

15-DAY NOTICE (STD. FORM 399) LIST OF PUBLIC COMMENTERS			
#	NAME OF ENTITY	DATE REC'D	LATE
1	Alliance of Automobile Manufacturers (plus attachment)	06/06/2013	
2	American Chemistry Council	06/06/2013	
3	Association of Global Automakers	06/06/2013	
4	California Chamber of Commerce	06/06/2013	
5	California Foundation for Commerce & Education (Chang)	06/06/2013	
6	CHANGE (Californians for a Healthy & Green Economy)	06/06/2013	
7	Consumer Specialty Products Association	06/06/2013	
8	Green Chemistry Alliance	06/06/2013	
9	International Fragrance Association North America	06/06/2013	
10	Japan Industries Associations	06/05/2013	
11	Kirschner, Michael	06/06/2013	
12	Koch Industries	06/06/2013	
13	Rubber Manufacturers Association	06/06/2013	



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June 6, 2013

VIA EMAIL
gcregs@dtsc.ca.gov

VIA MAIL
Ms. Jackie Buttle
Acting Regulations Coordinator
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-2806

Re: Comments on Addition of Revised Economic and Fiscal Impact Statement to the Rulemaking File (R-2011-02/OAL File No:Z-2012-0717-04)

Dear Ms. Buttle:

On behalf of the members of the Alliance of Automobile Manufacturers (“Alliance”)¹, these comments respond to the addition of a revised Economic and Fiscal Impact Statement by the Department of Toxic Substances Control (“Department”) to the rulemaking file for the Safer Consumer Product regulations (the “Proposed Regulations”). As indicated in prior letters, the Alliance appreciates the efforts put forth to date, and embraces the goals and vision for safer consumer products embodied in California’s Green Chemistry Statute (the “Statute”).

We are disappointed that the Department has abdicated its duty to perform an assessment of the potential costs to business to comply with the Proposed Regulations. This last minute attempt to repair the rulemaking record does not represent a good-faith attempt at compliance with the Administrative Procedures Act (“APA”). The Department falsely reasons that because the particular products and chemicals that will have to perform the requirements of these Proposed Regulations have yet to be selected, it is somehow impossible to put any kind of estimate on the costs that businesses in that selection pool may have when performing the required tasks.

The Proposed Regulations are not costless, “process” regulations. Rather, they set out very detailed research and paperwork requirements, the costs of which can be estimated regardless of which product manufacturer must perform them.

¹ 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.

Alliance of Automobile Manufacturers

**BMW Group • Chrysler Group LLC • Ford Motor Company • General Motors Company • Jaguar Land Rover •
Mazda • Mercedes-Benz USA • Mitsubishi Motors • Porsche • Toyota • Volkswagen • Volvo**

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www.autoalliance.org

This “process” has some predictable and estimable costs, so it is not accurate to state that the “cost to perform an alternatives analysis” is “unknowable.” For instance, in the first 60 days of being selected, a business will have to submit from one to three notifications to the Department. All businesses in the supply chain of the selected product – manufacturer, assembler, importer and retailer – will have to submit these notices. Many of these businesses will have to conduct laboratory tests to determine which notice to submit. The American Chemistry Council submitted a modest estimate of the laboratory costs, based on available testing methods, for this first set of compliance duties in the “process.”²

The Department has an obligation to consider the potential costs this “process” will impose on businesses and consider if there would be a less costly way to achieve the objectives. For instance, would a notification process that had only one notice requirement rather than three notice requirements in a 60-day period assure that all the affected businesses for the selected product were in compliance? Would establishing a definitive threshold and testing methods provide certainty and reduce compliance costs for individual businesses?

As another example, in the next 180 days of the “process,” businesses must prepare a Preliminary Alternatives Analysis Report. The Proposed Regulations require each business to conduct an onerous amount of research into all viable alternative materials, chemicals and designs of the selected product. It is not necessary to know what product is at issue in order to estimate the potential cost of conducting this research and preparing this paperwork.

In yet another example, the Proposed Regulations require businesses to “evaluate, monetize, and compare [all alternatives identified] for all exposure pathways and lifecycle segments” in the third phase of the “process.” Among the analysis requirements, this part of the “process” requires businesses to evaluate all “public health and environmental costs” and “costs to government agencies and non-profit organizations that manage waste, oversee environmental cleanup and restoration efforts, and/or are charged with protecting natural resources, water quality, and wildlife.” Again, it is not necessary to know what product has been selected to estimate the potential costs of conducting this analysis and paperwork.

There are numerous other requirements imposed on business in these Proposed Regulations whose costs can be estimated. For instance, many regulatory regimes require labeling of products; those costs can be estimated in advance.

The Department is under an obligation to examine the costs the Proposed Regulation will impose on businesses, and consider whether these costs are necessary, and whether there is a more feasible means of achieving the statute’s objectives. Unfortunately, this rulemaking record does not evidence a genuine inquiry of costs. It is not accurate to conclude that there will be “no significant fiscal impact” while at the same time maintaining that the impacts are “unknowable.”

² “Potential Costs to the State of California Associated with Implementing the Proposed Safer Consumer Product Regulations under CCR 22”, ICF International, July 26, 2012, http://www.dtsc.ca.gov/LawsRegsPolicies/Regs/upload/SCP_Comments_A_J.pdf, pages 162-184.]

Many business stakeholders have provided the Department samples of potential costs that could assist the Department in conducting a good faith economic analysis. For instance, we provided in a previous comment period a copy of a study detailing costs involving in identifying and research alternatives to lead solder in electronics.³ The California Foundation for Commerce and Education similarly provided a cursory estimate of the potential costs of the Proposed Regulations. ⁴That study found that the costs imposed on businesses under the Proposed Regulation will exceed \$10 million. Thus, it is not accurate for the Department to state that the costs of this regulation will not exceed \$10 million because they are “process regulations.” It will cost businesses many millions to conduct the process required by the Proposed Regulations.

The Department has provided stakeholders with an adequate fiscal and economic analysis, nor met its statutory responsibility to provide estimates of costs, as discussed in depth in the attached letter of the California Foundation for Commerce and Education.. It is disturbing that the Department is following a rulemaking process that appears to be geared toward insulating its prior decisions from scrutiny, rather than obtaining input to improve and feasibly implement the Proposed Regulations and to effectuate the statute.

The Alliance seeks only to have a meaningful opportunity to provide thoughtful comments to the Department’s Proposed Regulations. Throughout the regulatory development process, the Alliance has consistently advocated for revisions that will render the Proposed Regulations more effective, efficient and expedient, while maximizing the potential for environmental benefits envisioned by 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.

Sincerely,



Filipa Rio
Director, Environmental Affairs

Attachment

California Foundation for Commerce and Education Letter

³ See presentation entitled “Economic Impact of the European Union RoHS Directive on the Electronics Industry,” <http://dtsc.ca.gov/LawsRegsPolicies/Regs/upload/15-Day-Notice-Revised-Regs-Comments.pdf>, pages 47-102.

⁴ “The Consumer Impact of California’s Green Chemistry Initiative”, California Foundation for Commerce & Education, October 8, 2012, <http://www.dtsc.ca.gov/LawsRegsPolicies/Regs/upload/Combined-SCP-Comments.pdf>, pages 235, 257 and 523.

Andrew Chang & Co, LLC

June 6, 2013

Ms. Jackie Buttle
Acting Regulations Coordinator
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-2806
Email: gcregs@dtsc.ca.gov

Dear Ms. Buttle:

On behalf of the California Foundation for Commerce and Education, we are writing to voice concerns with the Department's revised Economic and Fiscal Statement (Form 399) for the "Safer Consumer Product" regulations dated May 21, 2013. The Department's re-characterization of its groundbreaking regulations as "procedural" with no costs or economic impact amounts to a clear circumvention of the Department's statutory responsibility to inform the public policy discussion and decision making process as established by California's Administrative Procedures Act. Moreover, in addition to not meeting the requirements established in law, the submission does not meet the administrative requirements for submission to the Office of Administrative Law and contradicts itself in a number of significant areas.

1. The Department Fails to Provide a Meaningful Fiscal and Economic Analysis:

In its revised statement and corresponding attachments, the Department notes that it is currently "not possible" to meet its statutory responsibility to estimate impacts to California's business, small businesses, jobs, competitiveness and/or impacts to individuals "due to the number of unknowable factors of the [Safer Consumer Products] program." The Department ignores the readily available data of other jurisdictions and within industry. Indeed, Director Deborah Raphael publicly acknowledges that California's Safer Consumer Products program is largely comparable to other programs. She states, "This is not a new concept. . . Europe has done this. Canada has done this. The State of Washington has done this" (*Manufacturers and Chemicals*, <http://www.dtsc.ca.gov/SCPVideo.cfm>). Moreover, the Department readily ignores the existence of industry experience. Director Raphael states, "An alternatives assessment is not something we invented here at DTSC. It's not something new even to industry. If you go to industry and say, 'Do you do alternatives assessment?' they will say, 'Actually we do. We look at alternatives all the time'" (*Alternatives Analysis and De Minimis*, <http://www.dtsc.ca.gov/SCPVideo.cfm>)

We are not alone in our concern over DTSC's disregard of its statutory obligation to inform the public debate. In his comment to DTSC, Klaus Berend the head of Unit Chemicals for Europe's green chemistry efforts states, "DTSC has not provided information on possible costs or other

impacts on companies. . . nor quantitative or semi-quantitative estimates of any expected benefits. . . . In addition, the requirements concerning the alternative assessments and certain 'regulatory responses' seem very burdensome and difficult to comply with, in particular for small and medium size enterprises." (Comment Letter from Klaus Berend to the Department, December 22, 2011).

The Department cannot ignore its statutory responsibility to provide economic and fiscal information today. State Administrative Manual, Chapter 6600 establishes guidelines for making fiscal and economic estimates as they pertain to the STD 399. It acknowledges that reasonable estimates of costs and economic impact can and should be made using the principals of "reasonable compliance" and the "prudent person" test. In summary, SAM provides guidance stating that reasonable assumptions can be made in conducting analyses.

In our analysis that we submitted to the Department in October 2012 on behalf of the California Foundation for Commerce and Education, we use generally accepted principals of economics, public policy analysis, mathematics, statistics, "reasonable compliance," the "prudent person" test and readily available data from other jurisdictions and industry to report the potential economic and fiscal impact of the Safer Green Products regulations. Rather than being unknown and/or insignificant, we found that the economic and fiscal impact of the proposed regulations may be substantial and are key to the policy discussion pertaining to the further development and adoption of the regulations. Indeed, even when benefits are factored, net costs to California businesses and consumers could approach \$150 billion and will directly affect 123,000 jobs in California at the peak of implementation.

Compliance Needed 1: The Department must update its Economic and Fiscal Impact submission to meet its statutory obligation to inform the policy discussion and decision making process.

2. The Department Fails to Meet Its Statutory and Administrative Obligations

The Department has wholesale failed to provide the information required to meet its statutory and administrative requirements. Among the required information that it fails to provide include the following:

- Fails to analyze the economic impact of the regulation on a number of factors, including:
 - The total number of business impacted
 - The total number of small businesses impacted
 - Jobs created or eliminated
 - California's economic competitiveness
 - The direct costs imposed on California businesses
 - The industries impacted
 - The cost of housing
 - The benefits created by this regulation
- Fails to analyze the fiscal or economic impacts of any alternatives

- Fails to consider performance standards, as required by law
- Fails to assess the fiscal impact in a number of required ways, including:
 - The fiscal costs to local governments
 - Claims there is no fiscal cost for state government, despite having redirected 39 staff and \$6.2 million in permanent annual spending
 - The fiscal impact to federally funded programs
- Failed to secure agency secretary approval/concurrence, as required by the State Administrative Manual, Section 6614

The shortcomings of the filings are too numerous to include in the main body of our letter. Inasmuch, we have provided a detailed commentary of the Department's STD 399 shortcomings in Attachment 1.

