other information as set forth in §11346.2.

DTSC has now undertaken an action that appears to be contrary to the spirit and perhaps letter of California administrative procedure law. In order for the population affected by the proposed regulatory action to be best informed and therefore able to “be heard on the merits” in comments on regulations, the proposed regulations are supposed to be accompanied by an explanatory document, the ISOR. Without understanding the rhyme and reason behind all aspects of the proposed regulation, it would be difficult for the affected public to provide informed comments to be considered by the agency. With the current revised ISOR, we now have DTSC letting the public know after the fact – after comments on the regulations were provided – what was the actual necessity for provisions. This action does not comport with the purpose of California administrative procedure law and denied the persons and entities affected by the proposal the opportunity to be heard on the merits of all aspects of the proposal. Accordingly, to ensure that all are able to provide DTSC with thoughtful comments on all aspects of the proposal, we ask that no regulatory proposal for Safer Consumer Product Alternatives be presented for comment and review without a final Initial Statement of Reasons upon which all affected entities can comment in tandem.

As noted, ACC appreciates the opportunity to comment and express our concerns about this revision. We remain committed to working with both the Executive and Legislative Branches of California State government in the development of Safer Consumer Product Alternative regulations that are practical, meaningful, and legally defensible.



Please feel free to contact me or my colleague, Emily Tipaldo (emily_tipaldo@americanchemistry.com), if you have any questions or require clarification on any aspect of our comments.

Sincerely,

A handwritten signature in blue ink that reads "Judah Prero". The signature is fluid and cursive, with a long horizontal stroke at the end.

Judah Prero
Assistant General Counsel





AmericanCoatings
ASSOCIATION

January 22, 2013

Ms. Krysia Von Burg, Regulations Coordinator
Department of Toxic Substances Control
P.O. Box 806
Sacramento, California 95812-0806
Via Electronic Mail Only to gcreqs@dtsc.ca.gov

Re: ACA Comments on the DRAFT Initial Statement of Reasons for the California Safer Consumer Products Regulations

Dear Ms. Von Burg:

The American Coatings Association (ACA) is submitting comments concerning the latest draft of the Initial Statement of Reasons for the California Safer Consumer Products Regulations. ACA is a voluntary, nonprofit trade association representing some 350 manufacturers of paints, coatings, adhesives, sealants, and caulks, raw materials suppliers to the industry, and product distributors. Our membership represents over 90% of the total domestic production of paints and coatings in the United States.

The manufacture, sale, and distribution of paints and coatings are a \$20 billion dollar industry in the United States. Our industry operates in all 50 states, and employs over 60,000 people engaged in manufacturing and distribution. The state of California currently represents approximately 18% of our domestic coatings sales market.

ACA appreciates the opportunity to submit these comments to the Department of Toxic Substances Control (DTSC or Department). As this is the ninth draft of these regulations, our comments are more concise.

Respectfully Submitted,

Stephen Wieroniey
Specialist; Health, Safety, and Environmental Affairs

Alexandra Whittaker, Esq.
Counsel, Government Affairs

End-of-Life Management Requirements [Sections 69501.1(a)(9), 69506.8(b) and (c)]

Of major concern to ACA is the very detailed and cumbersome end-of-life management program that is one of many regulatory response requirements that DTSC can impose. Previously, ACA requested that PaintCare and any other end-of-life management program be exempt from a regulatory response if the responsible entity is participating in an end-of-life management or extended producer responsibility (EPR) program that is currently required pursuant to a different California statute or regulation.

Although the current draft regulations provide an opportunity for companies to apply for a regulatory response exemption, DTSC has retained authority to go beyond the CalRecycle PaintCare regulations found at AB 1343 and require companies to abide by specific EPR components that were intentionally left out of AB 1343 by the California legislature. DTSC's authority results in CalRecycle and DTSC driving PaintCare towards a government run, command and control EPR program that the agencies could not get passed in the legislature. The draft regulations place an unfair burden on the manufacturer to apply to the Department for an exemption from regulatory response requirements that conflict and/or duplicate one or more statutory requirements.

Even though subsection (c) of the end-of-life management requirements authorizes the manufacturer to substitute an alternative end-of-life management program, such substitution must achieve "to the maximum extent feasible, the same results as the program required by this section." Said substitutions can only be used by the manufacturer if it receives advanced written approval from the Department even though the implementation of PaintCare is already required under California law. Ultimately, the "maximum extent feasible" and "written approval" requirements would burden PaintCare with both an end-of-life management program administered by DTSC as well as by CalRecycle.

Finally, the Green Chemistry statute in S. 25257.1 (b) and (c) provides that DTSC is not authorized "to supersede the regulatory authority of any other department or agency" or "duplicate or adopt conflicting regulations for product categories already regulated or subject to pending regulation consistent with the purposes of this article." ACA continues to request that the regulations be amended to be consistent with the specific language of the Green Chemistry statute. Manufacturers should receive an explicit exemption from the end-of-life management regulatory response if the manufacturer is participating in an end-of-life management or product responsibility program mandated by a California statute. Manufacturers should not have the burden to request an exemption from DTSC in such cases. In addition, the regulations should remove DTSC's authority to impose an end-of-life management program even if it provides additional public health or environmental protections. Without such changes, the regulations clearly go beyond the Department's authority and fails to recognize S. 25257.1's clear mandate that DTSC cannot supersede another agency's regulatory program.

Duty to Comply and Consequences for Non-Compliance [Section 69501.2(a)(2)]

This section creates an option for manufacturers, importers, or retailers to have a consortium, trade association, public partnership, or any other entity to act on their behalf. Specifically, the text states that this section is "necessary for a more efficient use of resources in complying with these regulations and that manufacturers who no longer want to sell the Priority Products as it existed when identified as a Priority Product need to have a "regulatory off-ramp" so that they can efficiently transfer out of the

use of the Chemical of Concern in the Priority Product without having to go through the entire Alternative Analysis process.”

ACA is very pleased with the addition of the “regulatory off-ramp” language. A “regulatory off-ramp” can be built in a manner that facilitates production reformulation, provided a well prioritized list of Chemicals of Concern is created. Once a company reformulates a product as identified as a Priority Product, the reformulated product should be allowed to exit the regulation without an alternative assessment. Assessing alternatives will allow DTSC to assess chemicals that are not included on the Priority Product list.

Chemicals of Concern Identification [Section 69502.2(a) and (b)]

In this section, DTSC specifies the criteria for the initial Chemicals of Concern list. Specifically the section states that “each of the chemicals lists incorporated in Article 2 is necessary to have a robust, scientifically rigorous, and significant suite of Chemicals of Concern subject to these regulations.”

ACA fully supports DTSC’s views and encourages it to maintain the above-mentioned position when confronted with information from stakeholders that supports conclusions contrary to DTSC.

Priority Products Prioritization Factors [Section 69503.2(a)(1)(B)(2)]

The text in this section states that “the information used to meet this factor for exposure consideration must meet the definition of reliable information and/or reliable information demonstrating the occurrence of exposure to ensure that exposure is occurring and that adverse impact is a concern during the prioritization process. This is necessary, here, as elsewhere, so that DTSC’s decisions are grounded in science.”

DTSC is using the generalized term “grounded in science” to indicate that a reasoned consensus approach will be considered. However, it is important to note that the implementing regulations must clearly define the term “grounded in sound science” and provide examples.

Alternatives Assessment Reports [Section 69605.1(c)(2)]

The section specifies that, “except as provided in 69505.1(b),(f), and (g), a responsible entity for a product that contains one or more Chemical of Concern that is the basis for designation as Priority Product shall conduct an AA for the Priority Product, and shall comply with all requirements of Article 5. . . . If a product is no longer place in the stream of commerce or meets the AA Threshold, or the Chemical of Concern for which it is listed as a Priority Product is removed, the responsible entity is not required to conduct and prepare an AA . . .”

ACA believes that it is critical to design a simplified “off-ramp” that acknowledges a product manufacturers commitment to reformulate. The cited text implies that DTSC’s preferred approach is the removal of a product from the market. ACA does not support DTSC’s seemingly preferred approach. DTSC’s main priority should be to encourage reformulation of consumer products containing chemicals of concern rather than removing the chemical from commerce.

Department Review of Claims of Trade Secret Protection [Section 69510.1]

ACA previously suggested that the regulations focus on the interrelationship with preexisting California law on trade secrets. While there is a mechanism to make a trade secret claim, the approval of trade secret claims is conditioned on DTSC's approval. This seemingly unfettered discretion carved out for DTSC continues to be problematic. More than any other section, the trade secret section must be clarified in order to adhere to the requirements of the California Civil Code on trade secret protection.

Further, ACA maintains that the California statute which the draft regulations are required to implement states in Section 25253(c) that the Department must "make every feasible effort to devise simplified and accessible tools that consumer product manufacturers, consumer product distributors, product retailers and consumers can use to make consumer product manufacturing, sales, and purchase decisions."

In DTSC's treatment of trade secrets, it does not ensure a process that is easy to use, nor does DTSC provide simplified tools that manufacturers, distributors, retailers, and consumers can use. The current draft regulations fail to fulfill the requirements set forth in the statute. In order to encourage innovation and maintain the free flow of goods in commerce, it is imperative that bona fide trade secrets are protected as outlined in the California Civil Code and that any final regulation clearly support this principle.

Albany
Atlanta
Brussels
Denver
Los Angeles

**McKenna Long
& Aldridge**^{LLP}
Attorneys at Law

101 California Street • 41st Floor • San Francisco, CA 94111
Tel: 415.267.4000 • Fax: 415.267.4198
www.mckennalong.com

New York
Philadelphia
San Diego
San Francisco
Washington, D.C.

ANN G. GRIMALDI
(415) 267-4104

EMAIL ADDRESS
agrimaldi@mckennalong.com

January 22, 2013

**VIA E-MAIL (DRAPHAEL@DTSC.CA.GOV) AND
BY FEDERAL EXPRESS**

Debbie Raphael, Director
California Department of Toxic Substances Control
1001 "I" Street
Sacramento, CA 95812

Re: Comments of the Complex Durable Goods Coalition on Revised Initial
Statement of Reasons for Proposed Safer Consumer Products Regulations

Dear Ms. Raphael:

I am pleased to submit the comments of the Complex Durable Goods Coalition (the "Coalition") on the Revised Initial Statement of Reasons ("ISOR") released on December 21, 2012 for public comment.

The Coalition is a group of trade organizations representing broad and diverse industry interests. Its mission is to engage in strategic planning, and regulatory and technical advocacy, regarding state and federal chemical initiatives that may impact the manufacturers of complex durable goods, their suppliers and other related entities such as those that may distribute or sell such goods and/or sell or use their service parts. For the Coalition's purposes, "complex durable goods" are manufactured goods composed of 100 or more manufactured components, with an intended useful life of five or more years, where the product is typically not consumed, destroyed, or discarded after a single use. For purposes of this comment letter, the Coalition consists of the following members: the Aerospace Industries Association, the Alliance of Automobile Manufacturers, the Association of Global Automakers, the Automotive Aftermarket Industry Association and the Motor and Equipment Manufacturers Association.

The Coalition's primary concern is that the release of the Revised ISOR for public comment, severed from the release of any proposed or final regulations, creates an unworkable situation in which the changes to the ISOR cannot be correlated to the revised Safer Consumer Products ("SCP") Regulations, or to whatever version of the SCP Regulations DTSC was working with when it revised the ISOR. Such a correlation is essential because of the critical role that the ISOR plays in serving as a foundation for the final regulations. Although we are

concerned that there are legal deficiencies with the unprecedented approach of separating the public's review of the Revised ISOR from its review of the regulations, the Coalition's primary concern is that DTSC's action makes it impossible for the public, and especially the regulated community, to draft comments at this juncture in a meaningful way.

By way of example, the Coalition points to DTSC's revised rationale for the definition of "manufacture." See Revised ISOR at p. 30-31. The revisions suggest that "restoration" activities such as repair, parts replacement and rebuilding would *not* constitute "manufacture" under any circumstances. The Coalition agrees that such activities should not be deemed "manufacture." Yet, the current proposed SCP Regulations released on July 27, 2012 carved out situations in which such activities *would* constitute "manufacture," an issue of great concern to the Coalition as stated in its October 11, 2012 comments. Based solely on the Revised ISOR and the related Notice of Public Availability of Post-Hearing Changes, the Coalition is unable to determine whether these changes in the Revised ISOR represent DTSC's response to the Coalition's and others' similar comments on this issue (with the soon-to-be released revised SCP Regulations presumably eliminating the carve-outs) or whether instead these revisions are DTSC's attempt to clarify the July 27, 2012 regulatory definition of "manufacture." It is also unclear whether these revisions mean DTSC has revised, or will revise, the regulations to exempt from the SCP Regulations' scope replacement parts used to perform these exempted activities. As to all these issues, the Coalition again urges DTSC to adopt the changes that were detailed in the Coalition's October 11, 2012 comments.

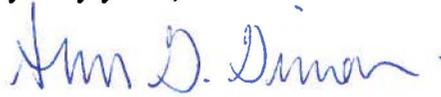
There are a number of other similar areas of confusion created by DTSC's unorthodox severing of the Revised ISOR and any proposed or final regulations, which makes it impossible for the Coalition and other members of the public to comment in a cogent and thoughtful manner. Attempting to describe every such instance, and provide any sort of comment to them, would require an intolerable amount of resources.

In summary, although the release of the Revised ISOR may be an attempt achieve transparency throughout the regulatory process, DTSC's release of the Revised ISOR without any accompanying regulations is far from the transparent, collaborative regulatory process that DTSC has sought to achieve for the last several years with the Green Chemistry Initiative. The Coalition requests that DTSC either: (1) withdraw the Revised ISOR and release it in connection with a specific version of the SCP Regulations to allow the public a meaningful opportunity to comment; or (2) extend the current comment period through the end of the anticipated comment period for the revised SCP Regulations.

Debbie Raphael, Director
January 22, 2013
Page 3

Thank you again for this opportunity for the Coalition to comment on the Revised ISOR.

Very truly yours,



Ann G. Grimaldi

cc: Matthew Rodriquez, Cal/EPA Secretary (via first class mail and email:
matthew.rodriquez@calepa.ca.gov)
Cliff Rechtschaffen, Senior Advisor to Governor Brown (via first class mail)
Martha Guzman-Aceves, Deputy Legislative Affairs Secretary, Office of the Governor
(via first class mail)
The Honorable Michael Rubio, California State Senate (via first class mail)
Odette Madriago, Deputy Director (via email: omadriago@dtsc.ca.gov)
Jeff Wong, Chief Scientist (via email: jwong@dtsc.ca.gov)
Kryisia von Burg, Regulations Coordinator (via first class mail and email:
gcregs@dtsc.ca.gov)

SF:27557782.1



Representing Household & Institutional Products

Aerosol - Air Care - Cleaners - Polishes
Automotive Care - Antimicrobial - Pest Management

January 22, 2013

Via E-Mail GCRegs@dtsc.ca.gov

Kryisia Von Burg, Regulations Coordinator
Regulations Section
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

Re: Revised Initial Statement of Reasons for Safer Consumer Products

Dear Ms. Von Burg:

The Consumer Specialty Products Association (CSPA)¹ appreciates the opportunity to review and provide comments on the revised Initial Statement of Reasons for the Safer Consumer Products Regulation. CSPA and our member companies have been actively engaged in the advancement of California's green chemistry program over the past five years, from the announcement of the Green Chemistry Initiative, through the adoption of the 2008 legislation (SB 509 and AB 1879) which provides the statutory basis for this regulation, and through the years-long regulatory development process.

CSPA members are committed to manufacturing and marketing safe products that are protective of human health and the environment while providing essential benefits to consumers. As stated in previous submissions regarding the Safer Consumer Products Regulation, CSPA and our members support the broad goals of the Green Chemistry Initiative and look forward to continuing work with the Department and other stakeholders in the state to help spur green chemical innovation and continue to ensure that products are safe.