Compliance Needed 2: The Department must revise its submission based on incompleteness, and allow the public to comment on its revisions.

3. The Department's Submission is Contradictory in a Number of Significant Areas:

The Department contradicts itself on the submittal in a number of significant areas. First, the Department fails to report any fiscal impact resulting from the regulations. However, in its Attachment A, the Department details that it has redirected 39 Department staff and \$6.2 million to what appears to be a new and permanent function under a Department reorganization. The Department goes on to elaborate that additional resources may be foreseen in the near future. The significant and permanent shift of state funds and personnel for a new program under the guise of a department reorganization should not only be reported on the Form 399, but may require a Budget Change Proposal, as specified in the Department of Finance's Budget Letter 12-15. Moreover, the permanent liquidation of funds to augment contracting may be in violation of the State constitution and Government Code 19130 as they pertain to the protection of the civil service.

Second, the Department also fails to acknowledge that the program may change California's competitiveness. However, in Attachment 2, the contractor speculates that the Safer Consumer Products regulations will change California's competitiveness. It should be noted that if the Department's claim that this submittal is purely procedural should be taken at face value, Attachment 2 is not germane to the discussion and should be withdrawn.

Furthermore, Attachment 2 fails to meet the most basic requirements of an economic analysis, simply relying on the contractor's opinion, rather than substantive analysis. While the contractor correctly points out there is uncertainty in the regulations, this is an inadequate excuse for failing to conduct required analysis as stated above. Though these uncertainties make analysis challenging, they are challenges that occur in many projects and are overcome regularly by talented analysts in government, academia and the private sector. Furthermore, they do not remove the responsibility for agencies to conduct a full fiscal and economic analysis of the

regulations they seek to implement. In fact, the uncertainty inherent in complex, cutting-edge regulations makes such analysis all the more crucial.

DTSC's contractors work amounts to 'analysis by proclamation', noting that he is "optimistic," the contractor outlines a best case scenario arriving at a single conclusion that the regulations will produce net benefits, without conducting any analysis. It is more appropriate, given the substantial uncertainty inherent in this regulation, to articulate the risks, produce a range of possible outcomes, noting both the potential "optimistic" upside of the policy, as well as the costs, should such a rosy scenario not develop.

Third, DTSC contends, "The proposed SCP regulations do not . . . have any physical impacts to public health or the environment." This contradicts page 2, item C-2 which notes the benefits as "Unknowable". IF DTSC is to be taken at face value, the benefits should be correctly listed as "None". As DTSC acknowledges, this regulation produces no benefits to offset its costs.

Compliance Needed 3: The Department must clarify contradictions in its submittal.

Compliance Needed 4: The Department must submit a Budget Change Proposal for the redirection of personnel and contract authority, as appropriate.

Compliance Needed 5: The Department must submit its contracts regarding its Safer Consumer Products to the State Personnel Board for review to ensure that it is consistent with provisions of the State constitution as it pertains to the civil service and Government Code 19130, as appropriate.

Compliance Needed 6: The Department must withdraw Attachment 2, as appropriate.

When the Department first attempted to move these regulations through the rulemaking process, they acknowledged their responsibility to provide a fiscal and economic analysis of the regulations they were creating. While the analysis provided was clearly inadequate and failed to provide required policy guidance, it shows that Department staff understood the regulations required such analysis. It is unclear why the Department would attempt to circumvent the process in this iteration.

I can be reached at 916-538-6091 or at Andrew.Chang@AChangLLC.com if you have any questions regarding my comments.

Sincerely,



Andrew Chang
Managing Director
Andrew Chang & Co, LLC

Attachment 1: Form 399 (1 of 4)

STATE OF CALIFORNIA—DEPARTMENT OF FINANCE ECONOMIC AND FISCAL IMPACT STATEMENT (REGULATIONS AND ORDERS)

STD 399 (REV. 12/03/88)

See SAM Section 6601 - 6616 for Instructions and Code Citations

DEPARTMENT NAME Toxic Substances Control	CONTACT PERSON Sara Benson	TELEPHONE NUMBER (916) 324-2993
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 430 Safer Consumer Products	NOTICE FILE NUMBER Z 2012-0717-04	

ECONOMIC IMPACT STATEMENT

A. ESTIMATED PRIVATE SECTOR SOCIAL IMPACTS (Include calculations and assumptions in the rulemaking record.)

1. Check the appropriate box(es) below to indicate whether this regulation:

- a. Impacts businesses and/or employees
- b. Impacts small businesses
- c. Impacts jobs or occupations
- d. Impacts California competitiveness
- e. Imposes reporting requirements
- f. Imposes prescriptive instead of performance
- g. Impacts individuals
- h. None of the above (Explain below. Complete the Fiscal Impact Statement as appropriate.)

h. (cont.)

(If any box in Items 1 a through g is checked, complete this Economic Impact Statement.)

2. Enter the total number of businesses impacted: UNKNWBLE Describe the types of businesses (include nonprofits): See Attachment 1 to this

Economic and Fiscal Impact Statement Form 399. Note: "UNKNWBLE" OR "UNK" means Unknowable.

Enter the number or percentage of total businesses impacted that are small businesses: UNK

3. Enter the number of businesses that will be created: 0 eliminated: 0

Explain: These are process regulations and only ask businesses to provide information to DTSC (see Attachment 1 to this Form).

4. Indicate the geographic extent of impacts: Statewide Local or regional (List areas): _____

The Safer Consumer Products Regulation also allows DTSC to ask businesses outside of California for information.

5. Enter the number of jobs created: 0 or eliminated: 0 Describe the types of jobs or occupations impacted:

These regulations are process regulations and will not create or eliminate jobs.

6. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here?

Yes No If yes, explain briefly: _____

B. ESTIMATED COSTS (Include calculations and assumptions in the rulemaking record.)

1. What are the total estimated dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? Minimal

a. Initial costs for a small business: \$ _____ Annual ongoing costs: \$ _____ Years: _____

b. Initial costs for a typical business: \$ _____ Annual ongoing costs: \$ _____ Years: _____

c. Initial costs for an individual: \$ _____ Annual ongoing costs: \$ _____ Years: _____

d. Describe other economic costs that may occur: The only costs businesses may incur is the cost to provide information to

DTSC if the business chooses to provide such information (see Attachment 1 to this Form).

DTSC did not report that the regulation will impact the following:

- c. Jobs or occupations
- d. California competitiveness
- e. Impose reporting requirements (on Page 2, Question 3, DTSC acknowledges that the regulation will impose unknown reporting costs)
- f. Imposes prescriptive instead of performance
- g. Impacts individuals

DTSC fails to assess the impact of the regulations on businesses

DTSC fails to assess the impact of the regulations on California jobs

DTSC fails to acknowledge that the regulation will make California businesses less able to compete with other states by making it more costly to produce goods or services in the state

DTSC fails to assess the impact of the cost of the regulations on California businesses

Attachment 1: Form 399 (2 of 4)

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

2. If multiple industries are impacted, enter the share of total costs for each industry: Unknownable

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. (Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.) \$ N/A

4. Will this regulation directly impact housing costs? Yes No. If "No," enter the annual dollar cost per housing unit: _____ and the number of units: _____

5. Are there comparable Federal regulations? Yes No Explain the need for State regulation given the existence or absence of Federal regulations: There are no comparable federal regulations - State law requires DTSC to develop regulations (see Attachment 1).

Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: \$ _____

C. ESTIMATED BENEFITS (Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. Briefly summarize the benefits that may result from this regulation and who will benefit: The Safer Consumer Products Regulations establish the processes that DTSC and businesses must follow when DTSC designates Priority Products. Future regulations listing the Priority Products will provide consumers with better information concerning the products they purchase (see Attachment 1).

2. Are the benefits the result of: specific statutory requirements, or goals developed by the agency based on broad statutory authority?
 Explain: State Law, AB 1879 (Ch. 559/Stats 2008), which requires DTSC to promulgate these regulations,

3. What are the total statewide benefits from this regulation over its lifetime? UNKWBLE

D. ALTERNATIVES TO THE REGULATION (Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: See Attachment 1 to this Form.

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation:	Benefit: \$ <u>Unknownable</u>	Cost: \$ <u>Unknownable</u>
Alternative 1:	Benefit: \$ <u>None</u>	Cost: \$ <u>None</u>
Alternative 2:	Benefit: \$ <u>Unknownable</u>	Cost: \$ <u>Unknownable</u>

3. Briefly discuss any assumptions or costs that are relevant to the analysis of estimated costs and benefits for this regulation or alternatives: See Attachment 1 to the Economic and Fiscal Impact Statement Form 399.

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? Yes No
 Explain: The statute requiring the promulgation of these regulations requires that the regulations establish processes (see Attachment 1 to this Form).

E. MAJOR REGULATIONS (Include calculations and assumptions in the rulemaking record.) Cal/EPA boards, offices, and departments are subject to the following additional requirements per Health and Safety Code section 57005.

Page 2

DTSC fails to assess the impact to industry

DTSC fails to assess the reporting requirements. Please note that on Page 1, DTSC fails to acknowledge that the regulation will impose a reporting burden

DTSC fails to assess the potential impact to housing

DTSC fails to assess the total statewide benefits from the regulation

If DTSC's submission is taken at face value, that this is simply an intermediate step, without real world impact, there would be no benefits because "The proposed SCP regulations do not require the private sector to take any actions specific to any chemicals or products and these process regulations do not have any physical impacts to public health or the environment."

DTSC fails to assess the fiscal impact of any solution or alternative

DTSC fails to consider performance standards as required by law

Attachment 1: Form 399 (3 of 4)

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

1. Will the estimated costs of this regulation to California business enterprises exceed \$10 million? Yes No (If No, skip the rest of this section.)

2. Briefly describe each equally as effective alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: _____
Alternative 2: _____

3. For the regulation, and each alternative just described, enter the estimated total cost and annual cost-effectiveness ratio:

Regulation:	\$ _____	Cost-effectiveness ratio:	\$ _____
Alternative 1:	\$ _____	Cost-effectiveness ratio:	\$ _____
Alternative 2:	\$ _____	Cost-effectiveness ratio:	\$ _____

DTSC fails to assess the fiscal impact of any solution or alternative

DTSC describes but fails to assess the potential fiscal impact on local governments

FISCAL IMPACT STATEMENT

FISCAL EFFECT ON LOCAL GOVERNMENT (Indicate appropriate boxes 1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

- 1. Additional expenditures of approximately \$ _____ in the current State Fiscal Year which are reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code. Funding for this reimbursement:
 - a. is provided in _____, Budget Act of _____ or Chapter _____, Statutes of _____
 - b. will be requested in the _____ Governor's Budget for appropriation in Budget Act of _____ (FISCAL YEAR)
- 2. Additional expenditures of approximately \$ _____ in the current State Fiscal Year which are not reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code because this regulation:
 - a. implements the Federal mandate contained in _____
 - b. implements the court mandate set forth by the _____ court in the case of _____ vs. _____
 - c. implements a mandate of the people of this State expressed in their approval of Proposition No. _____ at the _____ election; (DATE)
 - d. is issued only in response to a specific request from the _____, which is/are the only local entity(x) affected;
 - e. will be fully financed from the _____ [FEE, REVENUE, ETC.] authorized by Section _____ of the _____ Code;
 - f. provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each such unit;
 - g. creates, eliminates, or changes the penalty for a new crime or infraction contained in _____
- 3. Savings of approximately \$ _____ annually.
- 4. No additional costs or savings because this regulation makes only technical, non-substantive or clarifying changes to current law regulations.

Attachment 1: Form 399 (4 of 4)

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

- 5. No fiscal impact exists because this regulation does not affect any local entity or program.
- 6. Other.

B. FISCAL EFFECT ON STATE GOVERNMENT (Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

- 1. Additional expenditures of approximately \$ _____ in the current State Fiscal Year. It is anticipated that State agencies will:
 - a. be able to absorb these additional costs within their existing budgets and resources.
 - b. request an increase in the currently authorized budget level for the _____ fiscal year.
- 2. Savings of approximately \$ _____ in the current State Fiscal Year.
- 3. No fiscal impact exists because this regulation does not affect any State agency or program.
- 4. Other.

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS (Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

- 1. Additional expenditures of approximately \$ _____ in the current State Fiscal Year.
- 2. Savings of approximately \$ _____ in the current State Fiscal Year.
- 3. No fiscal impact exists because this regulation does not affect any federally funded State agency or program.
- 4. Other.

FISCAL OFFICER SIGNATURE <i>Sara Benson</i>		DATE 5/21/13
AGENCY SECRETARY ¹ APPROVAL/CONCURRENCE <i>[Signature]</i>	DATE	
DEPARTMENT OF FINANCE ¹ APPROVAL/CONCURRENCE <i>[Signature]</i>	PROGRAM BUDGET MANAGER	DATE

1. The signature affests that the agency has completed the STD.399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or department not under an Agency Secretary must have the form signed by the highest ranking official in the organization.

2. Finance approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD.399.

DTSC fails to report the expenditure impact of the regulation

Based on Attachment 1, DTSC has redirected 39 staff and \$6.2 million in permanent, annual spending to the regulation



June 6, 2013

Ms. Jackie Buttle
Acting Regulations Coordinator
Department of Toxic Substances Control
P.O. Box 806
Sacramento, California 95812-0806

RE: Comments on the revised Economic and Fiscal Impact Statement (Std. Form 399), and attachments, revised to reflect post-hearing changes to the proposed Safer Consumer Products regulations (R-2011-02)

Dear Ms. Buttle:

The American Chemistry Council (ACC) submits the following comments on the Department of Toxic Substances Control's (DTSC) revised Economic and Fiscal Impact Statement (hereafter "EIS"), and attachments, related to the post-hearing changes to the proposed Safer Consumer Products regulations. ACC also supports the comments of the Green Chemistry Alliance.

Despite DTSC's many changes to the proposed Safer Consumer Products regulations, ACC remains concerned that the Department is still unable, as with the preliminary EIS, to provide dollar ranges for the potential estimated impacts to the private sector or to quantify the potential benefits of the regulations. Regulatory analysis is a tool used to anticipate and evaluate the likely consequences of the rules, both positive and negative. It provides evidence as to whether the benefits of an action are likely to justify the costs. Benefit-cost analysis is a primary tool within regulatory analysis, and when it is not possible to quantify monetary units of all the benefits and costs, a "threshold" analysis using professional judgment should be conducted – evaluating the significance of the non-quantified benefits and costs.¹

DTSC has not conducted a threshold analysis for the process that would be set by the proposed regulations. DTSC has not considered implicit consequences that will affect businesses within and external to California once the proposed rule is promulgated. Moreover, contrary to the preliminary EIS, DTSC has not included a revised "Attachment 3: Estimated Costs for DTSC to Implement the Safer Consumer Products Regulations."²

¹ Office of Management and Budget, Circular A-4, September 17, 2003, Subject: Regulatory Analysis, http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf, p. 1-2.

² <http://dtsc.ca.gov/LawsRegsPolicies/Regs/upload/SCP-399-Attach-3-July-2012.pdf>.



ACC is concerned that stakeholders have not been provided with an opportunity to weigh the potential *overall* impacts of the regulatory procedure established by the proposed Safer Consumer Products regulations. Although DTSC views the proposed regulations as procedural regulations that will subsequently prioritize further regulation, and which will be accompanied by specific economic assessments, the State and the regulated community miss a key opportunity to assess benefits and costs associated with the regulatory procedure by not having an economic assessment before the rule is made final. Despite the proposed economic and fiscal impact statements that are to accompany subsequent rulemakings on Priority Products, the Department should, to the best of its ability, conduct an assessment of the underlying regulatory program.

ACC disagrees with the Department's assertion that the only impacts to the private sector under the proposed Safer Consumer Products regulations, would result from a DTSC request of businesses to provide existing information or generate new information necessary to implement the regulations. An important, but under-appreciated consequence is that market impacts will likely occur once DTSC publishes the Candidate Chemical list of approximately 1200 substances, and, the list of approximately 230 Candidate Chemicals³ that will be evaluated for the development of the first Priority Products List. The listing of chemicals as "candidate chemicals" can trigger market de-selection pressures against the use of these chemicals, even if there is insignificant risk from their use in a product. Market changes, based upon the Candidate Chemicals List, will have direct impacts on particular chemicals and particular products. Product manufacturers and chemical manufacturers will likely see costs rise as the volume of customer and consumer questionnaires increase, inquiring as to whether certain products contain "candidate chemicals". Manufacturers could spend a significant amount of time and resources just to prove the negative. Furthermore, de-selection could affect the costs to produce goods or services even in the absence of significant risks of material harm to human health and/or the environment from exposure to the chemical or product.

In addition, DTSC should focus its efforts on chemicals and products that are explicitly subject to the proposed regulations. It is legally questionable whether DTSC has authority under Health and Safety Code Sections 25252-25255, and 25257, to require manufacturers, importers, assemblers, and retailers "of any product" to provide information regardless of whether these chemicals or products are subject to the regulation.⁴ DTSC should focus the scope of the regulation on chemicals and products that have the highest hazard and exposure potential to Californians.

Finally, ACC suggests that DTSC issue a revised attachment that outlines the estimated costs to DTSC to implement the proposed regulations, given the significant changes since the July 2012

³ <http://dtsc.ca.gov/upload/SCPHandoutsJuly2012.pdf>

⁴ Proposed, revised, post-hearing changes Safer Consumer Products Regulation, §69501.4(a) (2).



version. DTSC could update the estimates outlined in the previous “Attachment 3: Attachment 3: Estimated Costs for DTSC to Implement the Safer Consumer Products Regulations,” published with the July 2012 regulatory proposal.

Before recommending regulatory action, the Department should establish that the proposed action is necessary, demonstrating that the estimated benefits will outweigh the costs. This type of demonstration, or economic and fiscal impact assessment – before the promulgation of the rule – should include quantifying both benefits and costs, and conducting a threshold analysis for those elements that cannot be quantified. It is this demonstration that is required under the California Administrative Procedure Act.⁵ The failure to adequately identify the economic impacts of the proposed regulations is not merely a shortcoming; it reaffirms the legislative findings of the Administrative Procedure Act⁶ that proposed regulations promulgated without orderly, systematic review may place an unnecessary burden on people and entities in California. Consequently, this failure may also be one in complying with the Administrative Procedure Act.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Emily V. Tivaldo
Manager
Regulatory and Technical Affairs

CC: The Honorable Matt Rodriguez, Secretary, CalEPA (SectyRodriguez@calepa.ca.gov)
Mike Rossi, Senior Business and Economic Advisor, Office of the Governor
(mike.rossi@gov.ca.gov)

⁵ Government Code §11346.3

⁶ Government Code § 11340 “The imposition of prescriptive standards upon private persons and entities through regulations . . . has placed an unnecessary burden on California citizens and discouraged innovation, research and development of improved means of achieving desirable social goals.”



June 6, 2013

SUBMITTED VIA GCREGS@DTSC.CA.GOV

Ms. Jackie Butler
Acting Regulations Coordinator
California Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812

Re: Safer Consumer Products; Notice of Public Availability of Documents added to the Rulemaking File;
Reference Number: R-2011-02; Office of Administrative Law Notice File Number: Z-2012-0717-04

Dear Ms. Butler:

The Technical Affairs Committee of the Association of Global Automakers, Inc.¹ (Global Automakers) appreciates the opportunity to provide comments to the California Department of Toxic Substances Control (DTSC) on the additional documents that have been added to the rulemaking record for the Safer Consumer Products regulations.

Global Automakers and its members have consistently supported the development and use of safe chemicals and products available for use in the automotive industry. Through the application of green chemistry principles and sound scientific methods, Global Automakers believes that the design and development of new chemistries and technologies will continue to provide innovative solutions to current and emerging environmental challenges. Our goal is to ensure that our members have the opportunity to provide high quality, environmentally sound, safe products and services. With these goals in mind, we look for ways to provide tools to our members to facilitate continuous improvement and to ensure that wherever possible we assist them to not only meet but exceed safety and environmental standards.

Global Automakers has been actively engaged in the development of the Safer Consumer Products (SCP) regulations from the outset of this effort. Beginning in 2010, we have invested in review and comment for each of the iterations of these regulations; we have participated in public meetings and listened intently to the debates and discussions of the Green Ribbon Science Panels. We have provided constructive input at

¹ The Association of Global Automakers represents international motor vehicle manufacturers, original equipment suppliers, and other automotive-related trade associations. Our Technical Committee members include: American Honda Motor Co., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Isuzu Motors America, Inc., Kia Motors America, Inc., Maserati North America, Inc., McLaren Automotive Ltd., Nissan North America, Inc. Peugeot Motors of America, Subaru of America, Inc., Suzuki Motor of America, Inc., ADVICS North America, Inc., Delphi Corporation, Denso International America, Inc., and Robert Bosch Corporation. We work with industry leaders, legislators, and regulators in the United States to create public policies that improve motor vehicle safety, encourage technological innovation, and protect our planet. Our goal is to foster an open and competitive automotive marketplace that encourages investment, job growth, and development of vehicles that can enhance Americans' quality of life. For more information, visit www.globalautomakers.org.

each stage of development of these regulations including the need for a robust economic assessment of the impacts that these regulation will have on consumers, the industrial sector and more broadly, the U.S. economy.

Global Automakers thanks you for your consideration of the detailed comments we are providing and would welcome the opportunity to provide any additional information you may need. If you have any questions, please contact me at jrege@globalautomakers.org or (202) 650-5559.

Sincerely,



Julia M. Rege
Senior Manager, Environment & Energy

CC: Odette Madriago, DTSC

Comments Submitted by
The Association of Global Automakers, Inc.
On the
Notice of Public Availability of Documents Added to the Safer Consumer Products Rulemaking File
Department Reference Number: R-2011-02
Office of Administrative Law Notice File Number: Z-2012-0717-04

On May 22, 2013 the California Department of Toxic Substances Control (DTSC) added the following three documents to the Safer Consumer Products rulemaking file:

- *Revised Economic and Fiscal Impact Statement (Std. Form 399)*
- Detailed Attachments explaining the rationale behind the Economic Analysis and Fiscal Impacts Statement
 - Attachment 1: *Economic Impact Statement*
 - Attachment 2: *Economic Analysis of California's Green Chemistry Regulations for Safer Consumer Products*

These documents have been revised to reflect post-hearing changes to the proposed Safer Consumer Products (SCP) regulations notices released in January 2013 and April 2013. The California Administrative Procedure Act (APA) mandates that State agencies perform an economic analysis of the “adverse economic impact on California business enterprises and individuals” when engaged in rulemaking. Another provision of the APA calls for assessment of the extent to which the proposed regulations will lead to the creation or elimination of businesses and jobs in California.