While not the subject of this comment period, we have noted in previously submitted comments, there remain numerous aspects that make this regulation unworkable in terms of its stated purposes considering the resource limitations of the Department of Toxic Substances Control

¹ The Consumer Specialty Products Association (CSPA) is the premier trade association representing the interests of companies engaged in the manufacture, formulation, distribution and sale of more than \$80 billion annually in the U.S. of familiar consumer products that help household and institutional customers create cleaner and healthier environments. CSPA member companies employ hundreds of thousands of people globally. Products CSPA represents include disinfectants that kill germs in homes, hospitals and restaurants; candles, and fragrances and air fresheners that eliminate odors; pest management products for home, garden and pets; cleaning products and polishes for use throughout the home and institutions; products used to protect and improve the performance and appearance of automobiles; aerosol products and a host of other products used every day. Through its product stewardship program, Product Care[®], and scientific and business-to-business endeavors, CSPA provides its members a platform to effectively address issues regarding the health, safety and sustainability of their products.

(DTSC), the public, and industry. To be workable, the regulation must be more flexible to allow for the multiplicity of chemical-product combinations that could be selected, with performance-based instead of laundry-list requirements, with deadlines adjustable to the scope of work.

There are a number of concerns raised with the revised Initial Statement of Reasons (ISOR), including:

- Unorthodox and likely unprecedented separation of ISOR from the underlying regulation, and,
- Inadequate time to review and comment.

First and foremost, CSPA is very concerned about the revision of the Initial Statement of Reasons without a coincident update to the associated Safer Consumer Products regulation. This action is unorthodox, possibly unprecedented, and raises a number of questions about the propriety of the process and whether it is consistent with the Administrative Procedures Act (APA). The California Administrative Procedure Act (“APA”), Cal. Gov. Code §11346 et seq., establishes basic minimum procedures agencies must follow when adopting new regulations. The minimum procedures include providing to the public a copy of the regulations and an initial statement of reasons for proposing the regulations, which were issued July 2012.² The procedures do not contain a provision for revision of the initial statement of reasons in the absence of a corresponding revision to the regulation. We request that DTSC respond to the questions of why such an action was taken and the benefit(s) to the state agency and the regulated community in terms of meeting APA requirements.

Secondly, CSPA notes that the 30-day comment period deviated from APA requirements, included three Federal holidays and severely impinged on our ability to review and comment upon the ISOR and discouraged stakeholder input. As noted in Cal. Gov. Code §11346.4, DTSC must give the public at least 45 days to comment on the proposed regulations and initial statement of reasons.³ The release of the revised document immediately preceding the Christmas and New Year’s holidays meant many stakeholders did not have an opportunity to review the document until well into the comment period. In addition, the comment period overlapped a portion of the external scientific peer review comment period further compounding the ability to provide meaningful input.⁴ By releasing segments of the complex and ambitious Statute for public review in this piecemeal fashion, the Department effectively deprives the public of an opportunity to understand and provide meaningful input on the totality of the Department’s plan to implement the Statute, depriving the public of due process of law. We request that DTSC respond to the questions of why the comment period deviated from standard APA requirements and the benefit(s) to the state agency and the regulated community.

² Cal. Gov. Code §11346.2, <http://codes.lp.findlaw.com/cacode/GOV/1/2/d3/1/3.5/5/s11346.2>

³ <http://codes.lp.findlaw.com/cacode/GOV/1/2/d3/1/3.5/5/s11346.4>

⁴ The Department released a set of ten external scientific peer review reports on November 30, 2012, requesting comments by January 4, 2013. Three weeks later, the Department released the Revised ISOR on December 20, 2012, seeking comments by January 22, 2013.

It is noted that there is a tonal difference in the revised ISOR, i.e., the use of “may.” It is troubling that this advantage more broadly applies to the Department while mandatory language tends to apply to the obligations of the regulated community.

It is noted that there is a significant revision of § 69501.1(a)(40) defining “manufacture” with the intent to better articulate scope.⁵ We raise a concern about the addition of the term “unnecessary” and ask that this language be clarified.

It is noted that there is a significant revision of § 69501.1(a)(52) defining “reliable information” with the intent to better articulate scope.⁶ We raise the concern that there is significant variability in the quality, purpose and applicability of the indicated “reliable information” and that there is no apparent means or criteria with which the Department will evaluate the received information. It is suggested that a ‘weight of evidence’ approach⁷ or similar evaluative methodology be incorporated into the narrative approach to enhance the process.

It is noted that there is a significant clarification of § 69501.2(d)(4) on the Department’s Failure to Comply List with the intent to better articulate scope.⁸ We suggest § 69501.2(d)(4)(C/D) be revised to more clearly indicate that a Failure to Comply List posting *only* applies to the identified products containing the Chemical(s) of Concern.

It is noted that there is a significant clarification of § 69502.2(b)(2) that now specifies that exposures to a chemical is a factor in identifying a Chemical of Concern.⁹ This criterion is necessary appropriate for the reasons described in discussing the inclusion of hazard trait and exposure as the basis for identifying and prioritizing chemicals as Chemicals of Concern; that is, without exposure, adverse impacts would not occur.

It is noted that there is a significant addition to § 69505.1(g)(1) on the Chemical of Concern Removal Notification referencing the stakeholder’s ability to determine in the 1st stage of Alternatives Assessment the ‘need’ for CoC.¹⁰ The concept of “unnecessary” ingredient implies that non-essential ingredients are commonly used and needlessly prejudices against the manufacturer. We ask for clarification for the basis of this conclusion.

It is noted that there is a significant addition to § 69505.2(a)(2) on the Preliminary AA Report Submission and the Department’s belief of the adequacy of the time to collect and compile requested information.¹¹ It is unclear what the nexus is between “market signals” based on public comment and the more conventional view of “market signals” via consumer response to product based on efficacy, performance, etc. We ask for clarification for the basis of this conclusion.

⁵ Page 30, line 45 of revised Initial Statement of Reasons

⁶ Page 35-37 of revised Initial Statement of Reasons

⁷ Weed, D. L. (2005), Weight of Evidence: A Review of Concept and Methods. *Risk Analysis*, 25: 1545–1557.

⁸ Page 47-48 of revised Initial Statement of Reasons

⁹ Page 89 of revised Initial Statement of Reasons

¹⁰ Page 138 of revised Initial Statement of Reasons

¹¹ Page 140 of revised Initial Statement of Reasons

It is noted that there is a significant revision of § 69505.5. Alternatives Assessment Reports with the intent to better articulate purpose and scope.¹² We ask for clarification as to how much additional time will be provided should the Department require additional data to fill informational gaps as part of Final AA Report.

It is noted that there is a significant clarification to § 69505.6(a)(2)(B) on the Request for Additional Information after notice of deficiency.¹³ It is unclear what basis the Department will use to make its determination of what is “legitimate” for protection as a trade secret. We ask for clarification of the basis for making this determination.

It is also noted in § 69505.6(a)(6)(A) that there is a “need to strike balance between a trade secret and ‘legitimate need’ of the *Public* to have access to AA reports”. While we agree that transparency is important, but disagree that the public’s protection is enhanced through the general availability of Alternatives Assessment reports. We ask for clarification for the basis of this conclusion.

It is noted that there is a significant clarification to § 69506.8 on the End-of-Life Management Requirements.¹⁴ We ask for clarification on how the Department will enforce and/or evaluate the effectiveness of program.

It is noted that there is a significant clarification to § 69506.11 on the Exemption from Regulatory Response Requirements.¹⁵ The provision appears to shift the burden of determining regulatory response requirements to the responsible entity and is diametrically opposed to the authorizing statute which acknowledged the primacy of existing chemical management authority or programs. It also would be more useful of available resources to make this determination much earlier in the process than the regulatory response stage. We ask for clarification of this section to better clarify the intent.

To reiterate, we have a number of concerns with the revised ISOR of the Safer Consumer Products regulation, including the extremely unusual and likely unprecedented separation of ISOR from the underlying regulation and the abbreviated time to review and comment.

CSPA appreciates the opportunity to comment on the Safer Consumer Product Regulation revised Initial Statement of Reasons and remains supportive of the principles of Green Chemistry and programs that are consistent with those principles.

We appreciate the significant stakeholder outreach and communication; however, we continue to believe further work must be done to make this regulatory process science-based, economically and technically feasible, and workable for both DTSC and the regulated community.

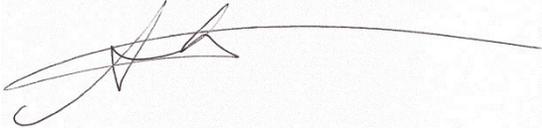
¹² Page 156 of revised Initial Statement of Reasons

¹³ Page 166 of revised Initial Statement of Reasons

¹⁴ Page 184-189 of revised Initial Statement of Reasons

¹⁵ Page 190-192 of revised Initial Statement of Reasons

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven Bennett", with a long horizontal flourish extending to the right.

Steven Bennett, Ph.D.
Director, Scientific Affairs

A handwritten signature in black ink, appearing to read "Kristin Power", written in a cursive style.

Kristin Power
Director, State Affairs – West Region

cc: Matthew Rodriguez, Secretary, California Environmental Protection Agency
Miriam Barcellona-Ingenito, Deputy Secretary for Environmental Policy,
California Environmental Protection Agency
Michael E. Rossi, Senior Advisor for Jobs and Business Development,
Office of the Governor
CSPA Scientific Affairs Committee Green Chemistry Task Force
CSPA State Government Affairs Advisory Committee
Laurie Nelson, Randlett/Nelson/Madden



DIRECT SELLING ASSOCIATION

1667 K Street, NW
Suite 1100
Washington, DC 20006
202-452-8666 | 202-452-9010 Fax
www.dsa.org

October 11, 2012

Kryisia Von Burg, Regulations Coordinator
Regulations Section
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

RE: Green Chemistry Proposed Regulations

Dear Kryisia,

I write concerning the proposed “Green Chemistry Rules,” specifically the addition of chapter 55 to division 4.5 of Title 22, California Code of Regulations. As written, the rules could have a **serious and negative impact on a number of the approximately 2.5 million Californians depending on direct selling** to augment their household income. These Californians sell approximately \$3.8 billion of products in California each year and contribute thousands of dollars in tax revenue to the state.

The Direct Selling Association (DSA) is the national trade association representing over 190 companies that sell products through personal presentation or home parties. Our companies sell and distribute their products through an independent contractor sales force, predominantly made up of individuals working part-time to augment their family income. For purposes of this letter, these individuals will be referred to as distributors. Under the proposed rules, these distributors may fall within the definition of a “retailer” and therefore be subject to overly burdensome disclosure requirements.

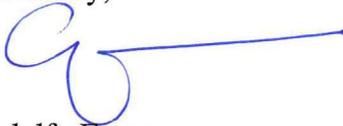
As written, the rules could require distributors to report to consumers specific chemicals contained in the products they contract to sell on behalf of direct selling companies. Imposing such a reporting requirement on these distributors is costly to both the individual distributor and the State. **The adoption of these rules as written could result in reduced sales and have a negative economic impact on California.** Regulatory hurdles will only discourage individuals from taking advantage of direct selling opportunities and hence, reduce revenue in California.

We believe it is unsuitable to place the burden of reporting specific chemicals contained in products on an individual distributor. The proposed regulations cover over 1,200 explicit chemicals with the potential to trigger a duty to disclose. The individual distributor has no control over the chemical composition of the products he/she sells. Nor does the individual

exercise any control as to how products are labeled by a manufacturer. With that in mind, requiring an individual distributor to be responsible for notifying or disclosing chemical contents to his/her customers is an unreasonable expectation.

Accordingly, on behalf of the 2.5 million direct sellers who reside in California, the Direct Selling Association respectfully requests that you **amend the proposed rules** to exempt independent distributors selling products on behalf of direct selling companies from any overly burdensome disclosure requirements.

Sincerely,

A handwritten signature in blue ink, appearing to be 'Adolfo Franco', with a long horizontal line extending to the right from the end of the signature.

Adolfo Franco
Executive Vice President
Direct Selling Association

January 22, 2013

Ms. Krysia Von Burg
Regulations Coordinator
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

RE: Tech Industry Comments on DTSC's Revised Initial Statement of Reasons for the Safer Consumer Products Proposed Regulation

Dear Ms. Von Burg,

The Information Technology Industry Council (ITI), the Technology Association of America (TechAmerica), the Consumer Electronics Association (CEA), and the Semiconductor Industry Association (SIA), are pleased to provide these comments on behalf of the technology industry regarding the Department of Toxic Substances Control's (DTSC or Department) revised Initial Statement of Reasons (ISOR) for the Safer Consumer Products proposed regulation of July 27, 2012.

Our member companies have long been leaders in innovation and sustainability, often taking measures to exceed regulatory requirements on environmental design, energy efficiency and product stewardship. We are thus submitting these comments in response to the 30-day public notice and comment period announced on December 21, 2012 of revisions made to the Department's ISOR from July 27, 2012, in hopes of ultimately developing a regulation that ensures California's continued leadership in technological innovation while achieving meaningful environmental gains in consumer products.

As the Department has stated, many of the revisions to the ISOR are of a non-substantive nature – typographical, formatting, or otherwise. However, DTSC has indicated that these revisions address substantive drafting issues as well, particularly by more explicitly stating the necessity of each provision found in the July 27th proposed regulation. It appears that the reinforcement of necessity statements for the proposed regulation's provisions constitutes a majority of the changes made by DTSC in the revised ISOR. This is of concern to us because, as communicated in our comment letter on the proposed regulation from October 11, 2012, the technology industry has considerable concerns with a number of those provisions – provisions which are now being reinforced by the Department as explicitly necessary for the regulation to achieve its goals.

We have found this to be procedurally confusing as we understand that a revised proposed regulation will be released by DTSC to public in the near future. Presumably there will be some, if not significant, changes made to the regulation in that revision. At the same time, we have the present revised ISOR comment period to consider. Do the many revisions to the ISOR that further emphasize necessity indicate the Department's intention not to waiver from the original provisions in the proposed regulation? Out of an abundance of caution and in order to reinforce our original concerns with many of the proposed regulation's provisions, we have decided to attach for your reconsideration our October 11, 2012 comment letter, which can be found as "Attachment A."

Additionally, we are concerned that the revised ISOR has not provided any further justification for the Department's conclusions found in its "Economic Impacts Analysis" section. As we have indicated in previous comment letters, the technology industry remains concerned over the apparent significant costs associated with compliance that will be borne by companies subject to the regulation. We continue to believe many of these costs are created by unnecessary and significant paperwork requirements, an overreliance on difficult and expensive testing, as well as other resource-intensive procedural requirements found throughout the regulation. These costs will impact not only the industry, but will add significantly to the Department's costs to run the program. Because of these concerns, we echo the sentiments that others have expressed regarding the need for a more robust economic assessment of the regulation. Due to the sheer size and scope of the proposed regulation, it is important that regulators and the public are informed of its potential cumulative impact on California, which would necessarily include a more robust assessment of the regulation's economic impact.

We thank you for the opportunity to provide comments on the revised ISOR and look forward to continuing to work with the DTSC to finalize a workable set of regulations. If you have any questions, please do not hesitate to contact Robert Callahan at (916) 443-9088 or robert.callahan@techamerica.org or Chris Cleet at (202) 626-5759 or ccelet@itic.org.

Sincerely,



Chris Cleet, QEP
Director, Environment and Sustainability
Information Technology Industry Council (ITI)
1101 K Street, NW Suite 610
Washington, DC 20005
202.626.5759
www.itic.org



Robert Callahan
Director, State Government Affairs
TechAmerica
1107 9th Street, Suite 850
Sacramento, CA 95814
916.443.9088
www.techamerica.org



Walter Alcorn
Vice President, Environmental Affairs and
Industry Sustainability
Consumer Electronics Association
1919 South Eads Street
Arlington, VA 22202
(703) 907-7765
www.ce.org



David Isaacs
Vice President, Government Affairs
Semiconductor Industry Association
1101 K Street, NW Suite 450
Washington, DC 20005
(202) 446-1709
www.sia-online.org

ATTACHMENT

ATTACHMENT A

Electronics Industry Comments on Proposed Regulation on Safer Consumer Products (July 2012)

The Information Technology Industry Council (ITI), TechAmerica, the Consumer Electronics Association (CEA) and the Semiconductor Industry Association (SIA), are pleased to provide these comments on behalf of the information technology, consumer electronics, and semiconductor industries on the Proposed Regulation for Safer Consumer Products (Proposed Regulation). We appreciate the opportunity to provide input on the Proposed Regulation and we look forward to working with the California Department of Toxic Substances Control (DTSC) as the Regulation is finalized and implemented.