Global Automakers believes that the DTSC should provide significantly more detail regarding the economic impacts of the SCP regulations than what has been provided in these documents. We also believe that DTSC has mischaracterized these regulations as “process” regulations only in the documents supporting the *Economic and Fiscal Impact Statement*. These regulations have and will impose economic consequences on the industrial sector and indirectly on consumers in California and across the nation. We believe that in order for the Office of Administrative Law (OAL) to be able to conduct a meaningful review of these regulations to determine whether they are “clear, necessary, legally valid and available to the public”¹ that DTSC should be required to provide as much economic information as possible.

Economic and Fiscal Impact Statement (Std. Form 399) and Revised Economic and Fiscal Impact Statement (Std. Form 399)

DTSC has certified that statewide costs businesses and individuals may incur to comply with this regulation over its lifetime are minimal. It has also reiterated its position that these are process regulations only and will not create or eliminate jobs. Only when future regulations listing priority products are finalized, argues DTSC, will costs be incurred. At that time, DTSC will issue economic analysis and impacts statements

¹ Office of Administrative Law Website. <http://www.oal.ca.gov/>.

regarding the specific listings. Global Automakers disagrees with this determination as reflected in the comments that follow.

Attachment 1: Economic Impact Statement

Under the proposed SCP regulations, DTSC has determined that the only impacts to the private sector as a result of this rulemaking are that DTSC may request businesses to provide existing information or generate new information necessary to implement the regulations. Additionally, DTSC has reaffirmed that the proposed SCP regulations are process regulations only and do not have any significant impacts on private sector costs.

There are a number of flaws in DTSC's approach to estimating the impacts associated with these "process" regulations:

1. Impacts Associated with Publication of a Candidate Chemical List

DTSC has provided a large number of lists in the various iterations of the proposed rulemaking that will be used to identify Candidate Chemicals. The very existence of this "list of lists" and the effect that it will/has had on the selection of chemicals for new products and as substitutes for existing products has a cost associated with it. In addition to the direct monetary costs associated with the movement away from these "Candidate Chemicals", there are the longer term costs associated with the substitutions that will occur in an attempt to move away from the chemicals associated with the list of lists. Some manufacturers may decide to move to relatively untested substitutes or substitutes that do not provide adequate functionality in order to avoid the stigma of using a listed chemical. Both of these costs are directly associated with these process regulations.

2. Estimating Compliance Costs

DTSC has been disingenuous in claiming that it cannot estimate compliance costs at this point in the process. In fact, DTSC can provide illustrative examples of what the costs may be for individual chemical/product listings. Putting these process regulations in place without providing best estimates for potential compliance costs may mislead reviewers as it assesses the appropriateness and economic consequences of the regulations. In response to the question, "Will the estimated costs of this regulation to California business enterprises exceed \$10 million," DTSC says that "the proposed SCP regulations are process regulations and will not have any significant fiscal impact on business enterprises."² We believe these regulations clearly go beyond process only and thus will have significant associated costs.

DTSC states that it cannot estimate the costs, but the agency does in fact provide some initial cost estimates. For example, DTSC has referenced the costs associated with implementing the Alternative Assessment process laid out in the Massachusetts Toxics Use Reduction Initiative

² Attachment 1 to the Economic and Fiscal Impact Statement (Std. Form 399), p. 18.
http://www.dtsc.ca.gov/LawsRegsPolicies/Regs/upload/SCP-Regs-F399_Attach-1-5-21-13.pdf.

(TURI),³ and DTSC extrapolated those costs into estimates for two, three and four priority products listings.⁴ DTSC has already stated that it will list no more than five products for the initial list and likely has a sense of the product categories that it is considering for the first priority products list, since efforts to adopt a list through public notice and comment are expected to start shortly following finalization of the regulations. It would not be difficult for DTSC to provide a projected range of costs associated with the initial list that reflect simple, moderately complex, and highly complex assessment modules. In fact, DTSC cites some initial estimates based on product complexity in Attachment 1. Based on these estimates, there is the possibility that the initial priority products list and responsive required actions will result in costs greater than \$10 million. Reviewers of the Revised Economic and Fiscal Impact Statement (Std. Form 399) should be aware of those impacts.

3. Providing Requests Information is Voluntary

DTSC claims that providing information is not mandatory and that if the costs are high, businesses will not provide the information being requested. DTSC has recognized that the public process it will use to identify companies that have not provided requested information will provide a strong incentive to comply. By stating that the submission of that initial information is not mandatory, DTSC is underestimating the influence that the negative implications of DTSC's "non-responsive" list will have on companies. DTSC should be able to project for small, medium and large companies the costs associated with searching records and submitting data. This is basic regulatory compliance information and DTSC should have access to this type of economic information. If the agency does not have a good sense of these costs, it raises serious questions about the viability of these regulations.

Attachment 2: Economic Analysis of California's Green Chemistry Regulations for Safer Consumer Products

This economic analysis clearly states that "responsible entities will bear real costs as a result of these regulations."⁵ This statement appears to be in direct conflict with DTSC's determination that these are process regulations only and that no significant costs can be attributed to them. The report highlights a number of important issues that need to be considered by California's OAL. These issues include:

1. "Manufacturers that are found to produce products that contain Chemicals of Concern are likely to suffer sales losses when this information becomes public knowledge."⁶ This is a very real issue that will impact manufacturers as soon as the list is published, regardless of the outcome of the Alternative Assessment.

³ *Ibid*, p. 8.

⁴ *Ibid*, p. 19.

⁵ *Economic Analysis of California's Green Chemistry Regulations for Safer Consumer Products; Matthew E. Kahn March 2012*, p 4. http://www.dtsc.ca.gov/LawsRegsPolicies/Regs/upload/SCP-Regs-F399_Attach-2_Econ-Analysis-March-2012.pdf.

⁶ *Ibid*. p 5.

2. “Most product manufacturing takes place outside of California.”⁷ DTSC appears to have ignored the impacts that these regulations will have nationwide. Given the scope and reach of these regulations, DTSC must consider national impacts, since they will potentially affect consumer prices both in and outside of California.
3. “Some small firms may face financial constraints in implementing an alternatives analysis. Small firms may not have sufficient cash available to pay such a consulting firm. Such [small] firms are unlikely to have a research staff or established relationships with consultants who can advise them on handling these issues.”⁸ DTSC has offered no assessment or evaluation of what will happen to companies who cannot afford to comply with the Alternative Analysis process.

While we have identified what we believe are the most serious flaws with DTSC’s Economic and Fiscal Impact Statement, there are multiple other inconsistencies with the materials submitted to OAL.

Global Automakers requests that DTSC provide estimates of the real economic impacts that these “process” regulations impose and a realistic range of estimates for the economic impacts that will accrue as the process is implemented. DTSC should provide compliance estimates for the initial list of priority products so that these regulations can be evaluated in light of the real costs they will impose. Without these estimates, the OAL will be evaluating a process without a true understanding of the consequential costs.

⁷ *Ibid*, p. 5.

⁸ *Ibid*, p.19.

June 6, 2013

Via Fax (916) 324-1808 and E-Mail gcregs@dtsc.ca.gov

Ms. Jackie Buttle
Acting Regulations Coordinator
Department of Toxic Substances Control
PO Box 806
Sacramento, CA 95812-0806

SUBJECT: Economic and Fiscal Impact Statement (Std. Form 399) for Safer Consumer Products Regulation (May 21, 2013 Release)

Dear Ms. Buttle:

The California Chamber of Commerce (CalChamber) submits these comments to the Department of Toxic Substances Control (DTSC or Department) in response to the revised Economic and Fiscal Impact Statement (Std. Form 399) for its Safer Consumer Products Regulation (Proposal or Proposed Regulations) dated May 21, 2013.

An important part of developing good state policy is making sure that new laws and regulations do not impose unreasonable or unnecessary burdens on business owners that could stifle economic growth and job development. Realizing this, lawmakers created a requirement within the Administrative Procedure Act (APA) that any state agency seeking to adopt, amend, or repeal a regulation must complete an economic impact assessment that identifies a proposed regulation's "potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping or compliance requirements." Unfortunately, the Department's revised Std. Form 399 and supporting documents still fundamentally fail to meet this APA requirement.

For this reason, we believe DTSC must go back and conduct a meaningful economic impact assessment and provide substantive responses on the Std. Form 399 prior to transmitting the Regulatory Proposal to the Office of Administrative Law (OAL) for review.

I. DTSC HAS FAILED TO ANALYZE MOST OF THE ECONOMIC IMPACTS REQUIRED BY THE APA AND THE STD. FORM 399.

According to Government Code section 11349.1 (d)(1), one of the bases under which the OAL must return a regulation to the adopting agency includes when the adopting agency fails to complete the economic impact assessment required by section 11346.3. Despite this, the DTSC has responded to most requests for information on the form by stating that the impacts are unknowable, including the:

- Number of businesses impacted
- Number or percentage of businesses impacted that are small businesses
- Number of businesses that will be created or eliminated

- Share of costs for each impacted industry
- Statewide benefits from this regulation over its lifetime
- Benefits and costs associated with an alternative other than to do nothing

While DTSC has not left most of these items on the form blank, we don't believe that the responses it has given fulfill its obligation to perform an economic impact assessment. At the same time, despite the fact that the Department asserts that almost none of the economic impacts are knowable at this time, DTSC has concluded that:

- These regulations will not create or eliminate jobs.
- The total statewide costs that businesses and individuals may incur to comply with this regulation over its lifetime are "minimal."
- The only cost businesses may incur is the cost to provide information to DTSC if the business chooses to provide such information.
- The estimated costs of this regulation to California business enterprises will not exceed \$10 million.

The Department attempts to justify these incongruous responses by asserting two things. First, DTSC believes that it does not need to assess the economic impacts of the entire process as a whole, but rather, that it may do separate economic impact assessments for each stage of the process so long as it follows APA rulemaking procedure for each stage. Second, DTSC believes that the Proposed Regulations are not subject to the same deadlines under the APA governing completion of the economic assessment because the Proposal sets forth a process rather than creating an immediate obligation for regulated entities. Both of these assertions are faulty.

The language of Government Code Section 11346.3 (e) states that an economic impact assessment should be conducted, "prior to submitting a proposal to adopt, amend, or repeal a regulation to the office." It goes on to say that, "analyses conducted pursuant to this section are intended to provide agencies and the public with tools to determine whether the regulatory proposal is an efficient and effective means of implementing the policy decisions enacted in statute or by other provisions of law in the least burdensome manner." The baseline for the analysis should be the "most cost-effective set of regulatory measures that are equally effective in achieving the purpose of the regulation..."

This language, taken together, shows that the economic analysis is to be conducted *before* regulations are submitted to the OAL for review, and certainly before implementation begins, because the whole purpose of the analysis is to inform the decision making of the regulatory agency and make sure the regulatory program that is implemented is the most cost-effective way that still effectuates the goals of the underlying statute. As such, performing an economic impact assessment on only one piece of a regulatory program at a time circumvents the entire purpose of that assessment.

Furthermore, the Department's repeated statements that the economic impacts of the proposal cannot be known until later stages of rulemaking show that it has still not devised a complete regulatory program. The Legislature, when it enacted the Safer Consumer Products Initiative, did not just charge DTSC with drafting regulations that establish a process. It also charged DTSC with identifying chemicals of concern, evaluating the potential alternatives to those chemicals,

determining how best to limit exposure or reduce the level of hazards posed by those chemicals, and with imposition of a regulatory response at the end of this process. The reason the Department cannot determine the possible range of economic impacts the Proposed Regulations might have on the state economy is because it has not finished drafting those regulations yet. The full regulatory scheme envisioned by the Legislature will impose real obligations on real California businesses, and will have meaningful outcomes that can and must be estimated by DTSC prior to implementation.

Equally unfounded is the imaginary category the Department has created for “process regulations.” While it is true that some regulations, once implemented, impose a distinct set of obligations on a clearly-defined population, and while estimating the economic impacts in those cases may be easier, the APA does not provide any exceptions or alterations to the requirements or timelines for different regulations. Nothing in the law allows adopting agencies to shirk their responsibility to conduct an economic impact assessment simply because the task is difficult or filled with uncertainties. Nor does the law set forth any distinction between types of regulations, or allow agencies to delay the economic impact analysis by breaking up the regulatory process. The law is clear – an adopting agency must meet the APA requirements, in full, “prior to submitting a proposal to adopt, amend, or repeal a regulation to the office.”

II. THE FEW ECONOMIC IMPACTS THE DEPARTMENT HAS REPORTED ON THE STD. FORM 399 ARE UNSUBSTANTIATED AND INACCURATE.

We also have concerns with the few instances where the Department has seen fit to include a substantive answer on the Std. Form 399. First, DTSC asserts that the cost of the Proposal to California business enterprises will not exceed \$10 million. As we understand it, this claim does not include an estimate of the cost of the complete regulatory scheme when fully implemented, since the Department believes that this total is unknowable at this time. Instead this estimate appears to reflect the Department’s view that the regulation it is seeking to finalize at this moment exists in a vacuum, is just a process with no actual requirements, and as such has little or no cost. As discussed above, we wholeheartedly disagree with this view and do not believe it complies with the law.

Along these same lines, the Department suggests the total cost that businesses and individuals may incur to comply with this regulation over its lifetime is “minimal” because the only cost they may incur is the cost to provide information to DTSC. Not only is there no information in the three documents on which to base this conclusion, but it is also patently false based on other information provided in those supporting documents. As described in the attachments, the Proposed Regulations require manufacturers of regulated chemical-product combinations to provide information requested by the Department, to determine whether an Alternatives Analysis or some lesser analysis must be conducted, to conduct an Alternatives Analysis or lesser analysis if necessary, and finally, to comply with whatever regulatory response(s) DTSC chooses to impose at the end of this process. The cost to businesses and individuals, then, clearly includes more than just the cost of providing information to DTSC. In fact, in one of the examples provided in Attachment 1, the Department itself envisioned a scenario where the cost of compliance for 100 manufacturers of four priority products requiring more complex alternative analyses would be \$110 million, excluding any costs that might be associated with a regulatory response - hardly a minimal cost, and certainly more than \$10 million.

Perhaps more distressing are the repeated statements throughout the three documents suggesting that compliance with information requests from the Department is optional. At one point in Attachment 1 the Department actually states that, “the cost to generate the data is expected to be minimal because businesses are not required to provide the information and would not do so if the costs were too high.” Nowhere in the Proposed Regulations does it state that a business or individual does not have to comply if the cost of compliance is too high, nor does it make any sense for an agency to provide a low cost estimate because it assumes that businesses will not comply with the law.

In fact, compliance with the Proposed Regulation is not optional at all. DTSC is required by the authorizing statute to maintain and post on its website a “Response Status List” indicating which manufacturers have not fully complied with its information requests. Even if being on a public website listed as noncompliant is not enough to motivate all manufacturers to comply, DTSC also has authority to issue hefty penalties and even imprison repeat-violators under Health & Safety Code Section 25190.

In addition, the Proposal identifies business entities further down in the stream of commerce that have a responsibility to comply when a manufacturer does not, including importers, assemblers, and retailers. If a retailer stops selling items from a non-compliant manufacturer, that manufacturer will lose access to the California marketplace and resulting profits, which is not only an additional motivation to comply with the law, but also an unaccounted-for cost imposed by the Proposal on manufacturers who do not. Furthermore, the costs associated with burdening these downstream businesses with compliance are not considered anywhere in the three documents. It is both absurd for the Department to assume that manufacturers will not comply under these circumstances, and also inappropriate to ignore costs that would be incurred by other entities charged with downstream compliance, many of whom are California businesses.

III. THE ECONOMIC ANALYSIS IN ATTACHMENT 2 SHOULD BE DISREGARDED.

Attachment 2 is an Economic Analysis updated by Matthew Kahn from UCLA in March 2012. The analysis is of little, if any, value to the regulatory package for several reasons. First, the analysis is stale as it evaluates the Proposed Regulation as it existed over one year and several major revisions ago. Second, there are no quantitative analyses or conclusions included anywhere in the entire document, making it useless in informing the quantitative estimates that are required by the APA and Std. Form 399. Third, the qualitative discussions within the analysis are based on assumptions of the author, with no studies, calculations, or evidence to back up the conclusions reached.

Finally, the approach taken by the author of the study is a cost-benefit analysis that looks at the overall effects of the Proposed Regulation, both in terms of cost to businesses and consumers, and improved consumer safety and other societal benefits. While cost-benefit analyses are helpful when lawmakers are trying to decide whether to adopt a policy, they are not directly applicable to the economic impact assessment adopting agencies must conduct under the APA.

An economic impact assessment, as mentioned earlier, is “intended to provide agencies and the public with tools to determine whether the regulatory proposal is an efficient and effective means of implementing the policy decisions enacted in statute or by other provisions of law in the least

burdensome manner.” In a cost-benefit analysis, the costs often fall on one group while the benefits may fall on another, but balancing these two types of impacts helps lawmakers decide if, as a whole, the policy is worth adopting. The economic impact analysis required by the APA, on the other hand, is supposed to look at the costs a particular regulatory approach would have on the regulated entities, as compared to alternative regulatory approaches that would similarly effectuate the Legislature’s intent. These two types of analyses serve different purposes, and as such, the analysis by Matthew Kahn is not relevant to the task DTSC is supposed to be undertaking.

Conclusion

While we understand that the Department feels it will be in a better position to assess the costs of the program once implementation has begun, we do not believe the approach the Department is taking complies with Government Code Section 11346.3. Furthermore, it is not surprising that DTSC is struggling to figure out the economic impacts of the proposal because so much is yet to be decided about what that program will look like.

For the last four years the business community has repeatedly asked that more specific requirements, guidance, and constraints be added to the Proposed Regulation because there is no way for employers to gauge what their responsibilities or potential liabilities will be should their chemical-product combinations be selected for regulation. Now, rather than acknowledging that it has not yet developed a full regulatory program with estimable costs, the Department is trying to reshape the state regulatory process, arguing that the law allows it to break the development of a regulation into stages, and to meet the requirements of the APA in stages.

CalChamber is very concerned that DTSC is seeking to establish a precedent that could undermine the development of reasonable, clear, and detailed regulations by other agencies in the future. We are also very concerned that no matter what DTSC learns down the road about the true costs and economic impacts of the Proposal, no significant changes are apt to be made to the program because the Department has already shown itself to be fully wedded to this approach, regardless of the costs.

For these reasons, we urge the Department to go back to the table and, at a minimum, conduct a meaningful and comprehensive economic impact assessment of the fully-implemented Safer Consumer Products Regulation. If more details must be included in the Proposal to make that analysis possible, those details should be filled in prior to submitting the Proposed Regulation to the OAL for review.

Thank you for your consideration of our comments, and we hope that DTSC will continue to work with the business community to evaluate the true costs of the Safer Consumer Products Initiative. I can be reached at 916-930-1343 or at mira.guertin@calchamber.com.

Sincerely,



Mira Guertin
Policy Advocate

Andrew Chang & Co, LLC

June 6, 2013

Ms. Jackie Buttle
Acting Regulations Coordinator
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-2806
Email: gcregs@dtsc.ca.gov

Dear Ms. Buttle:

On behalf of the California Foundation for Commerce and Education, we are writing to voice concerns with the Department's revised Economic and Fiscal Statement (Form 399) for the "Safer Consumer Product" regulations dated May 21, 2013. The Department's re-characterization of its groundbreaking regulations as "procedural" with no costs or economic impact amounts to a clear circumvention of the Department's statutory responsibility to inform the public policy discussion and decision making process as established by California's Administrative Procedures Act. Moreover, in addition to not meeting the requirements established in law, the submission does not meet the administrative requirements for submission to the Office of Administrative Law and contradicts itself in a number of significant areas.

1. The Department Fails to Provide a Meaningful Fiscal and Economic Analysis:

In its revised statement and corresponding attachments, the Department notes that it is currently "not possible" to meet its statutory responsibility to estimate impacts to California's business, small businesses, jobs, competitiveness and/or impacts to individuals "due to the number of unknowable factors of the [Safer Consumer Products] program." The Department ignores the readily available data of other jurisdictions and within industry. Indeed, Director Deborah Raphael publicly acknowledges that California's Safer Consumer Products program is largely comparable to other programs. She states, "This is not a new concept. . . Europe has done this. Canada has done this. The State of Washington has done this" (*Manufacturers and Chemicals*, <http://www.dtsc.ca.gov/SCPVideo.cfm>). Moreover, the Department readily ignores the existence of industry experience. Director Raphael states, "An alternatives assessment is not something we invented here at DTSC. It's not something new even to industry. If you go to industry and say, 'Do you do alternatives assessment?' they will say, 'Actually we do. We look at alternatives all the time'" (*Alternatives Analysis and De Minimis*, <http://www.dtsc.ca.gov/SCPVideo.cfm>)

We are not alone in our concern over DTSC's disregard of its statutory obligation to inform the public debate. In his comment to DTSC, Klaus Berend the head of Unit Chemicals for Europe's green chemistry efforts states, "DTSC has not provided information on possible costs or other

impacts on companies. . . nor quantitative or semi-quantitative estimates of any expected benefits. . . . In addition, the requirements concerning the alternative assessments and certain 'regulatory responses' seem very burdensome and difficult to comply with, in particular for small and medium size enterprises." (Comment Letter from Klaus Berend to the Department, December 22, 2011).

The Department cannot ignore its statutory responsibility to provide economic and fiscal information today. State Administrative Manual, Chapter 6600 establishes guidelines for making fiscal and economic estimates as they pertain to the STD 399. It acknowledges that reasonable estimates of costs and economic impact can and should be made using the principals of "reasonable compliance" and the "prudent person" test. In summary, SAM provides guidance stating that reasonable assumptions can be made in conducting analyses.

In our analysis that we submitted to the Department in October 2012 on behalf of the California Foundation for Commerce and Education, we use generally accepted principals of economics, public policy analysis, mathematics, statistics, "reasonable compliance," the "prudent person" test and readily available data from other jurisdictions and industry to report the potential economic and fiscal impact of the Safer Green Products regulations. Rather than being unknown and/or insignificant, we found that the economic and fiscal impact of the proposed regulations may be substantial and are key to the policy discussion pertaining to the further development and adoption of the regulations. Indeed, even when benefits are factored, net costs to California businesses and consumers could approach \$150 billion and will directly affect 123,000 jobs in California at the peak of implementation.

Compliance Needed 1: The Department must update its Economic and Fiscal Impact submission to meet its statutory obligation to inform the policy discussion and decision making process.