Our member companies have long been leaders in innovation and sustainability, often taking measures to exceed regulatory requirements on environmental design, energy efficiency and product stewardship. ITI, TechAmerica, CEA and SIA are submitting these comments in order to promote the development of consumer product regulations that will expand on the environmental efforts of our member companies and drive improvements in environmental performance and ensure California's continued leadership in technological innovation.

General Comments:

We offer specific comments on sections of the Proposed Regulation below, but wish to offer several overarching comments. As we have mentioned in our previous comments, when AB 1879 was signed into law by then Governor Schwarzenegger, Governor Schwarzenegger specifically noted that AB 1879 and its implementing regulation were to draw on "lessons learned" in other jurisdictions, and take into account programs in other states, countries and regions, such as the European Union, and build upon their experience, data and expertise.

Unfortunately, it does not appear that the Proposed Regulation was developed with the perspective of learning from other jurisdictions' experience in developing chemical regulations. In previous comments, we have provided several examples of how such experience and expertise can be used to improve the Proposed Regulation; however, we have seen little improvement in this area. We suggest that the DTSC consider how other jurisdictions regulate chemicals used in consumer products when redrafting these regulations.

Overall, the electronics industry considers the Proposed Regulation to be an improvement over the informal draft regulations that were released in 2011, but we still have significant concerns with the Proposed Regulation. The Proposed Regulation presents a very onerous and potentially costly regulatory scheme that is predicated on significant paperwork requirements, for both industry and the DTSC, and an overreliance on testing that, especially for manufactured products (e.g., articles), will be difficult and expensive, while providing few, if any, environmental benefits.

The electronics industry is concerned that the Proposed Regulation is overly subjective and needs to be more focused on objective and standardized processes. It is critical that any person doing a regulatory analysis or determination under these regulations will be able to reach a similar conclusion. Currently, the Proposed Regulation is overly deferential to the DTSC and too discretionary in several areas, mostly but not exclusively in the prioritization and regulatory response areas, for which we've provided specific comments.

While we appreciate that the DTSC is looking for flexibility to allow for changes in science and in response to new information in chemicals management, in many cases, the overly-flexible language only provides ambiguity, does little to provide the regulated community with regulatory certainty, and could provide a disincentive to voluntary actions in the marketplace. While the DTSC has recently assured industry that the regulatory assessment process will be consistent across individual cases, future administrations may take different approaches if given the regulatory authority to do so. We suggest that, in particular, the DTSC provide clear processes for prioritization and clear triggers for regulatory actions. There should also be a provision allowing for the regulations to be revisited if there are changes in the scientific or economic landscape.

The electronics industry suggests removing the term "homogenous material" from the Draft Regulations, but retaining the concept and intent of targeting specific materials within a larger consumer product by modifying the definitions of "component" and "consumer product." While we agree with the intent of regulating specific uses of a material in certain and clearly defined cases, the term "homogenous material" has been problematic, even the improved version that is contained in the European Union's revised RoHS Directive (termed "RoHS Recast")¹. In our comments, we suggest that, by modifying the definitions of "component" and "consumer product," the DTSC will have the ability to target chemicals of concern in specific materials, but will not propagate a still problematic definition contained in another regulatory program.

We believe that several provisions contained in the Proposed Regulation, especially those requiring testing, may constitute a technical barrier to trade) under the World Trade Organization's Agreement on Technical Barriers to Trade². When suggesting restrictions on the use of any chemicals, the DTSC must be able to list acceptable, internationally-recognized testing methods that will allow manufacturers to demonstrate compliance with the regulatory requirements. However, testing should not be viewed as the only means of demonstrating compliance as there are often less costly and destructive means to determine regulatory compliance, such as supply chain disclosures and material declarations.

The electronics industry continues to oppose the use of Certified Assessors in Article 8. We provide more detailed comments on this Article below, but we believe that the use of Certified Assessors will not provide any certainty to the DTSC, public or manufacturers that the assessment has been done correctly and thoroughly, and can, in fact, raise significant legal issues for the Assessors, the manufacturers and the DTSC. The use of a Certified Assessor, with DTSC review and acceptance of the Alternatives Assessment (AA) results, raises a basic question up for debate as to who is ultimately

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0088:0110:EN:PDF>

² <http://www.worldtradelaw.net/uragreements/tbtatgreement.pdf>

responsible, and subsequently liable, for the selection of materials in a product. We have stated repeatedly in previous comments that an AA is only one data point of several that inform the decision of which materials are selected for use in a product. We believe that the DTSC is erroneous in assuming that there will be a clear “winner” material in an AA that should be used above all others. It is rarely the case that an assessment will provide an overwhelmingly clear answer.

Finally, the Proposed Regulation raises several concerns related to trade secret and confidential business information (CBI) protections. In several parts of the Proposed Regulation, requirements are established that would require manufacturers to supply information to the DTSC, such as specific information related to sales and manufacturing processes, which are often closely-held, private business information. ITI, TechAmerica, CEA and SIA recommend that the DTSC review the information that is being requested and consider the potential trade and business ramifications of divulging such information. We make specific comments on this important issue in our review of specific sections of the Proposed Regulation below.

Specific Comments by Section:

Article 1. General

Section 69501.2 Definitions

“Homogenous Material” – Because of the difficulty with the term “homogenous material” we suggest removing this definition (part 34) from the regulations in its entirety. We agree that the Department needs the ability to set threshold levels at the material level, rather than the part or component level, but as mentioned previously, the definition of “homogenous material” is not viewed as well defined in the EU RoHS Directive by all stakeholders, and attempting to harmonize with a term that is problematic to some in the industry will make compliance difficult for both the Department and manufacturers.

Additionally, while we support the continued exclusion of “Historic products” from the definition of “Consumer product” and therefore from being subject to these regulations, we note that the proposed definition fails to include any necessary repair or replacement parts to maintain such products. The continued manufacture and availability of repair and replacement parts without being subject to these regulations is critical to maintaining the cost-effective support and operation of these products for our customers. As noted in the Initial Statement of Reasons (ISOR), the definition of “manufacture” (40) is intended to also exclude “replacement parts” as may be required to repair or refurbish an existing consumer product, although the actual proposed definition fails to reference replacement parts. We recommend below that these definitions be modified accordingly.

Thus, we recommend that the definitions of “Component” and “Consumer Product” be changed to read:

(21) “Component” means a uniquely identifiable part, piece, assembly, subassembly or uniquely identifiable material within a single part, piece, assembly, subassembly of a consumer product that:

- (A) Is required to complete or finish an item
- (B) Performs a distinctive or necessary function in the operation of a product or part of a product
- (C) Is intended to be included as a part of a finished item

(22)(A) “Consumer product” or “Product” means the following:

1. A “consumer product,” including component, as defined in Health and Safety Code section 25251, that is identified under section 69503.4(a)(2)(B), as the minimum required focus of an AA.

(B)1. “Consumer product” or “Product” does not mean any historic product.

2. “Historic product” means a product that ceased to be manufactured prior to the date the product is listed as a Priority Product, and includes its service, replacement and repair parts regardless of when manufactured that are necessary to maintain and/or repair the historic product.

(C) “Consumer product” or “Product” does not mean a product previously owned or leased by someone other than the manufacturer, importer, distributor, or retailer of the product.

(40) “Manufacture” means to make, produce, or assemble. “Manufacture” does not include any of the following actions, unless the action results in the addition, or increased concentration, of a Chemical of Concern, or replacement of a Chemical of Concern, in a product:

(A) Repair or refurbishment of an existing consumer product, including the manufacture of repair or replacement parts;

(B) Installation of standardized components to an existing consumer product; or

(C) Making non-material alterations to an existing consumer product.

Additional definitional recommendations:

(26) “End-of-life” – This definition would encompass stages of a product life cycle where products may be reused or refurbished and, therefore, are not considered to be at their “end-of-life.” This is an important distinction for electronic products. We suggest tying the end-of-life to when a product enters the waste stream and no longer has useful life.

We believe that DTSC could address this concern by changing the definition of (26) to read:

(26) “End-of-life” means the point when the product is at the end of its useful life, and is discarded for recycling or disposal by the consumer.

(52) “Reliable information” – We are concerned that the definition of “reliable information” assumes that too much information is *de facto* deemed “reliable” simply because it has been published in peer reviewed journals or by state regulators. We believe neither of these scenarios automatically make information “reliable” We recommend that, due to the limitations of peer review³ and state agency reports, that a process for disputing the reliability of such information be included. .

Recommendation:

We suggest revising the definition of “Reliable information” to read as follows:

³ See OMB’s Information Quality Guidelines, 67 Fed. Reg. 8452, 8455 (Feb. 22, 2002).

(52) (A) “Reliable information” means a scientific study or other information that is one or more of the following:

1. Published in a scientifically peer reviewed report or other literature;
2. Published in a report of the United States National Academies;
3. Published in a report by an international, federal, state, or local agency that implements laws governing chemicals; and/or
4. Conducted, developed, submitted, or reviewed and accepted by an international, federal, state, or local agency for compliance or other regulatory purposes.

(B) Interested parties may dispute the information from the Department in public workshops or during comment periods.

Section 69501.2. Duty to Comply and Consequences of Non-Compliance

(a) Duty to Comply.

Subpart (a)(2) should allow a consortium, trade association, public-private partnership, or other to apply for technology-specific exemptions under sections 69503.6 and 69503.7, rather than each company being required to do so independently. Thus, to minimize the compliance burden on individual companies, we recommend the following:

Change subpart (a)(2) to read:

The requirements of this chapter applicable to a responsible entity may be fulfilled by a consortium, trade association, public-private partnership, or other entity acting on behalf of, or in lieu of, the responsible entity.

(b) Manufacturer and Importer Options.

(b)(1) and (2) - These notification requirements will only serve to burden manufacturers and the Department, with no discernible benefit to the environment, and (b)(2) will significantly increase the burden of placing new products on the market. The Department has consistently stated that the regulations must reward innovation. However, these requirements will significantly slow the introduction of new products in the California market.

We believe one way that DTSC could address this concern is as follows:

Change subpart (b) (1) and (2) to read:

if a priority product is either removed from commerce in California, or if the product has been redesigned to remove or reduce the chemical(s) that were the basis of an AA or replaced, the manufacturer must be able to demonstrate to the Department’s satisfaction, upon request, that the product has been removed from commerce or redesigned or replaced in the marketplace.

A similarly simplified process should also be applied to the Retailer Option under subpart (c).

Section 69501.4. Chemical and Product Information

The Department should not request information from responsible parties unless publically-available sources of information have been exhausted. We suggest that the Department specify that the approaches outlined are in order of preference.

It is not clear how the Department will handle cases where responsible parties do not have the information being requested or if there is conflicting information between sources of information; in particular for information submitted by responsible parties.

Article 2. Chemicals of Concern Identification Process

Section 69502.2. Chemicals of Concern Identification

While we appreciate that the lists presented in the regulation have been pared down from previous versions, the list of chemicals identified by the list of lists in § 69502.1 will still be in excess of 1,000 chemicals. We are concerned that the purpose of this list will be misconstrued by companies in the supply chain as well as by governments, NGOs, and in particular by members of the general public whose lack of understanding with this complex regulation may lead to unfounded fear. It is very likely that the chemicals identified by this process will have a stigma attached to them that will cause their use to be unnecessarily challenged or questioned, even though the chemicals may have already undergone an assessment or have been determined to be safe in specific applications. The electronics industry believes that the approach suggested by Mr. Mike Rossi of the Governor's office is appropriate for the chemicals of concern identification process, which is reflected in our recommendation below.

Further, we believe that there should be different terms to address specific instances in the regulation. The term "Chemical of Concern" (CoC) currently means a chemical on the list per section 69502.2 that exhibits a hazard trait; the chemical paired with a specific product and the focus of the alternatives assessment in sections 69503.4 and 69503.5; and could mean any chemical requiring reporting to the Department in section 69505.5 or disclosure in consumer information in section 69506.4. Using different terms in different instances will clarify what the Department is referring to at any part in the regulatory process.

Recommendation:

The electronics industry recommends a two-part process for identifying chemicals of concern. First, a list of "Chemicals of Interest" are developed using the process in Section 69502.2, then a pared-down "Chemicals of Concern" list is developed from the "Chemicals of Interest list" and specific factors identified by the Department. Finally, a "Priority Chemical" is a chemical that has been pared with a priority product and is the focus of the Alternative Analysis. This Priority Chemical will also be the focus of any regulatory actions that stem from the AA.

Article 3. Chemicals of Concern and Consumer Product Prioritization Process

Section 69503.1. Applicability

The Statement of Reasons document for these regulations is very clear that products that do not contain a chemical of concern are not subject to the requirements of this Chapter. However, the regulations are not as clear on this point.

Recommendation:

There are two options that we believe address this concern.

Option 1 - Add a second sentence:

This section is not applicable to products that do not contain one or more chemicals of concern.

Option 2 – Modify the definition of Priority Product:

(48) “Priority Product” means a product containing one or more Chemical(s) of Concern as identified and listed as a Priority Product by the Department under section 69503.4.

Section 69503.2. Priority Products Prioritization Factors

The regulations have several factors that include the concept of exposure, but exposure of a chemical of concern is not a factor in the prioritization. While the regulations do contain subpart (a)(1)(B), the regulations seem to assume that any exposure to a product equates to exposure to the chemical of concern, so this subpart relates to exposure to the product, not to the chemical of concern.

“Containment of the Chemical” within the product is included in the product prioritization criteria in subpart (a)(1)(B). As described in the ISOR, “how the Chemical of Concern is contained or bound during the use of the product determines, in part, the amount of exposure that may occur. For instance, the Chemical of Concern may be a component inside a product and may not be accessible to the user, in which case, there is little to no exposure as a result of use of the product.” These are meaningful and practical ways to assess exposure to a chemical in a complex product or article and should be retained. We suggest that the Department add language in subpart (a)(1)(B) to clarify that “containment” includes the concept of accessibility as described in the ISOR. “Accessibility” is a commonly-accepted term with well-established tests for whether a part of a product is accessible or not for chemical exposure purposes, such as the test used by the Federal Consumer Product Safety Commission.⁴

Finally, subpart (a)(1)(B)(4)(a) discusses chemical exposures during manufacturing. The Department has been consistent in stating that these regulations cover consumer products and chemicals. Exposures during manufacturing processes are already covered under existing authority by the federal Occupational Safety and Health Act (OSHA), and should not be included in these regulations.

Recommendation:

⁴ <http://www.cpsc.gov/about/cpsia/inaccessiblefr.pdf>

We recommend that this section, in particular subpart (a)(1)(A), be greatly simplified and specifically mention exposure as a factor. One way that DTSC could address this concern is as follows:

Change (a)(1) to read:

Adverse impacts and exposure. The Department will consider the adverse public health and environmental impacts posed by the Chemical(s) of Concern in a product due to the physicochemical properties, environmental fate, hazard traits and the possibility and likelihood of exposure to the Chemical(s) of Concern through reasonably foreseeable use and abuse of the product.

Additionally, we believe further clarity could be provided by the following:

Change (a)(1)(B)(4)(d) to read:

Containment of the Chemical(s) of Concern within the product, which includes whether the Chemical(s) of Concern is in an inaccessible component within a product.

Subpart (a)(3) also has the Department “considering” other California and federal laws. The electronics industry strongly believes that, as in previous drafts of the regulations, devices that are already regulated for a particular chemical use must be exempt from these regulations. The potential for multiple, conflicting and confusing regulatory schemes is too great to simply make those a factor for consideration. At the least, there should be considerations for exempting products that are previously regulated under other international or federal chemical regulatory regimes. There should be a presumption that chemical risks have already been reduced in such cases.

Subpart (b) lists key prioritization factors the Department will consider. We believe this process is more complicated than in previous drafts, and suggest the Department consider expanding these key criteria to make it clearer when a product may meet them.

Recommendations:

We suggest the Department give priority to products meeting the following criteria:

- (1) The chemical of concern in the product have a significant potential to cause adverse public health or environmental impacts;
- (2) The product is widely distributed in commerce and widely used by consumers;
- (3) There is significant potential for public and environmental exposures to the chemical(s) of concern in the product in quantities that can result in adverse public health or environmental impacts; and
- (4) For assembled products, the product contains one or more chemicals of concern that may present potential exposure(s) through inhalation or dermal contact in quantities that can result in adverse public health or environmental impacts during intended and reasonably foreseeable use.

Section 69503.3. Process to Evaluate Products Using the Prioritization Factors

While this section is labeled a process, the electronics industry does not believe this is truly a process as required by AB 1879. As we mention in our general comments on the regulations, we are concerned that any person, or any administration, conducting this process will not generate similar results. While we appreciate that different entities (i.e., manufacturers vs. regulators) will have different assumptions and potentially different expertise, the process should still be sufficiently standardized so that anyone who does the process in good faith will come up with a similar result. We are not convinced that this is the case with the SCP regulations. There is simply too much discretion and variation in the steps enumerated in this section.

We recommend that the DTSC revert to the flow chart process that the DTSC used previously. A flow chart approach or, at least, a step-wise approach will be more systematic and less subjective than the current proposal.

Subpart (f)(1)(B) allows the Governor's office to potentially skip all of the Article 2 Chemical of Concern identification, and to unilaterally give priority to a chemical without any process or public input. While the final list would be open for public comment, it would be too late in the process to respond to any potential issues stemming from a Governor's Executive Order. We believe this is too broad a mandate and needs to be either removed or moved to the CoC identification in 69502.2.

Section 69503.4. Priority Products List

Subpart (a)(2)(B) introduces the concept of the highly durable product. While we appreciate the intent of this term, we are not sure that it will adequately distinguish between formulated products and articles, and we believe that the limits placed on the department for selection of components and materials (10 per product every 3 years) are not useful. Alternatives assessments on articles are often very long and complex undertakings. For example, the US EPA Design for Environment program has been investigating alternatives for decaBDE in plastic casings. This assessment has taken over 3 years and has consumed several hundred thousand dollars, and has just gone out for public comment. While we recognize that this case is more complex than many others, it is still not unusual for assessments on electronic products to take two – three years. Having a limit of 10 things every three years will still potentially have manufacturers in a constant loop of mandated assessments.

Subpart (d) notes that the Department may respond to some or all public comments. We believe that for a truly credible process, the Department has the obligation to respond to all public comments. We do recognize that the response will be, in some cases, that a comment is without merit.

(a)(2)(B) – Per our comments on homogenous material in Section 69501.1, we recommend changing (B) to read:

- (B)1. If applicable, the component(s) and/or uniquely identifiable material(s) within a component, to which the alternatives analysis threshold applies, and which is/are the required minimum focus of the AA.
2. For each Priority Product that is a highly durable product, the Department shall in all cases specify the number of component(s) and/or uniquely identifiable material(s) within a

component to which the alternatives analysis threshold applies, and which is/are the required minimum focus of the AA. For each listed highly durable product, the Department shall specify no more than ten (10) components and/or uniquely identifiable materials per product every three (3) years.

Section 69503.5. Alternatives Analysis Threshold Exemption

As mentioned in comments to previous Draft Regulations, we believe that the inclusion of cumulative concentrations (in subpart (d)) will add ambiguity to the regulations that will make it very difficult for the Department and manufacturers to determine compliance with these regulations. For example, if a chemical gets reclassified or a new chemical of concern gets added to an existing priority product, then industry and DTSC personnel will have to re-calculate all the existing threshold level summations as the grouping of chemicals subject to the threshold will change. Further, manufacturers will not be able to use existing data and compliance systems, which are all based on single chemical thresholds, to ensure compliance with these regulations. This will delay DTSC's ability to quickly and efficiently implement the new regulation as both industry and the agency will be required to develop innovative new business processes and/or software tools that are capable of calculating the summation of chemicals vs. applying the threshold to a single chemical. This will divert valuable agency resources to focus on documenting that chemicals are not present in products from the primary purpose of the regulation which is to identify safer consumer products.

Finally, it is not always possible to analytically quantify all chemicals in a consumer product, especially for assembled products which may have matrix interferences, or some inorganic compounds with only analytical methods for the elements but not the full chemical compound. Therefore, having the threshold potentially set at a cumulative sum of chemicals and not an individual chemical increases the complexity of quantification to a sum total as more and more chemicals may fall into the category of "unquantifiable." As the department adds more chemicals to a priority product, the cumulative sum threshold will become more and more difficult to quantify as the thresholds get smaller and smaller going below any ability of analytical detection limits. This uncertainty will be exacerbated in more complex assembled products and will only make the compliance demonstration and/or enforcement more difficult.

The electronics industry acknowledges the importance of considering cumulative chemical effects, however, we believe this should be considered during the product prioritization phase and can be addressed through regulatory responses, but it is not appropriate for a threshold determination.

Section 69503.6. Alternatives Analysis Threshold Exemption Notifications

The electronics industry continues to believe that these minimum threshold exemptions should be self-implementing. The amount of information being requested by the Department to demonstrate that the levels are below that which should be regulated will be overwhelming to the regulated community and the Department. Additionally, there is a dependence on testing results to "prove the negative" that a chemical is not in a product, where a compliance assurance system, which may include but does not require testing results, is in most cases much more practical for manufacturers to manage the content of their products and the Department to ensure compliance with the regulations.

Recommendations:

The electronics industry suggests that much of § 69503.6 be deleted, and replace with a compliance assurance process where the Department may request information from the manufacturer.

In creating a program to ensure compliance with the threshold exemption, the Department should remove the implication at § 69503.6(a)(5) and (a)(7) that only analytical testing results are appropriate substantiation that a product meets the threshold exemption. Given the sheer number of chemicals of concern based on regulations and customer restricted/banned substances lists, testing for all of these chemicals is cost-prohibitive. Therefore, manufacturers commonly rely on supplier certifications regarding purchased material content to understand product ingredients and impurities, and cannot routinely test all purchased materials or finished goods. Responsible manufacturers augment supplier information with testing when knowledge of the chemistry of the product indicates probable presence of chemicals of interest, or when there is cause to doubt the veracity of the supplier certification. This method has been widely used to determine compliance with international chemical restriction laws and regulations and is sufficiently rigorous and credible to provide a model for the Safer Consumer Products Regulation.

Section 69503.7. Priority Product Notifications

As written, this section will inundate the Department with information as soon as a Priority Product list is published. The Department should reconsider the reporting and notification requirements in the regulations, considering the burden on the manufactures to produce this information and the Department to receive process and respond to it. It is not clear why the Department would need all of the information requested, in particular all of the information in subpart (a)(2).

Article 4. Petition Process for Identification and Prioritization of Chemicals and Products

Section 69504. Applicability and Petition Contents

We are concerned that the requirement of subpart (b), that a chemical be off all lists, is an overly high hurdle to clear to request a petition. The lists in section 69502.2(a) are all updated on different cycles, with some taking significantly longer than others to refresh. If there is significant new information, it is unlikely that it will change all of the lists within a reasonable time frame. The section should allow petitioners to remove Chemicals of Concern on a showing of “preponderance of the evidence” that the scientific evidence supports removal.

Recommendation:

We believe one way that DTSC could address this concern is as follows:

(b) Change to read:

A person may not petition the Department to delist any chemical identified as a Chemical of Concern unless that chemical has been removed from at least one list identified in section 69502.2(a).

Section 69504.1. Merits Review of Petitions

This section contains a list of factors the Department will consider in making a determination of whether a petition will be denied or granted. However, the criteria listed are only applicable to petitions to add substances to the Chemical of Concern list. There should be factors for how a chemical may be petitioned for removal from the CoC list.

Further, we are concerned with the subjectivity of this section. As with previous sections, there should be assurances that the petitions will be reviewed with a process that is dependent only on the science and merits of the review. We suggest that the Department develop a process or explanation of how the factors will be applied so that petitions may be reviewed more consistently based on an objective determination.

Article 5. Alternatives Analysis

Section 69505. Guidance Materials

The electronics industry contends that not all methodologies to perform an assessment are of equal caliber. Therefore, we are concerned that a process that has less rigor than necessary may be promoted and accepted as guidance by the department, and processes that are applicable to one type of products but not others may be used by assessors that do not understand the products and how they are produced. Therefore, we suggest that the Department allow for public input into the guidance materials when they are posted.

Section 69505.1. Alternatives Assessments: General Provisions

As mentioned in our general comments, the electronics industry feels that several of the timelines presented in the Proposed Regulations are too short to be workable. We believe that subpart (b)(3)(C) is an example of this. Some of our associations' member companies have done assessments using the guidance in previous drafts of the regulations, and the preliminary steps took longer than 180 days. For simpler products, it is possible that a shorter timeframe is practical, but for high tech products with a complex supply chain, 180 days is too little. We suggest allowing the Department to set due dates when the Priority Products List is published. Allowing flexibility for the due dates may provide manufacturers with the opportunity to work with their supply chain and develop meaningful AAs.

As we mention in our comments to Article 8, we believe the requirements for a Certified Assessor in subpart (e) should be removed. Notwithstanding our objection to the use of Certified Assessors, we further believe that the 2 year implementation is unworkable. If the department proceeds with a Certified Assessor program, the timeframe of 2 years from the effective date of the regulations is unworkable. For the first set of priority products, a manufacturer will start the AA before 2 years is over, but may not have been able to complete it. These manufacturers should not have to switch assessors mid-stream. The DTSC should instead allow that the AA's for the first round of priority products do not require a Certified Assessor.

Subpart (g) requires that manufacturers who reformulate their products submit significant information to show that the chemical of concern is no longer in the product. We believe that this is another example of an overly-burdensome and large information request that manufacturers will be required to

prepare and the DTSC will be required to process with little or no benefit to the environment. We believe that as with the AA threshold, if the manufacturer reformulates the product, no further reporting should be due. If the DTSC does feel some notice is necessary, a simple notification with the contact information and a statement that the product no longer contains a chemical of concern should be adequate. As we have mentioned previously, it is impossible to “prove the negative” that a chemical is not present, and the regulations are overly reliant on product testing to demonstrate compliance. There are many examples of other reliable and credible ways to demonstrate conformance, including supply chain declarations and internal process controls. If the DTSC is going to require testing to demonstrate compliance, it is incumbent on the Department to specify which tests are acceptable to show compliance.

Section 69505.2. Analysis of Priority Products and Alternatives

Subpart (b) notes that a responsible entity may submit an abridged AA report if an acceptable alternative is not “available or feasible.” However, the Department does not specify thresholds for these terms. The Department should provide some guidance for feasibility in this section or in section 69505.3. Additionally, subpart (b) indicates that a responsible entity cannot do an Abridged AA Report without first doing a full Stage 1 study. We believe that a responsible entity should be able to do an Abridged AA Report without first going through the process of a full Stage 1 study if they rely on information from other regulatory entities or trusted bodies to show that there are no viable alternatives.

Additionally, it is not clear how the Department will approve research and development (R&D) plans under this part and section 69505.3. It is unlikely that the Department will have the industry-specific expertise necessary to adequately review and approve R&D plans.

Subpart (d) allows for a responsible entity (manufacturer) to select a different alternative from the one identified in the Final AA Report. As we note in our general comments, this may raise the question of who is responsible for the material content of a product. It is not clear who will be ultimately responsible for a product material content if a manufacturer disagrees with the Certified Assessor. This subpart allows the manufacturer to assume that responsibility, but it is not clear why they may want to do this if a Certified Assessor has already made a recommendation.

Additionally, subpart (d)(1)(B) notes that the revised Final AA Report must be submitted to the Department 60 days prior to placing the product in the stream of commerce. What is the responsibility of the manufacturer if the proposed selected alternative is already in the stream of commerce?

Section 69505.3. Alternatives Analysis: First Stage

Subpart (a) is an example of our comments in Section 69502.2, where different terms are needed to identify chemicals at different parts in the process. Using the same term depending on when referenced in the regulations is confusing. We recommend developing separate terms for these concepts in the regulation.

Subpart (b)(1)(A) notes the responsible entity must identify all legal requirements associated with the use of the product. However, the manufacturer is not likely to have this information. The

manufacturers will have all compliance information for the manufacture of the product. We believe that this is what the DTSC is asking for in this section, but it should be made clear.

Subpart (b)(2)(A)1 states that alternatives must “eliminate or reduce the concentration” of the chemicals of concern in the product, but does not provide any threshold for this. As written, a trivial reduction of the CoC in the product through any means would meet this requirement. We suggest using the term “reduction in use” of the chemical of concern which will remove much of the ambiguity with the term.

The electronics industry is concerned with the requirement in (b)(2)(A)2 that a manufacturer shall consider alternatives posted for consideration by the Department. It is possible that a manufacturer has already considered these alternatives and should not be subject to doing so again, or based on the technical expertise of the manufacturer, they may be able to reject an alternative without the need for a full assessment. We suggest that the Department should not suggest alternatives, allowing the manufacturer to perform the AA, however, the Department could require the manufacturer to review and potentially explain why an alternative presented by the Department is not viable, but to require them to consider these in their AA is overly prescriptive.

Section 69505.4. Alternatives Analysis Second Stage

In subpart (a)(2), the Department assigns all responsibility for collecting and using available information and tools on the responsible entity; however, as we have pointed out, a third-party Certified Assessor may actually be the entity performing the assessment, and the Department has reserved the right to agree or disagree with the assessment results. As we have mentioned several times, this can potentially pose a significant conflict, and it is not clear who is ultimately responsible for the results of the AA. It is possible that the Department or Certified Assessor may second guess the manufacturer (responsible entity) and it is not clear what recourse, if any, the manufacturer has in these cases.

The electronics industry is concerned that the economic impacts in subpart (a)(2)(C) do not include research and development costs of using new materials, as well as performance and other testing (for example, for medical devices). These costs are important factors and should be part of the AA. Further, the Factors in subparts (B) and (C) do not include performance of the selected alternative.

Step 2 (subpart (b)) will require the use of the tools and guidance materials identified in section 69505. It is important to realize that these tools will provide important information, but will not be conclusive regarding the final decision or assessment. Weighting of the factors involved will have a significant effect on the outcome, and only the technical expertise of the manufacturer and assessor will be able to adequately weigh factors in the assessment. As we mentioned previously, there will rarely be a clear-cut “winner” material in this process, and only, after reviewing all the evidence, will the assessors and manufacturers be able to make a final decision based on the totality of the evidence. While the manufacturers will attempt to provide justification to the Department, it is not clear that the Department will agree with this justification, or for that matter, the outcome of the assessment.

Subpart (d), considering additional information, should be performed before an alternative is selected (currently subpart (c)).

The timelines for implementation of the alternative (in several sections, but mostly section 69505.5), are very tight and manufacturers, in many cases, may not be able to implement an alternative in proposed timeframe. For example, communications and medical devices have, on average, a four-year cycle between when a product is first designed to when it is formulated, assembled, and tested for performance and compliance with existing regulations. Further, smaller companies often do not have the “pull” to affect changes in the supply chain; in fact, large companies (our associations represent many of the world’s leading high-tech companies, as well as smaller or medium enterprises) often have trouble affecting changes in the supply chain since many companies are located overseas. This may lead to an outcome where certain globally-available products will not be available for sale in the State of California.

Section 69505.5. Alternatives Analysis Reports

(a) – The term “sufficient information” is used several times in this section, but is not defined in the regulations. It is not clear how the responsible entity can provide information for an appropriate due date. Section 69505.4(e) states that a responsible entity shall propose regulatory responses as part of the AA, then section 69505.5(a)(4) states that the Department will determine an appropriate regulatory response. What is the process if the Department disagrees with the Certified Assessor/Responsible Entity proposed response?