2. The Department Fails to Meet Its Statutory and Administrative Obligations

The Department has wholesale failed to provide the information required to meet its statutory and administrative requirements. Among the required information that it fails to provide include the following:

- Fails to analyze the economic impact of the regulation on a number of factors, including:
 - The total number of business impacted
 - The total number of small businesses impacted
 - Jobs created or eliminated
 - California's economic competitiveness
 - The direct costs imposed on California businesses
 - The industries impacted
 - The cost of housing
 - The benefits created by this regulation
- Fails to analyze the fiscal or economic impacts of any alternatives

- Fails to consider performance standards, as required by law
- Fails to assess the fiscal impact in a number of required ways, including:
 - The fiscal costs to local governments
 - Claims there is no fiscal cost for state government, despite having redirected 39 staff and \$6.2 million in permanent annual spending
 - The fiscal impact to federally funded programs
- Failed to secure agency secretary approval/concurrence, as required by the State Administrative Manual, Section 6614

The shortcomings of the filings are too numerous to include in the main body of our letter. Inasmuch, we have provided a detailed commentary of the Department's STD 399 shortcomings in Attachment 1.

Compliance Needed 2: The Department must revise its submission based on incompleteness, and allow the public to comment on its revisions.

3. The Department's Submission is Contradictory in a Number of Significant Areas:

The Department contradicts itself on the submittal in a number of significant areas. First, the Department fails to report any fiscal impact resulting from the regulations. However, in its Attachment A, the Department details that it has redirected 39 Department staff and \$6.2 million to what appears to be a new and permanent function under a Department reorganization. The Department goes on to elaborate that additional resources may be foreseen in the near future. The significant and permanent shift of state funds and personnel for a new program under the guise of a department reorganization should not only be reported on the Form 399, but may require a Budget Change Proposal, as specified in the Department of Finance's Budget Letter 12-15. Moreover, the permanent liquidation of funds to augment contracting may be in violation of the State constitution and Government Code 19130 as they pertain to the protection of the civil service.

Second, the Department also fails to acknowledge that the program may change California's competitiveness. However, in Attachment 2, the contractor speculates that the Safer Consumer Products regulations will change California's competitiveness. It should be noted that if the Department's claim that this submittal is purely procedural should be taken at face value, Attachment 2 is not germane to the discussion and should be withdrawn.

Furthermore, Attachment 2 fails to meet the most basic requirements of an economic analysis, simply relying on the contractor's opinion, rather than substantive analysis. While the contractor correctly points out there is uncertainty in the regulations, this is an inadequate excuse for failing to conduct required analysis as stated above. Though these uncertainties make analysis challenging, they are challenges that occur in many projects and are overcome regularly by talented analysts in government, academia and the private sector. Furthermore, they do not remove the responsibility for agencies to conduct a full fiscal and economic analysis of the

regulations they seek to implement. In fact, the uncertainty inherent in complex, cutting-edge regulations makes such analysis all the more crucial.

DTSC's contractors work amounts to 'analysis by proclamation', noting that he is "optimistic," the contractor outlines a best case scenario arriving at a single conclusion that the regulations will produce net benefits, without conducting any analysis. It is more appropriate, given the substantial uncertainty inherent in this regulation, to articulate the risks, produce a range of possible outcomes, noting both the potential "optimistic" upside of the policy, as well as the costs, should such a rosy scenario not develop.

Third, DTSC contends, "The proposed SCP regulations do not . . . have any physical impacts to public health or the environment." This contradicts page 2, item C-2 which notes the benefits as "Unknowable". IF DTSC is to be taken at face value, the benefits should be correctly listed as "None". As DTSC acknowledges, this regulation produces no benefits to offset its costs.

Compliance Needed 3: The Department must clarify contradictions in its submittal.

Compliance Needed 4: The Department must submit a Budget Change Proposal for the redirection of personnel and contract authority, as appropriate.

Compliance Needed 5: The Department must submit its contracts regarding its Safer Consumer Products to the State Personnel Board for review to ensure that it is consistent with provisions of the State constitution as it pertains to the civil service and Government Code 19130, as appropriate.

Compliance Needed 6: The Department must withdraw Attachment 2, as appropriate.

When the Department first attempted to move these regulations through the rulemaking process, they acknowledged their responsibility to provide a fiscal and economic analysis of the regulations they were creating. While the analysis provided was clearly inadequate and failed to provide required policy guidance, it shows that Department staff understood the regulations required such analysis. It is unclear why the Department would attempt to circumvent the process in this iteration.

I can be reached at 916-538-6091 or at Andrew.Chang@AChangLLC.com if you have any questions regarding my comments.

Sincerely,



Andrew Chang
Managing Director
Andrew Chang & Co, LLC

Attachment 1: Form 399 (1 of 4)

STATE OF CALIFORNIA—DEPARTMENT OF FINANCE
ECONOMIC AND FISCAL IMPACT STATEMENT
(REGULATIONS AND ORDERS)
STD 399 (REV. 12/05/08)

See SAM Section 6601 - 6616 for Instructions and Code Citations

DEPARTMENT NAME Toxic Substances Control	CONTACT PERSON Sara Benson	TELEPHONE NUMBER (916) 324-2993
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 430 Safer Consumer Products	NOTICE FILE NUMBER Z 2012-0717-04	

ECONOMIC IMPACT STATEMENT

A. ESTIMATED PRIVATE SECTOR SOCIAL IMPACTS (Include calculations and assumptions in the rulemaking record.)

1. Check the appropriate box(es) below to indicate whether this regulation:

- a. Impacts businesses and/or employees
- b. Impacts small businesses
- c. Impacts jobs or occupations
- d. Impacts California competitiveness
- e. Imposes reporting requirements
- f. Imposes prescriptive instead of performance
- g. Impacts individuals
- h. None of the above (Explain below. Complete the Fiscal Impact Statement as appropriate.)

h. (cont.)

(If any box in Items 1 a through g is checked, complete this Economic Impact Statement.)

2. Enter the total number of businesses impacted: UNKWBLE Describe the types of businesses (include nonprofits): See Attachment 1 to this

Economic and Fiscal Impact Statement Form 399. Note: "UNKWBLE" OR "UNK" means Unknowable.

Enter the number or percentage of total businesses impacted that are small businesses: UNK

3. Enter the number of businesses that will be created: 0 or eliminated: 0

Explain: These are process regulations and only ask businesses to provide information to DTSC (see Attachment 1 to this Form).

4. Indicate the geographic extent of impacts: Statewide Local or regional (List areas): _____

The Safer Consumer Products Regulation also allows DTSC to ask businesses outside of California for information.

5. Enter the number of jobs created: 0 or eliminated: 0 Describe the types of jobs or occupations impacted:

These regulations are process regulations and will not create or eliminate jobs.

6. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here?

Yes No If yes, explain briefly: _____

B. ESTIMATED COSTS (Include calculations and assumptions in the rulemaking record.)

1. What are the total estimated dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? Minimal

a. Initial costs for a small business: \$ _____ Annual ongoing costs: \$ _____ Years: _____

b. Initial costs for a typical business: \$ _____ Annual ongoing costs: \$ _____ Years: _____

c. Initial costs for an individual: \$ _____ Annual ongoing costs: \$ _____ Years: _____

d. Describe other economic costs that may occur: The only costs businesses may incur is the cost to provide information to

DTSC if the business chooses to provide such information (see Attachment 1 to this Form).

DTSC did not report that the regulation will impact the following:

- c. Jobs or occupations
- d. California competitiveness
- e. Impose reporting requirements (on Page 2, Question 3, DTSC acknowledges that the regulation will impose unknown reporting costs)
- f. Imposes prescriptive instead of performance
- g. Impacts individuals

DTSC fails to assess the impact of the regulations on businesses

DTSC fails to assess the impact of the regulations on California jobs

DTSC fails to acknowledge that the regulation will make California businesses less able to compete with other states by making it more costly to produce goods or services in the state

DTSC fails to assess the impact of the cost of the regulations on California businesses

Attachment 1: Form 399 (2 of 4)

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

2. If multiple industries are impacted, enter the share of total costs for each industry: Unknownable

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. (Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.) \$ N/A

4. Will this regulation directly impact housing costs? Yes No. If "No," enter the annual dollar cost per housing unit: _____ and the number of units: _____

5. Are there comparable Federal regulations? Yes No Explain the need for State regulation given the existence or absence of Federal regulations: There are no comparable federal regulations - State law requires DTSC to develop regulations (see Attachment 1).
Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: \$ _____

C. ESTIMATED BENEFITS (Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. Briefly summarize the benefits that may result from this regulation and who will benefit: The Safer Consumer Products Regulations establish the processes that DTSC and businesses must follow when DTSC designates Priority Products. Future regulations listing the Priority Products will provide consumers with better information concerning the products they purchase (see Attachment 1).

2. Are the benefits the result of: specific statutory requirements, or goals developed by the agency based on broad statutory authority?
Explain: State Law, AB 1879 (Ch. 559/Stats 2008), which requires DTSC to promulgate these regulations,

3. What are the total statewide benefits from this regulation over its lifetime? UNKWBLE

D. ALTERNATIVES TO THE REGULATION (Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: See Attachment 1 to this Form.

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation:	Benefit: \$ <u>Unknownable</u>	Cost: \$ <u>Unknownable</u>
Alternative 1:	Benefit: \$ <u>None</u>	Cost: \$ <u>None</u>
Alternative 2:	Benefit: \$ <u>Unknownable</u>	Cost: \$ <u>Unknownable</u>

3. Briefly discuss any special issues that are relevant to the analysis of estimated costs and benefits for this regulation or alternatives: See Attachment 1 to the Economic and Fiscal Impact Statement Form 399.

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? Yes No
Explain: The statute requiring the promulgation of these regulations requires that the regulations establish processes (see Attachment 1 to this Form).

E. MAJOR REGULATIONS (Include calculations and assumptions in the rulemaking record.) Cal/EPA boards, offices, and departments are subject to the following additional requirements per Health and Safety Code section 57005.

Page 2

DTSC fails to assess the impact to industry

DTSC fails to assess the reporting requirements. Please note that on Page 1, DTSC fails to acknowledge that the regulation will impose a reporting burden

DTSC fails to assess the potential impact to housing

DTSC fails to assess the total statewide benefits from the regulation

If DTSC's submission is taken at face value, that this is simply an intermediate step, without real world impact, there would be no benefits because "The proposed SCP regulations do not require the private sector to take any actions specific to any chemicals or products and these process regulations do not have any physical impacts to public health or the environment."

DTSC fails to assess the fiscal impact of any solution or alternative

DTSC fails to consider performance standards as required by law

Attachment 1: Form 399 (3 of 4)

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

1. Will the estimated costs of this regulation to California business enterprises exceed \$10 million? Yes No (If No, skip the rest of this section.)

2. Briefly describe each equally as to the alternatives, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: _____
Alternative 2: _____

3. For the regulation, and each alternative just described, enter the estimated total cost and cost-effectiveness ratio:

Regulation:	\$ _____	Cost-effectiveness ratio:	\$ _____
Alternative 1:	\$ _____	Cost-effectiveness ratio:	\$ _____
Alternative 2:	\$ _____	Cost-effectiveness ratio:	\$ _____

DTSC fails to assess the fiscal impact of any solution or alternative

DTSC describes but fails to assess the potential fiscal impact on local governments

FISCAL IMPACT STATEMENT

FISCAL EFFECT ON LOCAL GOVERNMENT (Indicate appropriate boxes 1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

- 1. Additional expenditures of approximately \$ _____ in the current State Fiscal Year which are reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code. Funding for this reimbursement:
 - a. is provided in _____, Budget Act of _____ or Chapter _____, Statutes of _____
 - b. will be requested in the _____ Governor's Budget for appropriation in Budget Act of _____ (FISCAL YEAR)
- 2. Additional expenditures of approximately \$ _____ in the current State Fiscal Year which are not reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code because this regulation:
 - a. implements the Federal mandate contained in _____
 - b. implements the court mandate set forth by the _____ court in the case of _____ vs. _____
 - c. implements a mandate of the people of this State expressed in their approval of Proposition No. _____ at the _____ election; (DATE)
 - d. is issued only in response to a specific request from the _____, which is/are the only local entity(ies) affected;
 - e. will be fully financed from the _____ (FEE, REVENUE, ETC.) authorized by Section _____ of the _____ Code;
 - f. provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each such unit;
 - g. creates, eliminates, or changes the penalty for a new crime or infraction contained in _____
- 3. Savings of approximately \$ _____ annually.
- 4. No additional costs or savings because this regulation makes only technical, non-substantive or clarifying changes to current law regulations.

Attachment 1: Form 399 (4 of 4)

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

- 5. No fiscal impact exists because this regulation does not affect any local entity or program.
- 6. Other.

B. FISCAL EFFECT ON STATE GOVERNMENT (Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

- 1. Additional expenditures of approximately \$ _____ in the current State Fiscal Year. It is anticipated that State agencies will:
 - a. be able to absorb these additional costs within their existing budgets and resources.
 - b. request an increase in the currently authorized budget level for the _____ fiscal year.
- 2. Savings of approximately \$ _____ in the current State Fiscal Year.
- 3. No fiscal impact exists because this regulation does not affect any State agency or program.
- 4. Other.

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS (Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

- 1. Additional expenditures of approximately \$ _____ in the current State Fiscal Year.
- 2. Savings of approximately \$ _____ in the current State Fiscal Year.
- 3. No fiscal impact exists because this regulation does not affect any federally funded State agency or program.
- 4. Other.

FISCAL OFFICER SIGNATURE <i>Sara Benson</i>		DATE 5/21/13
AGENCY SECRETARY ¹ APPROVAL/CONCURRENCE <i>[Signature]</i>	DATE	
DEPARTMENT OF FINANCE ¹ APPROVAL/CONCURRENCE <i>[Signature]</i>	PROGRAM BUDGET MANAGER	DATE

1. The signature affests that the agency has completed the STD.399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or department not under an Agency Secretary must have the form signed by the highest ranking official in the organization.

2. Finance approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD.399.

DTSC fails to report the expenditure impact of the regulation

Based on Attachment 1, DTSC has redirected 39 staff and \$6.2 million in permanent, annual spending to the regulation

**COMMENTS ON THE
Economic and Fiscal Impact Statement for the
CALIFORNIA SAFER CONSUMER PRODUCTS PROPOSED REGULATIONS
June 6, 2013**

**CHANGE Coalition
Californians for a Healthy and Green Economy**

Californians for a Healthy and Green Economy (CHANGE) is a statewide coalition of environmental and environmental justice groups, health organizations, labor advocates, community-based groups, parent organizations, faith groups, and others who are concerned with the impacts of toxic chemicals on human, environmental, and occupational health. We have closely tracked the development of the DTSC's regulations to implement a Safer Consumer Products (SCP) program under the authority of AB 1879 from the beginning. We are grateful DTSC has provided CHANGE the opportunity to provide the public interest perspective of our member organizations on this important effort.

With this letter, we provide comments on the Economic and Fiscal Impact Statement (Std. Form 399) and accompanying attachments.

Sincerely,



Kathryn Alcántar
CHANGE Campaign Director

CHANGE notes the required Standard Form 399 regarding Economic and Fiscal Impact leaves many questions unanswered because, as noted by DTSC, the answers are at this time "unknowable" until the Safer Consumer Products (SCP) program formally begins. Nevertheless, the attachments included with the Form 399 provide important context and analysis that strengthen the rationale for DTSC's proposed regulations. Despite the uncertainties about costs, CHANGE agrees with the analysis by Matthew Kahn in Attachment Two that the regulations will result in overall "significant net benefits" to California.

From CHANGE's perspective, one of the most important benefits that Californians will enjoy is an improvement to public and environmental health as the regulations reduce Californians' exposures to dangerous chemicals.

This is of course valuable for individual Californians who may become sick in part from toxic chemical exposure. If one only considers the mounting evidence of harm to children's long term development that can result from chemical trespass into the womb, from contaminated breastmilk, and from chemical exposure at sensitive life stages, the argument for safer chemicals in consumer products is compelling. But it is also of immense value to California's economy because costs to the state for the provision of health care services will decline, as well as costs for environmental remediation.

CHANGE agrees with Professor Kahn's assessment of the likely impacts of the regulations on the business environment in California. It will stimulate California's market in productive ways, promoting innovation and developing new business opportunities, and at the same time do so in ways that protect the environment and public health. This should rightly be viewed as a win-win outcome.

Closing the information "gap" or "asymmetry" about chemicals of concern in consumer products will be one of the program's important achievements. Consumers will be able to make safer choices, and forward-thinking companies will out-compete their counterparts which are less able to adapt to new market dynamics. The result will be a business climate in which consumer products made without toxic chemicals will gain market share. The quality of products sold in California will be higher.

Significantly, more information in the public sphere about chemical hazards will likely benefit communities which historically have had less access to information technologies because the overall safety of consumer products will be safer.

Importantly, companies will themselves learn about their supply chains in ways they may currently be unaware. They will acquire new understanding of the hazards their products may pose, and will invest in R&D to learn about alternatives. In addition to potentially eliminating the use of some toxic chemicals altogether, this in-house knowledge of toxic chemicals can enable companies to reduce costs by capturing newly-identified efficiencies. Specialized job skills will develop that will enable them to be more competitive. As Professor Kahn states, the regulations "will unleash a dynamic process of learning and technological change." And this will include valuable job creation.

It's important to recognize that the costs to some companies which are slow or unable to adapt and comply with the regulations will in many ways be offset by the benefits that will accrue to companies that realize greater profits because of their ability to innovate and bring less toxic

products to market. For example, companies that are already "REACH-compliant" (or are planning to be) will be at a significant advantage in selling their products in California. Furthermore, Professor Kahn notes the regulations provide companies with sufficient time to adapt to the new rules, and that internal company costs to comply with new regulations tend to decrease over time.

The analysis in Attachment Two emphasizes that California is well-placed to innovate quickly in response to the regulations because a market already exists here as demonstrated by California's "green conscious consumers" who value less toxic products. Moreover, venture capital will be more interested to make investments in the new marketplace opportunities, and California already has a highly skilled workforce with its universities ready to incorporate new skill sets into their curricula.

In CHANGE's view, DTSC's economic and fiscal assessment should delve more deeply into the occupational health benefits of the SCP program. Attachment Two notes in passing that the regulations are likely to reduce worker exposure to chemicals of concern. CHANGE agrees, and notes it would be helpful to quantify some of these benefits, including fewer disability claims, increased productivity on the job, and fewer costs for internal controls to manage hazardous compounds. DTSC has included language in the draft regulations that make it clear the rules pertain to workers; for example, the definition of "sensitive populations" includes "workers with greater exposures to chemicals due to the nature of their occupation."

In conclusion, CHANGE concurs that the SCP regulations will improve public, environmental, and occupational health as well as bring economic benefits to California that outweigh potential costs.

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Representing Household & Institutional Products

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

June 6, 2013

Via E-Mail GCRegs@dtsc.ca.gov

Ms. Jackie Buttle
Acting Regulations Coordinator
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-08066

**Re: Revised Safer Consumer Products Regulation (Z-2012-0717-04)
Economic and Fiscal Impact Statement (Std. Form 399)**

Dear Ms. Buttle:

The Consumer Specialty Products Association (CSPA)¹ appreciates the opportunity to review and provide comments on the revised Safer Consumer Products Regulation (SCP). CSPA and our member companies have participated throughout the years-long regulatory development process by submitting written comments and participating in public hearings and workshops/seminars.

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 to work with the Department and other stakeholders in the state to help spur green chemical innovation and continue to ensure that products are safe.

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 \$100 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; air fresheners, room deodorizers, and candles that eliminate odors; pest management products for home, lawn and 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.

CSPA offers the following comments on the Economic and Fiscal Impact Statement (Std. Form 399) of the Safer Consumer Products Regulation and respectfully requests the Department of Toxic Substances Control (DTSC) address the concerns raised regarding this statement as well as previously submitted comments to provide a regulatory process that is workable for the regulated community.

Costs of AAs Underestimated

We are pleased that DTSC has clearly indicated that “Impacts that can/will be more specifically identified and evaluated as part of future Administrative Procedures Act rulemaking processes for the proposed listing of product-chemical combinations as Priority Products.” However, we think the expressed cost of alternatives assessment (AA) is greatly understated.

While it is a valid observation that the U.S. Environmental Protection Agency has not fully exercised authority under the Toxic Substances Control Act (TSCA), section 5(b)(4), there are a number of existing programs that have a similar result without the onerous “unreasonable risk to health or the environment” rulemaking requirements imposed under existing law. For example, U.S. EPA has recently prioritized and identified 83 Work Plan chemicals for further assessment², and U.S. EPA has a number of voluntary activities related to Alternatives Assessment (AA) in the Design for the Environment (DfE) program.³

Comparing the Department’s approach to AA to the DfE approach reveals significant differences in methodology and impact on industry and consumers. The scope of the chemicals on which DfE conducts AA is narrower -- a subset of the panoply of chemicals -- but its approach and process are applicable to all chemicals. Informed substitution, using the results of the AA to lead industry to select a safer chemical, also has the attendant benefit of avoiding or minimizing unintended consequences.

Once the process using informed consent to select chemicals has begun, the DfE hazard evaluation continues with a series of seven key steps: 1) determine the feasibility of an alternatives assessment; 2) collect information on chemical alternatives; 3) convene stakeholders; 4) identify viable alternatives; 5) conduct the hazard assessment; 6) apply economic and life cycle context; and, 7) apply the results in decision-making for safer chemical substitutes. This methodology results in a more nuanced approach that characterizes chemical hazards based on a full range of human health and environmental information.

We question whether DTSC can adequately address the cost question raised. For example, under section E. Major Regulation, the question “Will the estimated costs of this regulation to California business enterprises exceed \$10 million?” is posed. The Department responds thusly:

No, the proposed SCP regulations are process regulations and will not have any significant fiscal impact on business enterprises.

² U.S. EPA TSCA Work Plan Chemicals, <http://www.epa.gov/opptintr/existingchemicals/pubs/workplans.html>

³ See “Alternatives Assessment Methodology”, http://www.epa.gov/dfe/alternative_assessments.html

Impacts that can/will be more specifically identified and evaluated as part of future APA rulemaking processes for the proposed listing of product-chemical combinations as Priority Products.

DTSC cannot estimate the costs of the future priority product regulations to California businesses (i.e., costs to perform alternatives analyses or take an alternative course of action and cost to implement regulatory responses) until specific product-chemical combinations are identified for proposed listing as Priority Products. Therefore, DTSC does not know at this time if those future regulations will result in costs to California businesses in excess of \$10 million.

It is unclear how the Department can state there will be no significant fiscal impacts while also stating that it cannot estimate the costs. The comment seems to be contradictory as all parts of the regulations are tied together. The total costs have to be considered under an economic analysis, not individual provisions, and looking at individual costs masks the overall burden.

Revisions in Rulemaking Limits Usefulness of Economic Analysis

We have a number of concerns regarding the “Economic Analysis of California’s Green Chemistry Regulations for Safer Consumer Products.” The original report was written in 2010 and updated in 2012, but there have been numerous and substantive changes to the regulation in the intervening time. Consequently portions of the report are irrelevant and ambiguous; yet the report remains the basis for the Department’s Economic and Fiscal Impact Statement. For example, there is extensive discussion throughout the report pertaining to Chemicals of Concern and corresponding actions by manufacturers and the marketplace. With the current regulation differentiation between Candidate Chemicals and Chemicals of Concern, these discussions are ambiguous. In addition, there is an extended discussion of the benefit of certified assessors (The Maturing AA Market), a provision that was deleted in the April 2013 draft regulation.