(d) – It is very likely that the manufacturer will not have much of this information, and it is unclear why this information would be necessary for an environmental, health and safety alternatives assessment. Manufacturers typically sell to distributors or distribution centers, and they determine what products go where. Additionally, much of this information, especially the supply chain and manufacturing locations, is likely classified as “trade secret” information.

Recommendation:

Remove these reporting requirements from this section. If this information is necessary, the Department can obtain it in the process outlined in § 69506.9.

(f) – The Regulation should not dictate how information is presented in the Alternatives Analysis Reports. It is not possible, in all cases, to present a matrix or even an easily-understood visual comparison. Very complex AAs may not lend themselves to one particular type of information format.

Recommendation:

Simplify section (f) and remove most requirements for how information is to be presented. The Department should consider adding a subpart asking for clarification on a section of the AA, rather than simply asking for more information.

(g) – As mentioned in several sections, determining the relevant comparison factors is a somewhat subjective exercise and depends greatly on technical expertise and knowledge of the industry being assessed. It is not clear what will happen if the Department disagrees with the weighing and comparison of the factors.

(j) – The list of all chemical ingredients is not always available for complex parts and products, or it may be confidential information not available to the responsible party or not relevant to the AA. The further information (subparts 1-6) is potentially a significant amount of information for the manufacturer to prepare and Department to process, which may not be relevant to the AA for the chemical-product pairings. We recommend simplifying this section and paring the information required to the chemical/product information used in the AA and relied upon to make the final assessment.

(k) – As per our general and subsequent comments, it may take several years to complete these sections, and it is not clear that the deadlines in this section are practical. We recommend providing more flexibility, especially for more complex products.

Section 69505.6. Department Review and Determinations for AA Reports

It would seem that this section obviates the need for Certified Assessors in Article 8. If the Department is reviewing all AAs to ensure compliance with this section, it is not clear what role the Certified Assessor will serve in assuring the quality and thoroughness of the AAs.

Article 6. Regulatory Responses

Section 69506. Regulatory Response Selection Principles

As written, this section does not require the Department to consider the five factors listed in subsection (c) when determining which regulatory response may be appropriate, if any. Rather, DTSC is only required to give preference to regulatory responses that provide the greatest level of “inherent protection.” However, less inherent toxicity in a product should not be the only factor DTSC considers; there are many other factors involved when a decision is made to use a particular chemical in a product. Thus, DTSC should be required to consider all five factors listed in subsection (c) by eliminating the permissive language on Page 52, Line 15 and replacing it with “...the Department shall consider all of the following factors.” We believe that reasonable consideration of all five factors prior to imposing any regulatory response will be critical if the program is to be practical, meaningful, and legally defensible. Additionally, the Department should consider existing regulations when determining a regulatory response.

Recommendation:

Add the following line to subpart (c):

(c)(6) Existing regulations for that product

Finally, while we appreciate that DTSC has included a cost-effectiveness consideration in (c)(2), we are concerned that the Department will not have the information necessary to do an effective cost-benefit analysis of the regulatory response.

Section 69506.1. Applicability and Determination Process

We believe that this section should include a minimum timeline for when a regulatory response will be required to be implemented. Given the complexity and significance of the regulatory response options at the Department's disposal, we believe that regulated entities should be given a minimum of one year after the receipt of the final regulatory response determination notice to implement the regulatory response. This timeline should increase depending on the severity of the regulatory response selected.

Section 69506.2. AA Report Supplemental Information Requirements

As written, we believe that this regulatory response would act as an overly broad and unnecessary mandate on companies, giving the Department the ability to demand any information from a company on any timeline it chooses. We suggest the following changes:

§ 69506.2 (a) – Change to read:

(a) The Department may require a responsible entity to provide, within a reasonable time frame specified by the Department, information supplementary to the Final AA Report...

§ 69506.2 (b) – Change to read:

(b) The Department may require a responsible entity to obtain or develop, within a reasonable time frame specified by the Department, information that is reasonably attainable by the entity to fill one or more information gaps identified in the Final AA Report...

In addition to these changes, we believe that the information demands made by DTSC should be targeted and reasonable, rather than overly broad. Furthermore, once the required information has been provided, that action should fulfill the regulatory response obligation for a reasonable period of time, so that a compliant entity is not continuously required to generate more and more information.

Section 69506.3. No Regulatory Response Required

It is not clear how this section relates to the product sales prohibition (Section 69506.6) and end of life management (Section 69506.8) response options. As currently written, it appears that § 69506.8, and potentially § 69506.6, will act as "default" regulatory responses and will be automatically implemented unless a finding is made that no regulatory response is required under this section. This is due to the language in both sections reading "except as provided in section 69506.3." For obvious reasons, we believe that automatic triggers for any of the regulatory responses, including product information, will lead to unnecessarily burdensome results. Rather, DTSC should be required to carefully weigh and consider all of the factors delineated in § 69506(c) before deciding to impose any of its regulatory response options.

Section 69506.4. Product information for Consumers

As written, it appears that this regulatory response will be automatically required unless no Chemical of Concern is present above the applicable threshold. This automatic trigger seems unnecessary and could lead to information saturation for consumers on a wide scale. This is especially true given the amount of information required by subsection (a)(1). This requirement also includes some information that the manufacturer may not even have available, such as (a)(1)(C), or that may be considered confidential business information, such as the importer information in (a)(1)(F).

It would also be very difficult to fit this much information on the product packaging, and retailers will not voluntarily provide a placard at the point of sale. As we have stated in prior comments, the physical labeling of products is an outdated and inefficient solution that makes little sense for many types of products. Research continues to show that beyond immediate hazards, labeling of a product is an ineffective way to warn consumers of potential hazards. Furthermore, information/disclosure requirements should be done in the least restrictive manner possible. Manufacturers should have options to labeling by providing information channels to consumers through the use of websites, product manuals, or other options that make sense for their market and for the potential hazard.

Section 69506.5. Use Restrictions on Chemical(s) of Concern and Consumer Products

It is not clear how restrictions on the use of consumer products can be enforced. While information on use restrictions can certainly be made available, how would the Department ensure compliance with such restrictions?

Section 69506.6. Product Sales Prohibition

As stated above, it is not clear how the tie-in to Section 69506.3 would work in practice for the product sales prohibition response option. Additionally, how would the Department know which products contain any Chemical of Concern above the applicable alternative analysis threshold, and which do not? Again, there may not be tests available for determining the presence of a particular material in a product, making these determinations and enforcement challenging.

This section is also made unnecessarily burdensome by allowing the Department to still prohibit the sale of a product even if no viable alternatives exists (see subsection (d)(1)), and by requiring responsible entities to notify DTSC if their product does not contain a Chemical of Concern.

Section 69506.7. Engineered Safety Measures or Administrative Controls

We would suggest that this section use the term “accessibility” rather than “integrally contain” in subsection (b), as there are defined tests for accessibility, making it a more objective standard for compliance. Thus, page 57, subsection (b), line 16 would read: “limit accessibility to the Chemical(s) of Concern within the structure of the product or limit...”

Additionally, we believe that there needs to be thresholds for presence under subsection (b)(1) as Chemicals of Concern, metabolites, or others may be naturally occurring or have multiple metabolites. Simply requiring “presence” is too ambiguous of a standard to be useful here. Also, as written, presence in a single building would be sufficient to trigger administrative control under (b)(2), which we think is unnecessarily strict.

Section 69506.8. End-of-Life Management Requirements

As stated earlier, it appears that this regulatory response will be automatically imposed unless the Department finds that there is no need for any regulatory response under § 69506.3. Automatically requiring end-of-life management requirements would lead to unnecessarily burdensome results as comprehensive product stewardship plans are very significant undertakings – logistically, financially, and otherwise – that should not be imposed absent careful consideration of all factors delineated in § 69506(c).

In addition, a one year time frame given in subsection (a)(2) is far too short for entities to implement the complex take-back schemes envisioned by this section, and it is unclear what financial guarantees, if any, would be adequate or available to entities under (a)(2)(A)(7). An additional concern is that this section does not differentiate between Business to Business (B2B) markets and consumer markets; there are viable markets for B2B recycling in many instances and the regulation should not undermine the free markets here.

The report required under (a)(2)(D) is also problematic. First, information on state sales and recycling is likely not available – most sales are done through distributors and manufacturers have no way to track what is sold in state. Additionally, and especially in the electronics industry, there is a vibrant post-consumer market, which would also make tracking recovery very difficult. And for durable products especially, which have lifespans of several years, the amount of goods recovered in a given year will have no relation to the amount of goods sold, which could give the impression to the Department that a program is performing poorly when in fact it is not.

Finally, it is unclear how a manufacturer might be able to prove to DTSC that an end-of-life management program is not feasible under subsection (d), though we agree that responsible entities should have the opportunity to show why they should be exempt from the requirement.

Section 69506.9. Advancement of Green Chemistry and Green Engineering

This section states that DTSC may “require” a manufacturer to conduct research and development, or fund a challenge grant, to design, improve, reduce the cost of, or increase the market penetration of, a safer alternative to a Priority Product. Since any given manufacturer might not have the resources to undertake such project, or might believe that such projects are not likely to be successful, a manufacturer should always have the option of discontinuing manufacture of the Priority Product. Section 69506.9 should be amended to provide explicitly that a manufacturer can choose to discontinue manufacturing a Priority Product instead of complying with any requirement issued pursuant to this section.

Additionally, many companies are engaging in research and development to achieve the goals specified in subparts (a) – (d), independent of the mandates in this regulation. These companies should be given credit for their independent efforts as it relates to this regulatory response, and any further mandated funding of R&D needs to come with IP protection for the responsible entity.

Section 69506.10. Regulatory Response Selection and Re-Evaluation

As written, it is not clear what other situations DTSC is referring to in subsection (a), or why this section is needed to begin with. This section seems to remove any of the constraints imposed by earlier sections by stating that DTSC “may impose one or more regulatory responses ... to situations other than those specified in those section.” If that is the case, what could the Department not impose as a result of this section? We would request clarification on this point.

Additionally, the term “periodically” needs to be further defined or clarified in subsection (b). It would be unnecessary and burdensome to review regulatory responses too frequently. Entities need certainty with the responses they are required to comply with in order to do business.

Section 69506.11. Exemption from Regulatory Response Requirements

As written, this section appears duplicative of work that the Department should have presumably already completed: the determination of conflicting or duplicative regulatory programs. If the product is already covered by California or other regulatory programs elsewhere, the product should already be exempt from these requirements. The responsible entity should not have to do an alternatives analysis and then put in a formal request to DTSC for exemption to demonstrate that a conflict exists with other regulatory schemes. That determination should have already been made.

We would suggest that a responsible entity be able to request and receive exemption for compliance with international law, such as RoHS or REACH, provided that the manufacturer can show compliance and that the international law will also provide health and environmental benefits.

Section 69506.12 Regulatory Response Report and Notifications

As written, we believe this section is very problematic and fundamentally ignores the realities of supply chains and commerce. Manufacturers rarely sell directly to a retailer and thus will not be able to identify the retailers required to comply with subsection (a). We would suggest rather that the manufacturer notify whoever it is they are directly selling the product to if it is reasonably likely that the product will be sold in California. Then, the entity selling or distributing the product would be obligated to notify the appropriate retailers.

We believe the regulatory response notice to the Department required under subsection (c) is unnecessary, as DTSC should assume but confirm compliance as needed, such as by requesting compliance documentation.

Article 7. Dispute Resolution Processes

Section 69507. Dispute Resolution

It is not clear why articles 2, 4 and 10 are not subject to dispute resolution. We would think that the DTSC would welcome the opportunity to informally arbitrate any decision made pursuant to the Regulation. We would think an information dispute process would help these articles; otherwise injunctive relief through the courts would be the only process open should a dispute arise. We suggest allowing all Articles to have some sort of administrative dispute process.

Section 69507.1. Informal Dispute Resolution Procedures

We submit that allowing only 30 days to dispute an action, especially notice on the Department's website, is inadequate. In many cases, it may take 30 days for a responsible entity to realize they are involved and decide to dispute a posting. We suggest at least 90 days for this initial time.

Article 8. Accreditation Bodies and Certified Assessors

ITI, TechAmerica, CEA, and SIA strongly assert that the Certified Assessor process as described in Article 8 will not serve to meet the goals of the Green Chemistry Initiative to ensure that 1) the alternative assessments are conducted by a person with all of the expertise necessary to adequately complete an assessment, and 2) that assessments will be done within the expected requirements for compliance with the law, thoroughness, and scientific rigor. For the reasons described in comments to previous sections and below, we urge the DTSC to remove Article 8.

Simply put, the Certified Assessor requirement will increase the costs to do the AAs, with absolutely no benefit. Most small companies will need to hire a third-party assessor, and larger companies will likely assume the expense of getting one or more of their technical experts certified. Most certified assessors will not have the specific product knowledge, especially if they are not experts in the industry they are trying to assess, to perform an assessment. Simply requiring a bachelor's degree in a scientific field and training on the requirements of these regulations will not ensure that the assessors will have the

knowledge base to adequately perform an assessment. The assessor must have knowledge of the tools being used to perform the assessment (which will vary depending on the type of material and product assessed), knowledge of the industry being assessed, and the expertise to be able to weigh the factors and assess the information used to perform the assessment. No certification program will ever be able to provide this level of expertise.

As we have mentioned previously, the use of third-party certified assessors will likely create potential legal issues. For example, who will be liable for any material use decision based on the outcome of an assessment? What happens if the manufacturer disagrees with the assessor? What if multiple assessors are used (either in different manufacturers of the same product, or even within a single assessment) and the assessors disagree on the optimal outcome? Who will resolve any conflicting findings?

Recommendation:

Delete Article 8. The Department reviews all submissions for compliance with the regulations in section 69505.6 and has provided for a process to audit any AAs submitted under Article 9. We believe this is adequate protection to ensure that the assessments are done correctly, and the Department has the ability to review the AAs in depth for compliance, information quality and adequacy of the analysis.

Article 10. Trade Secret Protection

Section 69510. Assertion of a Claim of Trade Secret Protection

The electronics industry believes that a reasonable protection of confidential business information (CBI) is critical to innovation and competition in the market. As mentioned earlier, the Proposed Regulation would require manufacturers to supply a substantial amount of information to the DTSC, including sales and manufacturing process information. The submittal of such a broad range of potentially sensitive information increases the likelihood and frequency that a manufacturer may have to rely upon the regulation's trade secret provisions in order to safeguard its CBI.

Under Section 69510(a), a claim for trade secret protection will involve the submittal of extensive supporting information to the DTSC in order to substantiate its need for trade secret protection. A disagreement from the DTSC in the trade secret claim would mean that the manufacturer would need to cure the perceived deficiencies in the trade secret claim or seek judicial review in order to prevent the CBI from being released to the public (Section 69510.1).

This resource-intensive CBI claim process strongly emphasizes the need for the Department to carefully consider what information it truly requires from regulated entities throughout the Regulation. Thus, we urge the Department to limit submission requirements only to that information which is absolutely necessary for DTSC to implement the Regulation. This will help reduce unnecessary compliance burdens and help ensure that CBI is properly protected.

Further, this section of the regulations should focus on the interrelationship of the new Safer Consumer Products law with existing California laws on trade secrets. California Civil Code § 3426.1 provides:

(d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Therefore, in order to establish that information submitted is a trade secret under California law, one would need to show that: (1) it has independent economic value, actual or potential, because it is not known to others; and (2) it is the subject of efforts to maintain its secrecy that are reasonable under the circumstances. The determination (whether or not information claimed to be trade secret is to be released) by DTSC under California Health and Safety Code §25257(d) should logically begin by looking at those two questions. While it seems that the gist of each of these two questions is addressed in subpart (a) of the document, subpart (b) requires, by itself, the submission of a large quantity of information, on top of the already large quantity of information that is being requested by the Proposed Regulation. Further, if any of the Trade Secret claims themselves are claimed to be Trade Secret, the entire process of subparts (a) must be submitted as per subpart (b), setting up a potential feedback loop of data submissions to the department. In particular, subparts (a)(4-8) will almost invariably involve trade secret information.

The exclusion of all chemical identity information in subpart (f) is overly broad due to the broad definition of "hazard trait" found in OEHHA's supporting regulations. For example, a chemical with the hazard trait of "irritation" cannot be claimed as a trade secret, even if it is not being assessed for that trait. Often, chemical identity is the most closely guarded trade secret, and, as drafted, the Proposed Regulation will substantially reduce the ability to protect such intellectual property.

For subpart (g), how does a manufacturer establish a chemical use is a "new use?" Proving that a chemical has never been used is difficult.

Section 69510.1. Department Review of Claims of Trade Secret Protection

As mentioned in our comments to section 69507, it is not clear why the DTSC would not subject these determinations to an agency review process. We appreciate that the DTSC has included in subpart (d) that the Department may not disclose information until a court proceeding is finished; however we are still concerned with the timelines, in particular subpart (b)(2). It is unlikely that a manufacturer will be able to respond or file an action in 30 days.

Conclusions

ITI, TechAmerica, CEA and SIA wish to thank the Department for its ongoing work on the Proposed Safer Consumer Product regulation, and feel that the proposed regulations contain several significant improvements compared to previous drafts. However, we are very concerned with the lack of specificity in several sections of the regulations, the immense data submission burdens, the required use of certified assessors, and the very weak trade secret protections offered in the draft regulations. We share the Department's goals of a meaningful and workable regulation, but unfortunately feel that the

proposed regulations contain several sections, as outlined above, that would make these difficult for industry to interpret and meet, as well as for the Department to enforce. We look forward to continuing to work with the DTSC to finalize a workable set of regulations in a manner that will focus on the chemicals and products that pose the greatest risk.

If you have any questions, please do not hesitate to contact Chris Cleet at (202) 626-5759 or ccleet@itic.org, Robert Callahan at (916) 443-9088 or robert.callahan@techamerica.org, Allison Schumacher at (703) 907-7631 or aschumacher@ce.org, or David Isaacs at (202) 446-1709 or DIsaacs@sia-online.org.

Sincerely,



Chris Cleet, QEP
Director, Environment and Sustainability
Information Technology Industry Council (ITI)
1101 K Street, NW Suite 610
Washington, DC 20005
202.626.5759
www.itic.org



Robert Callahan
Director, State Government Affairs
TechAmerica
1107 9th Street, Suite 850
Sacramento, CA 95814
916.443.9088
www.techamerica.org



Walter Alcorn
Vice President, Environmental Affairs and
Industry Sustainability
Consumer Electronics Association
1919 South Eads Street
Arlington, VA 22202
(703) 907-7765
www.ce.org



David Isaacs
Vice President, Government Affairs
Semiconductor Industry Association
1101 K Street, NW Suite 450
Washington, DC 20005
(202) 446-1709
www.sia-online.org

About ITI

The Information Technology Industry Council (ITI) is the premier advocacy and policy organization for the world's leading innovation companies. Founded in 1916, we have earned the trust of the world's most recognized technology brands to solve their most complex policy challenges. Learn more about ITI at www.itic.org

About TechAmerica

TechAmerica is the leading voice for the U.S. technology industry – the driving force behind productivity growth and jobs creation in the United States and the foundation of the global innovation economy. Representing approximately 1,000 member companies of all sizes from the public and commercial sectors of the economy, it is the industry's largest advocacy organization and is dedicated to helping members' top and bottom lines. TechAmerica is also the technology industry's only grassroots-to-global advocacy network, with offices in state capitals around the United States, Washington, D.C., Europe (Brussels) and Asia (Beijing). Learn more about TechAmerica at www.techamerica.org.

About CEA

The Consumer Electronics Association® (“CEA”) represents more than 2,000 companies involved in the design, development, manufacturing, distribution and integration of audio, video, in-vehicle electronics, wireless and landline communications, information technology, home networking, multimedia and accessory products, as well as related services that are sold through consumer channels.

About SIA

The Semiconductor Industry Association (SIA) is the voice of the U.S. semiconductor industry, one of America's top export industries and a bellwether measurement of the U.S. economy. Semiconductor innovations form the foundation for America's \$1.1 trillion dollar technology industry affecting a U.S. workforce of nearly 6 million. Founded in 1977 by five microelectronics pioneers, SIA unites over 60 companies that account for 80 percent of the semiconductor production of this country. Through this coalition SIA seeks to strengthen U.S. leadership of semiconductor design and manufacturing by working with Congress, the Administration and other key groups. The SIA works to encourage policies and regulations that fuel innovation, propel business and drive international competition in order to maintain a thriving semiconductor industry in the United States. Learn more at www.sia-online.org.

1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
tel. 202.434.4100
fax 202.434.4646

January 22, 2013

Writer's Direct Access
Devon Wm. Hill
(202) 434-4279
hill@khlaw.com

Via Electronic and Regular Mail

Ms. Krysia Von Burg, Regulations Coordinator
Regulations Section
Department of Toxic Substances Control
P.O. Box 806
Sacramento, California 95812-0806
gcregs@dtsc.ca.gov

**Re: Comments on the Safer Consumer Product Alternatives
Revised Initial Statement of Reasons, Dept. Ref. No. R-2011-
02, Office of Administrative Law Notice File No. Z-2012-7017-
04**

Dear Ms. Von Burg:

The purpose of this letter is to provide comments to the California Department of Toxic Substances Control (DTSC) regarding the revised Initial Statement of Reasons (ISOR) released by DTSC on December 20, 2012. The ISOR provides DTSC's rationale supporting its Safer Consumer Product Alternatives (SCPA) proposed regulations, which were published on July 27, 2012, and are intended to implement Article 14 of chapter 6.5, division 20, of the Health and Safety (H&S) Code (hereinafter, "the Green Chemistry Initiative" or GCI). We are addressing Section 69506.11 of the SCPA regulations, and specifically the flawed rationale provided in the revised ISOR to support this section. These comments are being submitted on behalf of the Food Packaging Coalition, a group of trade associations that has previously submitted comments to DTSC throughout the development process of the SCPA regulations.¹

¹ Specifically, these comments are being submitted on behalf of the Grocery Manufacturers Association, the Society of the Plastics Industry, Inc., the American Forest and Paper Association, the American Chemistry Council Plastics Foodservice Packaging Group, the Can Manufacturers Institute, the North American Metal Packaging Alliance, Inc., the Foodservice Packaging Institute, and the Recycled Paperboard Technical Association. The Food Packaging Coalition provided comments on the current draft of the proposed regulations on October 11, 2012.

Ms. Krysia Von Burg, Regulations Coordinator
January 22, 2013
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The Food Packaging Coalition is providing comments on the rationale provided in the revised ISOR regarding SCPA Section 69506.11,² “Exemption from Regulatory Response Requirements.” SCPA Section 69506.11 specifies conditions under, and the process by which a responsible entity may obtain an exemption from the requirements of a given regulatory response on the basis of regulatory duplication. The discussion provided in the revised ISOR on this section states, in relevant part, as follows:

“This section provides a process for a responsible entity to request an exemption from otherwise applicable regulatory responses. The basis for the request must be that the regulatory response would conflict with a requirement of another California or federal regulatory program or an international trade agreement if the responsible entity could not reasonably be expected to comply with both requirements. The required regulatory response must substantially duplicate a requirement and not substantially provide additional human health or environmental protection in order to justify an exemption. DTSC may require implementation of a modified regulatory response to resolve the conflict. This provision is necessary to effectuate the non-conflict/non-duplication prohibition in the authorizing statute and to have a workable program.”

We respectfully submit that this rationale reflects the legal flaw encompassed in SCPA Section 69506.11, in which DTSC improperly shifts the burden of preventing regulatory duplication from the Agency to industry in violation of the GCI.

Section 25257.1(c) of the California Health and Safety Code prohibits DTSC from adopting regulations under the GCI that duplicate or conflict with existing or pending regulations of other agencies that are consistent with the purposes of the GCI. Specifically, Section 25257.1(c) states, “The department *shall not duplicate or adopt* conflicting regulations for product categories *already regulated or subject to pending regulation* consistent with the purposes of this article” (emphasis added). A plain reading of this provision establishes that the California legislature placed the burden on DTSC to ensure that its regulations implementing the GCI would not result in regulatory duplication. The phrase “shall not duplicate or adopt” clearly indicates that DTSC must determine that any proposed regulations would not result in duplication of existing regulatory schemes *prior to* adoption of the GCI implementing regulations. Yet, SCPA Section 69506.11 clearly seeks to create a post hoc mechanism for

² See *Revised Initial Statement of Reasons (ISOR)*, page 190, available at <http://www.dtsc.ca.gov/LawsRegsPolicies/Regs/upload/Revised-SCP-ISOR.pdf>.

KELLER AND HECKMAN LLP

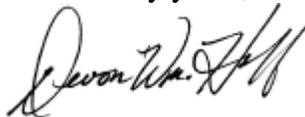
Ms. Krysia Von Burg, Regulations Coordinator
January 22, 2013
Page 3

DTSC to decide, after the SCPA regulations have been adopted, whether the SCPA imposes a regulatory response that duplicates an existing California or federal regulatory program or an international trade agreement. The rationale provided in the revised ISOR supports this legally flawed interpretation. By setting up this mechanism for requesting the exemption, DTSC is failing to meet its statutory obligation to prospectively avoid regulatory duplication, and is improperly placing the burden on the affected manufacturer to demonstrate regulatory conflict or duplication in order to be exempt from an SCPA-imposed regulatory response. This mechanism is, therefore, contrary to the plain language of the GCI.

As discussed in detail in our prior submissions, the Food and Drug Administration (FDA), using the legislative authority granted by the Federal Food, Drug, and Cosmetic Act (FFDCA), has established a comprehensive regulatory scheme to ensure the safety of food-contact materials from both a public health and environmental perspective. This regulatory scheme is wholly consistent with the goals and purposes of the GCI. Under GCI Section 25257.1(c), therefore, food-contact materials should be exempt from the SCPA regulations because failure to do so would result in regulatory duplication. This exemption should be established before the adoption of the proposed SCPA regulations. Requiring manufacturers of food-contact materials to submit a request for an exemption is against the plain meaning of the GCI statute and is improper shifting of the statutory burden from DTSC to responsible entities.

The Food Packaging Coalition appreciates the opportunity to comment on the revised ISOR. If you have any questions regarding these comments, please do not hesitate to contact us.

Sincerely yours,



Devon Wm. Hill



VIA E-MAIL

January 22, 2013

Ms. Krysia Von Burg
Regulations Coordinator
California Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

RE: Comments of the North American Insulation Manufacturers Association (“NAIMA”) on the California Department of Toxic Substances Control’s Proposed Regulation: Safer Consumer Product Alternatives (Department Reference Number: R-2011-02; Office of Administrative Law Notice File Number: Z-2012-0717-04)

Dear Ms. Von Burg:

INTRODUCTION

The North American Insulation Manufacturers Association (“NAIMA”) appreciates the opportunity to submit written comments on the California Department of Toxic Substances Control’s (“DTSC”) revised draft regulation entitled “Safer Consumer Product Alternatives.” NAIMA appreciates that DTSC has modified its approach from the first draft. Unfortunately, these modifications did not sufficiently mitigate many of the unnecessary burdens on businesses and California’s economy resulting from the proposed regulations or increase significantly benefits to public health and the environment. The proposed rule as revised could do significant harm to California’s economy.

Most importantly, the revised draft continues to give untested products and substances an undeserved and unmerited pass as acceptable substitutes for thoroughly tested and researched products and substances. DTSC should never assume that untested products or substances are safe; it can frequently be the case that the reason why no data exist on a particular product is that its manufacturers are careful not to generate any data regarding product hazards.

NAIMA is the association for North American manufacturers of fiber glass, rock wool, and slag wool insulation products. NAIMA promotes energy efficiency and environmental preservation through the use of fiber glass, rock wool, and slag wool insulation, and encourages the safe production and use of these materials. NAIMA’s members operate four insulation manufacturing plants in California and also import significant volumes of insulation into the State. Fiber glass insulation products are used widely throughout the State of California. NAIMA’s members’ insulation products are sold at home improvement stores throughout the State and installed by homeowners as weekend do-it-yourself projects. Their products are also installed by professional insulation contractors in both new and existing homes and commercial

buildings. Therefore, the DTSC's revised regulation is highly relevant to NAIMA and its manufacturing members.

DTSC's DRAFT RULE FAVORS UNTESTED AND UNPROVEN PRODUCTS

NAIMA is concerned that the revised regulations will be implemented in such a way that replacement materials will be approved for use over listed materials because there is no data on the potential health effects of those replacement materials. Lack of data does not necessarily equate to safe.

Have supposedly "safe substitutes" been tested? There is no scientific data available for many materials and products. Many materials and products have never been reviewed by expert panels such as the International Agency for Research on Cancer ("IARC") and the Department of Health and Human Services ("HHS") to make a decision on whether they present health hazards. For example, IARC and the National Toxicology Program ("NTP") do not even review a substance or product unless there is ample data to evaluate. NTP mandates that substances to be nominated for review possess appropriate background information and relevant data.¹ Similarly, IARC's selection of agents for review requires that published data on the potential carcinogenicity of the agent be available for review.²

The necessity of data to form a conclusion or listing is obvious. Yet DTSC seems to have ignored the simple fact that many producers of agents/substances purposefully decide to avoid testing or research on its products/substances. The reason is the likely avoidance of ending up on a list such as the ones relied upon by DTSC. Therefore, DTSC's regulation gives preferential treatment to untested products.

An untested product does not mean it is a safe product.³ A system wherein untested products are treated as though they are safe and not regulated should not form the basis for a decision on whether a product is banned. DTSC should avoid awarding preferential treatment to a product or substance simply because a particular product's manufacturer has neglected responsible product stewardship and refused or failed to test its product. Indeed, the failure of a particular product or substance to be adequately tested by its manufacturer should be a critical factor in determining that a product is not an acceptable alternative.

Sincerely,



Angus E. Crane
Executive Vice President, General Counsel

¹ Process for Preparation of the Report on Carcinogens, Page 1 (January 3, 2012). <http://ntp.niehs.nih.gov/NTP/RoC/Thirteenth/Process/FinalRoCProcesswithFig.pdf>.

² World Health Organization International Agency for Research on Cancer, "IARC Monographs on the Evaluation of Carcinogenic Risks to Humans" Volume 99, Some Aromatic Amines, Organic Dyes, and Related Exposures, Page 12 (2010). <http://monographs.iarc.fr/ENG/Monographs/vol99/mono99.pdf>.

³ J.M.G. Davis, "The need for standardized testing procedures for all products capable of liberating respirable fibres; the example of materials based on cellulose," *British Journal of Industrial Medicine* 1993; 50: 187-190.

January 22, 2013

Deborah O. Raphael, Director
1001 "I" Street
P.O. Box 806
Sacramento, CA 95812-0806

Comments on ISOR for the Safer Consumer Product Regulations
Submitted via Electronic Mail

Dear Director Raphael:

I am opposed to the process described in the ISOR that will be used as the basis for identifying the initial list of priority products under the Safer Consumer Product Regulation.

Requiring that a priority product meet the criteria in sections 69502.2(a)(1) and 69502.2(a)(2) will eliminate toxic solvents of concern such as N-methyl pyrrolidone, which is widely used in graffiti removers and paint strippers as a substitute for methylene chloride, as well as 1-bromopropane, which is sold as a degreaser in concentrations of 90% in aerosol cans. Failure to identify these largely unregulated solvents will have a disproportionate negative effect on California workers.

I urge DTSC to reconsider this restrictive requirement for identifying the initial list of priority products.

Respectfully,

Julia Quint, Ph.D.



RUBBER
manufacturers
association

1400 K Street, NW • Washington, DC 20005 • tel (202) 682-4800 • fax (202) 682-4854 • www.rma.org

January 22, 2012

Deborah O. Raphael
Director
Department of Toxic Substances Control
1001 I street
P.O. Box 806
Sacramento, California 95812

Re: Post-hearing changes to the Initial Statement of Reasons (ISOR) for the Safer Consumer Products Regulation

I. Introduction

RMA is the national trade association representing major tire manufacturers that produce tires in the United States, including Bridgestone Americas, Inc.; Continental Tire the Americas, LLC; Cooper Tire & Rubber Company; The Goodyear Tire & Rubber Company; Michelin North America, Inc.; Pirelli Tire North America; Toyo Tire Holdings of Americas Inc. and Yokohama Tire Corporation. RMA members are affected by the July 2012 Proposed Safer Consumer Products regulation because they manufacture tires, a consumer product, available for sale or placed into the stream of commerce in the state of California.

RMA offers the following comments on the post-hearing changes to the Initial Statement of Reasons (ISOR) for the Safer Consumer Products Regulation. Cal. Code Regs. Tit. 22, § 55 (2012). We thank the California Department of Toxic Substances Control (DTSC) in advance for consideration of these comments. RMA urges DTSC to take the time necessary to revise the July 2012 Proposed regulation to make it feasible for manufacturers.

II. Section 69501.1(a)(9) defines “adverse waste and end-of-life impacts” (Page 18 of 225)

RMA supports the evaluation of adverse waste and end-of-life impacts in performing an Alternative Analysis. (Page 18 of 225, lines 16-18). We support the additional language DTSC included in the ISOR under the definition of “adverse waste and end-of-life impacts,” which clarifies that the evaluation of Chemicals of Concern in products and their alternatives include at a minimum “waste and end-of-life disposal.”

Tires are highly engineered products. The chemical ingredients in tires are present because they impart critical functions and the composition of tires cannot be modified without great care. Changes in tire composition could affect critical attributes such as stopping distance, tire wear, tire fuel efficiency, endurance and other safety-related components. Each of these

attributes can affect the useful life of tire. As a result, changes in tire composition could cause increases in the number of scrap tires generated; causing adverse waste and end-of-life impacts. Consideration of whether an alternative chemical will cause an increase in adverse waste is an important consideration for tire manufacturers and should be included in the final Safer Consumer Products regulation.

A. DTSC should ensure that the ISOR consistently state that end-of-life management requirements are limited to products classified as hazardous waste. (Page 18 of 225)

Section 69506.8 of the July 2012 Safer Consumer Products regulation limited the requirement for end-of-life programs to finished products that are required to be managed as hazardous waste in California. RMA recommends that DTSC clarify throughout the ISOR that end-of-life management requirements are limited to products that are required to be managed as hazardous waste in California.

Tires are not managed as hazardous waste in California, so assuming tires are selected as a Priority Product, an end-of-life management program should not be required for tires. RMA and its members have engaged in a sustainable end-of-life management program for tires without the necessity of regulation. For more than two decades, the tire manufacturing industry has developed a voluntary post-consumer product recycling program that has resulted in approximately 90% of its product being recycled. While RMA does support the evaluation of end-of-life impacts in assessing alternative chemicals, RMA does not support mandatory end-of-life management requirements for tires. Any end-of-life management requirements for tires will disrupt the established, voluntary, scrap tire market. We ask DTSC to clarify in the ISOR sections that discuss the end-of-life of products that any requirement to establish an end-of-life management program that is limited to products classified as hazardous waste in California.

III. Section 69501.1(a)(13) defines “Alternatives Analysis Threshold” (Page 21 of 225)

RMA strongly supports the inclusion of an Alternatives Analysis Threshold in the final Safer Consumer Products regulation. The revised ISOR specifies that the definition of the “Alternatives Analysis Threshold” is “necessary to allow products containing Chemicals of Concern below a specified concentration or risk level to not have to comply with all of the other requirements of this program.” (Page 21 of 225, lines 27-29). Excluding products or product types that contain chemicals of concern in very low concentrations, and that have a low potential for exposure will enable DTSC to focus on priority products that pose the greatest risk which is envisioned by the statute (AB 1879, 2008). We agree that products containing chemicals of concern below a specified concentration should be excluded from the requirements of the regulation. However, RMA recommends that rather than setting an Alternative Analysis Threshold on a case-by-case basis that DTSC include a default Alternatives Analysis Threshold for all chemicals.

Prior drafts of the Safer Consumer Product regulation included a *de minimis* exemption with a default level of 0.01% for chemicals with one of nine hazard traits, and 0.1% for all other

chemicals. Specifically, we recommend that DTSC include a default Alternatives Analysis Threshold Exemption of 0.1% for all chemicals and allow for the default value to be lowered or raised based on sound scientific evidence. Additionally, we recommend that the default Alternatives Analysis threshold should apply to an individual chemical and should not apply to a group of chemicals that exhibit the same hazard traits or environmental/toxicological end points.

This approach is consistent with other Federal and International regulations established by The Occupational Health and Safety Administration 's (OSHA) Hazard Communication Standard requirements for development of Material Safety Data Sheets (MSDSs), the Environmental Protection Agency's (EPA) Toxic Release Inventory (TRI) program and the European Union's Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), that set a fixed de minimis level at 0.1% by weight, for individual chemicals. *See* Hazard Communication, 77 Fed. Reg. 17574 (March 26, 2012) and Toxic Chemical Release Reporting Community Right-To-Know, 42 U.S.C. §372.38(a) (1988). For example, the EPA has established de minimis levels for the TRI program with a base de minimis level set at 0.1% for any non-PBT chemical and OSHA-defined carcinogens. Additionally, allowing for the default Alternative Analysis thresholds to be lowered or raised is consistent with the EU's Globally Harmonized System of Classification and Labeling of Chemicals which establishes chemical specific thresholds that may be lower or higher than 0.1% based on sound science and reliable information. RMA also strongly recommends that the final regulation should be limited to intentionally-added chemicals to enable DTSC to focus on the chemical and product combinations that pose the greatest risk and are easily identified.

IV. Section 69501.1(a)(38) defines "legal requirements" (Page 30 of 225)

RMA strongly supports the requirement to consider during the alternatives analysis whether the replacement of a Chemical of Concern with an alternative chemical will enable a Priority Product to comply with other "legal requirements." DTSC included additional language in the ISOR under the definition of "legal requirements" to clarify that this "definition is necessary so that responsible entities do not waste time and resources pursuing possible alternatives to the Chemical of Concern in a Priority Product if, ultimately, the potential alternative would not comply with other binding requirements applicable to the product." (Page 30 of 225, lines 14-30). Consideration of other legal requirements is an important consideration for tire manufacturers that must comply with Federal Motor Vehicle Safety Standards (FMVSS) as established by the National Highway Traffic and Safety Administration (NHTSA).

Changes in tire composition could affect critical attributes such as stopping distance, tire wear, tire fuel efficiency, endurance and other safety-related components. NHTSA requires that all tire manufacturers self-certify that tires sold in the U.S. meet Federal Motor Vehicle Safety Standards (FMVSS). Thus, any change in the composition of tires typically requires feasibility studies and lengthy, multiple tests to ensure that the tires continue to meet FMVSS. If DTSC requires tire manufacturers to substitute a chemical ingredient in tires with an alternative, and the use of the alternative chemical jeopardizes achievement of NHTSA safety standards, tire manufacturers may not be able to comply with both the proposed regulation and federal NHTSA safety standards. If a potential conflict should arise tire manufacturers will comply with tire safety standards established by NHTSA.

V. Section 69501.1(a)(42)(A) defines “materials and resource consumption” (Page 32 of 225)

RMA believes it is beyond the scope of DTSC’s authority to require responsible entities located outside the state of California to assess “energy efficiency” and “energy inputs” when evaluating alternative chemicals. According to the ISOR, when evaluating a product’s life cycle, as part of the Alternatives Analysis, responsible entities are to consider the amount of materials and resource consumption associated with a Priority Product and the alternatives being considered. (Page 31 of 225, lines 35-38). According to DTSC, evaluation of energy consumption, by assessing energy used during production, in-use, and transportation, can determine the amount of resources consumed with the Priority Product and alternatives that are being considered. The revised language in the ISOR specifies that responsible entities must at a minimum include consideration of energy consumption and energy efficiency when evaluating alternatives. (Page 32 of 225, lines 27 – 41 and Page 33 of 225, lines 1 – 8).

While this evaluation can be considered for manufacturing facilities in the state of California, it is beyond the jurisdiction of DTSC to require manufacturers located outside the state of California to consider the energy consumption or energy efficiency when evaluating alternative chemicals. DTSC should specify that this requirement is applicable to facilities located only in the state of California.

VI. Section 69503.2(a)(1)(B)1.a. through c. (Page 97 of 225)

RMA does not support the use of market presence as a surrogate to assess exposure to a Chemical of Concern in a product. Section 69503.2(a)(1)(B)1.a. through c. of the ISOR includes additional language that the Safer Consumer Product regulation should include criteria related to volume of sales in California. According to DTSC, evaluation of market presence is necessary “to effectuate the statutory mandate that the regulations specifically include criteria related to volume of sales in California.” (Page 97 of 225, lines 6-15). We disagree that the statute, AB 1879 and SB 509 require DTSC to assess the market presence of a Priority Product as a means to assess exposure.

AB 1879 specifies a number of factors DTSC must consider in performing a multimedia evaluation. Specifically DTSC must evaluate all of the following when assessing available alternatives including: product function and performance, useful life, materials and resource consumption, water conservation, water quality impacts, air emissions, production, in-use and transportation energy inputs, energy efficiency, greenhouse gas emissions, waste and end-of-life disposal, public health impacts, environmental impacts, and economic impacts. The statute does not specifically state that DTSC is required to evaluate market presence of a Priority Product.

How widely a product is used does not provide information regarding exposure to a chemical of concern. For example, the process of manufacturing tires involves vulcanization, which changes the chemical composition of the chemicals formulated into the tire in the initial stages of the process. Therefore the chemical ingredients in tires may no longer be present following vulcanization. Thus the widespread use of tires does not provide evidence that there is

exposure to chemical ingredients in tires which may no longer be present following vulcanization. We recommend DTSC exclude market presence as a means of assessing exposure for Priority Products.

VII. Section 69503.6(a) (Page 119 of 225)

RMA recommends that the use of supplier certifications regarding purchased material content should provide adequate assurance to DTSC about the content of the Priority Products seeking to qualify for Alternatives Analysis Threshold exemption. DTSC included additional language in the ISOR that specifies “even if the manufacturers rely on supplier certifications regarding purchased material content, many manufacturers supplement the information provided by suppliers with further analytical testing.” (Page 120 of 225, lines 13 – 14). DTSC further specifies in the ISOR that responsible entities should have a high degree of assurance about the content of their products to qualify for this exemption. We recommend that DTSC clarify this language as it is confusing. We also recommend that DTSC clarify that manufacturers can adequately rely on supplier certifications when submitted an Alternatives Analysis Threshold notification to DTSC.

Additionally, section 69503.6(a) specifies that a responsible entity must continue to meet the criteria, assumptions and conditions that are the basis for the Alternatives Analysis exemption. Responsible entities must provide DTSC with continuing assurance that the Chemical of Concern in their Priority Product is below the Alternatives Analysis Threshold. The ISOR further specifies that when a Priority Product is “significantly modified,” a responsible entity must submit a revised Alternative Analysis Threshold Exemption Notification to DTSC. (Page 120 of 225, lines 28 – 32). RMA questions what qualifies as a significant modification? This term is not defined in the July 2012 Safer Consumer Products proposed regulation, nor is it defined in the revised ISOR. RMA asks that DTSC specify what qualifies as a significant modification in the final regulation and in the ISOR.

VIII. Section 69505.1(c)(2) (Page 132 of 225)

RMA recommends that DTSC include granting a petition to delist a Priority Product or chemical as a reason for not having to complete an Alternatives Analysis. Section 69505.1(b),(f) and (g) lists the various conditions under which a responsible entity does not have to conduct an Alternatives Analysis. These conditions include: “if a product is no longer placed in the stream of commerce, if the Chemical of Concern in the Priority Product meets the Alternatives Analysis Threshold, and if the Chemical of Concern for which it is listed as a Priority Product is removed.” DTSC should include in the list of conditions for which an Alternatives Analysis does not have to be completed the granting of a petition to delist a Priority Product or Chemical of Concern.

The July 2012 Safer Consumer Products proposed regulation included a petition process that enables a person to “petition the Department to evaluate a claim that a chemical or a product that contains a chemical should be delisted as a Chemical of Concern or a Priority Product.” Cal. Code Regs. Tit. 22, § 55 (2012). In our comments on the July 2012 Safer Consumer Products proposed regulation, RMA strongly supported the inclusion of the petition process to delist

Priority Products and Chemicals of Concern. As with most products available for sale in California, tires contain chemicals. However, the process of manufacturing a tire involves vulcanization, which changes the chemical composition of the chemicals formulated into the tire in the initial stages of the manufacturing process. As a result, the risk for exposure to chemicals in tires is reduced or eliminated as the chemicals in tire formulations undergo a chemical reaction during the vulcanization or heating of a tire during the manufacturing process. The “early off-ramp” provided in the petition process will enable the Department to focus time and resources on the Chemicals of Concern and Priority Products that pose the greatest risk to the public.

While we strongly support the inclusion of the petition process to list or delist a chemical or product as included in the July 2012 Safer Consumer Products proposed regulation, we have concerns about the timing for the Department to make determinations about whether to grant or deny a petition. The July 2012 proposed regulation indicates that “the Department shall make its determination no later than the next regular update of the Chemicals of Concern or Priority Products list.” (69504.1(a)). However, the July 2012 proposed regulation specifies that the Chemicals of Concern list shall be updated “periodically,” and the Priority Products list shall be updated at least once every three years. (*See sections* 69502.3(a) and 69503.4(f)). This creates an unreasonable situation in which a manufacturer may have to complete a preliminary and final Alternatives Analysis before a determination to grant or deny the delisting petition has been made. We recommended in our comments on the July 2012 proposed regulation that a responsible entity should not be required to complete an Alternatives Analysis until the Department has issued a notice of their decision to grant or deny the delisting petition. The Department should establish a process in which it responds to a petition to delist a Priority Product or Chemical of Concern before a responsible entity must complete an Alternatives Assessment, and include the granting of a petition to delist a product or chemical in the list of reasons in the ISOR for conditions under which a responsible entity does not have to complete an Alternatives Assessment.

IX. Section 69505.2(b)(2) (Page 141 of 225)

DTSC should not be empowered to select alternative chemicals for a Chemical of Concern in a Priority Product. RMA believes manufacturers are best suited to determine whether there is an alternative chemical for the Chemical of Concern in their product. Section 69505.2(b)(2) of the ISOR specifies that DTSC will use the provided information from the first and second stage of the Alternatives Assessment to “determine if the responsible entity made an appropriate decision, or that a safer alternative is available in the marketplace.” (Page 141 of 225, lines 30 – 44).

DTSC does not have the expertise to determine whether one alternative chemical will perform better than another alternative chemical in a Priority Product. For example, all tire manufacturers must self-certify to the National Highway Traffic Safety Administration Federal Motor Vehicle Safety Standards. Should DTSC require tire manufacturers to use one alternative chemical that may decrease performance or the life of a tire over another alternative chemical that would not affect performance or tire life, this could create a situation where the tire manufacturing industry is unable to comply with the Safer Consumer Products regulation and federal law at the same time.

We strongly recommend that where safety and performance of a consumer product are regulated by other Federal or State agencies, DTSC should not be empowered to determine and/or require that a safer alternative chemical should be used in the Priority Product; this determination should be made by the manufacturer of a Priority Product or in the case of manufacturers located outside the U.S., the importer of record of the product.

X. Section 69505.6(a)(3) (Page 167 of 225)

RMA recommends that DTSC include a petition process with criteria that responsible entities can submit to receive additional time to complete Alternative Analysis Reports rather than the one-size-fit-all approach in the July 2012 proposed regulation. Section 69505.6(a)(3) includes additional language that specifies a “responsible entity may subsequently request a 90 day extension for submitting the Final AA Report provided the request is in writing explaining why the extension is necessary. If a responsible entity requires additional time to conduct safety and/or performance testing prior to making a final AA alternative selection, the responsible entity may request up to 36 months pursuant to section 69505.5(k)(1)(C).” For tire manufacturers, 36 months may not be enough time to conduct safety and performance testing depending on the Chemical of Concern and its function in a tire.

NHTSA requires that all tire manufacturers self-certify that tires sold in the U.S. meet National Highway Transportation Safety Administration Federal Motor Vehicle Safety Standards. Unlike chemicals that are added to a product for taste, color or appearance, the chemical ingredients in tires are present to ensure the safe and reliable function of the final product. The July 2012 Safer Consumer Products proposed regulation specifies that preliminary Alternatives Analysis reports are due 180 days after the product is listed on the final priority product list, and final Alternatives Analysis reports are due 12 months after the date the Department issues a notice of compliance for the preliminary report. (§69505.1(c)(3)). Responsible entities can request a one-time extension from the Department of up to 90 days to complete the Preliminary or Final AA. (§69505.1(d)(1)). The July 2012 proposed regulation also specified that entities can request up to a 36 month extension to submit a final AA report if additional time is needed to conduct regulatory safety and/or performance testing on multiple alternatives. (§69505.5(k)(1)).

Again, RMA recommends that rather than specifying the maximum extension an entity can receive to complete the Alternative Analysis reports, that the Department grant extensions based upon a petition that demonstrates the need for additional time to enable Priority Products, whose safety and performance are regulated by other state or federal laws, to complete safety and performance testing requirements. A case specific schedule, taking into account testing and certification procedures, is necessary, rather than the one-size-fits-all approach embodied in the July 2012 proposed regulation. Tires are highly engineered products. The time needed to assess whether there is a workable chemical substitute for an ingredient in tires varies depending on the chemical that is to be assessed for possible replacement. Each component of a tire is composed of a different rubber compound. Compounds vary depending on the function of the compound and the type of tire that contains the compound. Thus, the type of tire that contains the Chemical of Concern, the size of the tire, the type of compound in the tire and the purpose of the compound in the tire, all affect the amount of time needed to determine if there is a viable

substitution. Additionally, depending on the chemical that is to be assessed for a safer alternative, it is necessary to determine the ability of the rubber processing equipment to handle the compound that contains the new chemical.

Specifically, RMA recommends that DTSC revise the final Safer Consumer Products regulation and clarify in the ISOR, that responsible entities that require additional time to conduct safety and/or performance testing prior to making a final AA alternative selection can petition the agency for additional time as needed.

XI. Section 69506.9 (Page 189 of 225)

RMA does not support the requirement for manufacturers to initiate a research and development project or fund a challenge grant if a responsible entity determines that there is no functionally acceptable and economically feasible alternative chemical. DTSC specifies in the ISOR that the requirement to initiate research or fund a challenge grant is necessary to implement Health and Safety Code section 25253(b)(8). (Page 189 of 225, lines 21 – 43). California Health and Safety Code section 25253(b)(8) states, “the regulations adopted pursuant to this section shall specify the range of regulatory responses that the department **may** take following the completion of the alternatives analysis, including, but not limited to, any of the following actions,” which includes initiating research and funding challenge grants when no feasible alternative chemical is selected through an Alternatives Analysis. We recommend that DTSC should not require responsible entities that must comply with other State or Federal laws to initiate a research or development project or fund a challenge grant.

The July 2012 Safer Consumer Products proposed regulation specified that after completing the first stage of the AA, if a responsible entity determines there is no functionally acceptable alternative chemical, the responsible entity may submit an abridged AA. (§69505.2(b)). However, even if the entity demonstrates that no viable alternative chemical currently exists, it may be required to conduct a research and development project or fund a green chemistry challenge grant for the product. (§69506.9). This essentially “taxes” a manufacturer even when there is a no substitute for the Chemical of Concern. Section 69506.9 of the July 2012 proposed regulation specifies that the requirement to initiate a research and development project or fund a challenge grant is to: “(a) Design a safer alternative to the Priority Product; (b) Improve the performance of a safer alternative to the Priority Product; (c) Decrease the cost of the safer alternative to the Priority Product; and/or (d) Increase the market penetration of a safer alternative to the Priority Product.” Id. This raises significant confidentiality issues in an industry (such as the tire industry) where the products have important and significant chemistry based differences. Developing a one-size-fits-all substitute would be unworkable for RMA members. Again, RMA recommends that for responsible entities that must comply with other State and Federal laws, DTSC should not require initiation of research projects or funding of challenge grants.

XII. Section 69506.11 (Page 190 of 225)

RMA strongly supports the additional language in section 69506.11 that specifies “this section provides a process for a responsible entity to request an exemption from otherwise

applicable regulatory responses. The basis for the request must be that the regulatory response would conflict with a requirement of another California or federal regulatory program or an international trade agreement if the responsible entity could not reasonably be expected to comply with both requirements.” (Page 190 of 225, lines 25 - 30). However, RMA questions the meaning of some of the additional language included in this section and ask that DTSC clarify the additional language added to ISOR section 69506.11, lines 30 – 32. In this section DTSC states “the required regulatory response must substantially duplicate a requirement and not substantially provide additional human health or environmental protection in order to justify an exemption.” (Page 190 of 225, lines 30 - 32).

The chemical ingredients in tires are present because they impart critical functions and the composition of tires cannot be modified without great care. All RMA members make tires that are safe. Changes in tire composition could affect critical attributes such as stopping distance, tire wear, tire fuel efficiency, endurance and other safety-related components. NHTSA requires that all tire manufacturers self-certify that tires sold in the U.S. meet Federal Motor Vehicle Safety Standards (FMVSS). Any change in the composition of tires typically requires feasibility studies and lengthy, multiple tests to ensure that the tires continue to meet FMVSS. If the Department requires tire manufacturers to substitute a chemical ingredient in tires with an alternative, and the use of the alternative chemical jeopardizes achievement of NHTSA safety standards, tire manufacturers may not be able to comply with both the proposed rule and federal NHTSA safety standards. Again, if a potential conflict should arise tire manufacturers will comply with tire safety standards established by NHTSA.

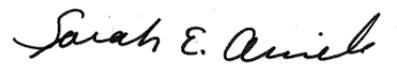
XIII. Conclusion

RMA again thanks the California Department of Toxic Substances Control for this opportunity to comment on the revised Initial Statement of Reasons for the Safer Consumer Products Regulations. RMA has continued concern that as written, the July 2012 proposed rule cannot be applied to tires in any feasible way.

As expressed in these comments, we recommend that DTSC revise the ISOR and the July 2012 Safer Consumer Products proposed regulation to: (1) limit end-of-life management requirements to products classified as hazardous waste in California; (2) include an Alternatives Analysis threshold with a default value of 0.1% by weight for all chemicals; (3) harmonize the proposed regulation to enable tire manufacturers to comply with both Federal Motor Vehicle Safety Standards and the proposed regulation; (4) ensure that DTSC responds to petitions to delist a Priority Product before a responsible entity must complete an Alternatives Analysis; (5) provide a process that enables tire manufacturers to demonstrate the need for additional time to complete the Alternatives Analysis process in order to conduct feasibility, safety, and performance testing on alternatives; and (6) exclude Priority Product that must comply with other State and Federal laws from the requirement for manufactures to initiate research and development projects or challenge grants when a Chemical of Concern is retained in the Priority Product. Additionally, as outlined in RMA’s comments on the July 2012 Proposed Regulation, we also recommend that DTSC revise the July 2012 proposal and the ISOR to: (7) exclude unintentionally added chemicals from the requirements of the rule and (8) provide a categorical CBI exemption for ingredients in tires

RMA appreciates your consideration of these comments. Please contact me at (202) 682-4836 if you have questions or require additional information.

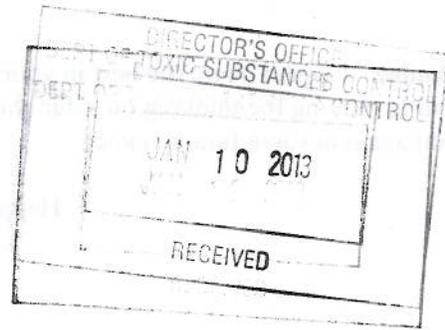
Respectfully Submitted,

A handwritten signature in cursive script that reads "Sarah E. Amick".

Sarah E. Amick
Senior Counsel
Rubber Manufacturers Association



Troy Virgo
Director of Sustainability and Product Stewardship
Shaw Industries, Inc.
PO Drawer 2128 Mail Drop: 019-06
Dalton, GA 30722-2128



Ms. Debbie Raphael
Director, Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

Dear Ms. Raphael,

I really enjoyed meeting you at the Biz NGO Annual meeting in December. As a product manufacturer, your summary and analysis of the Safer Consumer Products regulations, including the alternatives analysis was very helpful; your contributions to the discussions on our table and to the meeting in general were similarly insightful.

I wanted to briefly follow up on your references to formaldehyde in carpet adhesive. I had never heard of this as being an issue, so came back home after BizNGO and did some investigation within our company and with some of the major adhesive suppliers. I also discussed this issue with our trade association - The Carpet and Rug Institute (CRI), that oversees the Green Label (GL) testing program for carpet adhesives. Each group's response to me was positive on the issue of formaldehyde - and left me with a much better understanding of our adhesive stewardship program that I would like to share with you.

As you are probably aware, neither Shaw nor any of the other major carpet manufacturers makes carpet adhesives. All of us either have adhesives manufactured for us as private label products or specify particular categories of adhesive depending on the product and its function - typically as part of the warranty and installation instructions. All three of the adhesive manufacturers contacted by Shaw confirmed that they do not purchase raw materials with known levels of formaldehyde, nor is formaldehyde intentionally added or needed as part of the adhesive formulations for carpet use.

At Shaw, all our private labeled adhesives are tested for IAQ emissions compliance as part of the CRI Green Label program; for LEED credit, conformance with South Coast Air Quality Management District Rule 1168, and warranty performance, we expect all the other carpet mills have similar requirements. Formaldehyde is one of 15 individual compounds (plus TVOC) that are tested for in this program. As of January 2012, the maximum emissions rate allowed is 16 ug/m²-hr (equivalent to the CA 01350 CREL of 9ug/m³). For 2012 YTD, only one of 30 samples submitted to the CRI GL program by all carpet adhesive manufacturers exceeded this level (failure requires retests and/or exclusion from the program for that product).

I don't wish to suggest or imply that there are not adhesives in the marketplace that may contain formaldehyde (or have contained it in the past). However, for carpet adhesives specifically, we feel that the work our suppliers have done, the testing program we have in place through CRI, and the commercial marketplace expectations for product performance in green buildings, indicate that carpet adhesives are not significantly contributing to formaldehyde emissions in the built environment.

This letter was prompted only by a desire on my part to learn more about this issue that you raised and hopefully provide you with additional information to consider; I hope it is read and received in the same

manner. I wish you all the best in your efforts to finalize and implement the Safer Products regulations, and in moving the thinking on safer chemistry beyond the borders of California. I look forward to seeing you again at some future venue.

Happy Holidays and warmest regards,



Troy

Troy Virgo
Director of Sustainability and Product Stewardship
Shaw Industries, Inc.
706-275-2185
troy.virgo@shawinc.com



January 21, 2013

Kryisia Von Burg, Regulations Coordinator
Regulations Section
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

Subject: Comments on the California Department of Toxic Substances Control – Initial Statement of Reasons: Safer Consumer Products (R-2011-02)

Dear Ms. Von Burg:

The Toy Industry Association (TIA) appreciates this opportunity to provide comments on the revised Initial Statement of Reasons (ISOR) for the Safer Consumer Products Regulations released for public comment on December 21, 2012 by the California Department of Toxic Substances Control (DTSC or the Department).

TIA is a not-for-profit trade association representing six-hundred (600) toy makers, marketers and distributors, large and small, located throughout North America. TIA's members account for approximately 85% of the annual U.S. domestic toy market of \$21.6 billion, according to research from the NPD Group. Additionally, Toy Industry Association members employ more than 32,000 employees in California with a direct economic impact of more than \$6 billion to the state. The Toy Industry Association and its members have long been leaders in toy safety. In this role, we develop safety standards for toys, working with industry, government, consumer organizations, and medical experts. The U.S. risk-based standards are widely recognized and used as models around the globe. One of our missions is to educate industry on these standards, and to educate parents and caregivers on choosing appropriate toys and how to ensure safe play.

Below are general comments, observations and issues of concern that TIA has noted in the ISOR. TIA is providing limited comments at this time as it is necessary to review the specifics of the underlying regulations along with the ISOR in order to offer a thorough and complete discussion of the document.

TIA is disappointed by DTSC's approach to segment the release and comment period of the ISOR and the draft regulations. These documents are both complex and contingent, and should have been made available for the public to review and comment on the totality of the regulatory package.

For example, Section 69503.2(a)(1)(B)4(d) of revised ISOR, as well as the previous draft of the ISOR, states that there is little to no exposure to a “Chemical of Concern” (CoC) from inaccessible components. TIA agrees with the Department’s assessment on this issue, but it is imperative that we see the specifics on how the issue will be treated in the regulations in order to fully understand DTSC’s approach and provide substantive and useful feedback.

TIA also notes that the issue of “contaminants” is a recurring concept in the ISOR. As this issue may be both defined and addressed in various manners, it is unclear from the ISOR how DTSC will consider contaminants under the regulations and therefore makes it impossible to give effective comments on sections related to contaminants at this time.

Additionally, it is critical that DTSC take the most effective and least burdensome approach to meeting its mandate to adopt regulations. California Government Code §11346.2(b) requires that the ISOR include: (1) A description of reasonable alternatives including the reasons for rejecting said alternatives and a description of alternatives that would lessen any adverse impacts. In some cases, DTSC merely states that its chosen alternatives are “necessary,” but fails to explain how and why it is “necessary.” In other instances, there is limited or no discussion of reasonable alternatives and why less burdensome alternatives could not also meet the statute’s goals.

For example, the ISOR establishes that an Alternatives Analysis Threshold Exemption necessitates a notification be submitted to the Department. However, there is no description of why an Alternatives Analysis Threshold Exemption notification is necessary, and if the Department gave consideration to a self-implementing exemption, why the less burdensome alternative was rejected.

Section 69502.2(a) of the ISOR specifies the criteria for the initial Chemicals of Concern list. It states that “Each of the chemicals lists incorporated into Article 2 is necessary to have a robust, scientifically rigorous, and significant suite of Chemicals of Concern subject to these regulations,” but doesn’t explain why these particular lists are necessary to meet the mandate of the statute, and what alternative methods the Department considered in creating an initial list to meet the goal of the statute.

Finally, the ISOR outlines the Department’s preference of a narrative, rather than prescriptive, approach to creating these regulations. This chosen approach has the potential to create an enormous burden of ambiguity and uncertainty for those required to comply with the regulations, in order to provide DTSC with maximum latitude and flexibility. It is a basic tenet of good regulation that those being regulated must understand what is being regulated and be able to predict the effect of that regulation on their products. It is our hope that the Department will be able to achieve this despite their choice of a narrative approach.

Product safety is a vital consideration for toy manufacturers. A core practice of our industry is to perform rigorous safety-based assessments for all products prior to the marketing of a product and take into consideration potential impacts on children. In addition to meeting stringent internal product safety requirements, toys currently comply with numerous federal and international environmental and safety regulations under a variety of laws and regulations.

TIA Comments
Initial Statement of Reasons: Safer Consumer Products
January 21, 2013

TIA remains committed to working with the Department and will provide further and more substantive comments upon the release of the draft Regulations. Please feel free to contact TIA directly via Jennifer Gibbons at: jgibbons@toyassociation.org if you have any questions or concerns about these comments or would like to discuss in more detail.

Respectfully,

A handwritten signature in black ink, appearing to read 'Jennifer Gibbons', followed by a long horizontal line extending to the right.

Jennifer Gibbons
Director of State Government Affairs