The Economic and Fiscal Impact Statement also underestimates and understates the significance and likely impact of noteworthy economic factors. For example, the disparity of impacts upon a large and small business cannot be overstated. As noted, “If small firms do sell a smaller volume of output, then they are likely to face higher average fixed costs of compliance,” the Economic and Fiscal Impact Statement recognizes but does not delve into this concern with any detail. A large company would likely have the resources to reformulate, undergo product testing and distribute the costs across multiple markets in addition to California. Conversely a small company with a discrete portfolio or limited distribution could potentially reformulate, but would be less capable of taking this route as they could not readily absorb the inherent costs. In another area, the Economic and Fiscal Impact Statement indicates that smaller firms “can overcome transaction costs to work together and form a club or trade association that allows them to pool their resources to hire qualified AA assessors” while noting in the **previous** sentence that “an external consultant may not have sufficient expertise about the nitty gritty details of a particular product to be able to cost effectively evaluate it relative to alternatives.” Again this highlights the differences between small and large companies while ignoring a discussion of the implications including the legal costs associated with creating and administering the consortia to avoid anti-trust concerns and protection of confidential business information.

Consortia Costs Underestimated

Another area where the importance is understated is the formation of consortia by trade associations (an area in which CSPA has significant experience and expertise⁴). As the Economic and Fiscal Impact Statement notes:

Trade association research is most likely to reduce alternatives analyses costs when firms use common production technologies and products are made up of similar ingredients. A group of firms who produce similar products could contribute money to a collective pot to finance the overall analysis. For example, if there are ten firms in the collective, and they agree to share the cost of hiring a certified assessor, then each would face 10% of the total cost.

While consortia members can share overall expenses there are additional costs beyond the consulting that must be taken into consideration, such as, legal, administrative, sweat equity and miscellaneous expenses. The time to establish a consortia may be as little as two weeks, however it can easily take several months to adequately setup a new consortia especially if the identification of potential members is difficult or lengthy negotiations are necessary to achieve a final agreement. There are many behind the scenes details that must be handled to ensure legality of the new consortia and to ensure regulatory and antitrust compliance.

Vital Trade Secret Protection at Risk

Also the Economic and Fiscal Impact Statement discussion of “Trade Secrets and Intellectual Property Theft” is troubling at best.

Requiring companies to reveal their “secret sauce” is a necessary step for discovering what chemicals are embodied in the products but the transfer of this information raises the possibility of firms losing valuable trade secrets. This is surely a low probability event but it would be very costly for those firms who have made enormous up front R&D investments to design a product that competes with similar differentiated products. If such blue prints could be accessed, then other producers could easily enter that firm’s product niche. Anticipating this low probability risk, DTSC has built into the regulations substantial trade secret protections to limit the likelihood that a costly information leakage could happen.

The Economic and Fiscal Impact Statement conjecture that loss of trade secret information is a “low probability event” is not supported and greatly understates the problem.⁵ In addition, in previously submitted comments we have raised significant concerns that the Department has a less than adequate understanding of trade secret and confidential business information and limited experience with developing and maintaining an appropriate process for protecting trade secret and confidential business information.

⁴ See CSPA’s Product Ingredient Review Program, <http://www.cspa.org/affiliates-dedication/pir.html>

⁵ See “Administration Strategy on Mitigating the Theft of U.S. Trade Secrets”, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB424/docs/Cyber-082.pdf>

Replacement and Labeling Processes Undervalued

The statement in the Economic and Fiscal Impact, “Alternatives that involve only switching of one chemical for another are likely to be among the least complex and perhaps the cheapest. For example, in the production of electronics equipment manufacturers could substitute tin-copper solder for tin-lead solder,” is troubling for a variety of reasons. First, there are rarely, if ever, one-for-one replacements of a chemical within a product formulation. The original chemical was selected because it had the optimal set of physicochemical properties, toxicology, availability, sustainability, efficacy and chemical function at an appropriate cost to the consumer; any replacement would therefore be less than optimal. That is not to say that a company is not continually researching for the *next* optimal chemical or improvement. It is interesting that the author notes the substitution of tin-lead solder (actually the replacement was tin-silver-copper rather than tin-copper as noted by the author) as there was an extended discussion on the unique function of the tin-lead solder and the inherent challenges of finding a suitable replacement by the members of the Green Ribbon Science Panel (GRSP) during the development of this regulation.⁶ It is unfortunate that the observations and experiences of the GRSP were not fully incorporated into the economic analysis. It is also disconcerting that if this is in fact an example of “the least complex and perhaps the cheapest” option, implementation of the regulation could be very expensive.⁷

The Economic and Fiscal Impact Statement conjecture that “... changing the product packaging to include the labeling would be low cost, it would result in additional consumers being aware of the product’s potentially harmful nature than when the product was listed on the DTSC web site, and could result in additional loss of sales,” paints an incomplete picture of labeling decisions. While an individual labeling modification on existing products *may* be relatively inexpensive; ensuring compliance with, for example, the Federal Trade Commission (FTC) guidelines⁸, OSHA Hazard Communication Standard⁹, the Consumer Product Safety Commission (CPSC) regulations¹⁰ or Proposition 65 requirements¹¹ is a significant and essential economic investment.

⁶ See comments by Panel Member Kirschner on meeting transcript from July 11, 2011, pg 86.

<http://www.dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/upload/GRSP071411.pdf>

⁷ Total estimated cost of RoHS estimated to be greater than \$32 Billion and lead solder is significant portion thereof. See presentation entitled “Economic Impact of the European Union RoHS*Directive on the Electronics Industry” of Public Comments on April 2013 Revised Regulations Text <http://dtsc.ca.gov/LawsRegsPolicies/Regs/upload/15-Day-Notice-Revised-Regs-Comments.pdf>, page 47-102.

⁸ U.S. Federal Trade Commission Environmental Marketing Claims, “Green Guides”, <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=b68565c5b33d4809da330a5735968c40&n=16y1.0.1.2.24&r=PART&ty=HTML#16:1.0.1.2.24.0.5.4>

⁹ Occupational Safety and Health Administration Hazard Communication Standard in conformance with United Nations’ Globally Harmonized System of Classification and Labeling of Chemicals (GHS), <http://www.osha.gov/dsg/hazcom/GHSfinal-rule.pdf>. An extended discussion of the economic impacts, especially on small entities is included on pages 236-254.

¹⁰ <http://www.cpsc.gov/en/Regulations-Laws--Standards/Regulations-Mandatory-Standards--Bans/Regulated-Products/>

¹¹ <http://oehha.ca.gov/prop65/law/index.html>

It is also critical to clearly identify the appropriate risk associated with the use of a product, as improper labeling without the proper context can unduly alarm consumers.¹²

Economic Analysis Outdated

The Economic and Fiscal Impact Statement examination of the United States Consumer Expenditure Survey (CEX) should be revisited and updated significantly. The Economic and Fiscal Impact Statement reliance on economic data from 2008 provides an inaccurate snapshot due to the concomitant economic downturn and it is suggested that the Department repeat the analysis with the latest available CEX.¹³ While much of the analysis may remain similar, there have been significant changes in consumer patterns that are not reflected in the Economic and Fiscal Impact Statement analysis. For example, there were significant but *temporally different* reductions in each of the categories cited by the Economic and Fiscal Impact Statement from 2008 through 2011. Going further, the Economic and Fiscal Impact Statement posits that “This means that consumers are unlikely to suffer a significant loss in real purchasing power from any product price increases caused by these regulations,” but the economic downturn clearly changed consumers buying patterns with respect to green products.¹⁴

As we indicated in our comments on the July 2012 Economic and Fiscal Impact Statement CSPA remains concerned with the inadequacy of the economic analysis and further requests the Department to embrace the direction Governor Brown implied with his signature on Senate Bill 617¹⁵ in October, 2011. The bill is intended to create more transparent rulemaking, improve oversight of agencies and encourage policymakers to implement the most cost-effective regulatory option. As noted in the signature message, “Governor Edmund G. Brown Jr. announced today that he has signed the following bills to boost California's economic competitiveness, bring greater fiscal stability to the state and reform the regulatory process to promote business growth:” Given that all regulatory agencies must comply with requirements of the law in just three short months, it is our opinion that the Department should implement the Governor’s direction and complete a more robust economic analysis of this proposed major regulation.

By failing to provide an economic analysis, it is difficult to assess how our industry would be affected. CSPA thinks the brief review of the potential economic impacts performed by an economist for the California Foundation for Commerce and Education indicates that the impacts on industry could be severe.¹⁶

Summary

We remain concerned the Economic and Fiscal Impact Statement underestimates the economic impact of the proposed Safer Consumer Products Regulation and request the Department conduct

¹² For example, see the hazards associated with dihydrogen monoxide (more commonly known as water), www.dhmo.org

¹³ Consumer Expenditures in 2011, <http://www.bls.gov/cex/csxann11.pdf>

¹⁴ For example, <http://www.nytimes.com/2011/04/22/business/energy-environment/22green.html>

¹⁵ Calderon, http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0601-0650/sb_617_bill_20111006_chaptered.pdf

¹⁶ Chang, Andrew, "The Consumer Impact of California’s Green Chemistry Initiative", California Foundation for Commerce & Education, October 8, 2012.

a full economic analysis as required by California law and to consider alternative regulatory designs and language in light of that analysis.

Please contact us if you have questions regarding our comments.

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.
Senior Director of Scientific Affairs and Sustainability

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

Kristin Power
Director, State Affairs – West Region

cc: CSPA Scientific Affairs Committee Green Chemistry Task Force
CSPA State Government Affairs Advisory Committee
Laurie Nelson, Randlett/Nelson/Madden



Green Chemistry Alliance

Committed to Product Sustainability in the Global Economy

Alliance of Automobile
Manufacturers

June 6, 2013

American Chemistry Council

American Cleaning Institute

American Forest & Paper
Association

California Chamber
of Commerce

California League of Food
Processors

California Manufacturers
& Technology Association

California Paint Council

California Restaurant Association

California Retailers Association

Can Manufacturers Institute

Chemical Industry Council of
California

Citizens for Fire Safety Institute

Consumer Healthcare Products
Association

Consumer Specialty Products
Association

Grocery Manufacturers Association

Independent Lubricant
Manufacturers Association

Industrial Environmental
Association

Metal Finishing Associations of
Northern and Southern CA

National Paint and Coatings
Association

Natural Products Association

Personal Care Products Council

Plumbing Manufacturers
International

TechAmerica

Toy Industry Association

Western Plant Health Association

Western States Petroleum
Association

Ms. Jackie Buttle
Acting Regulations Coordinator
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

Via Mail and Email: gcregs@dtsc.ca.gov

RE: DTSC Reference Number R-2011-02, OAL File Number Z-2012-0717-04

Dear Ms. Buttle:

On behalf of the Green Chemistry Alliance we wish to comment on Form 399 and provide specific citations and examples to help DTSC understand why the Economic Impacts Analysis is inadequate. The Department is required to file a Std. Form 399 - Attachment to the Economic and Fiscal Impact Statement for proposed regulations. Unfortunately the statement filed by the DTSC for the Safer Consumer Products Regulation is once again devoid of any substantive information and therefore inadequate by any measure. The recurring theme throughout the document is that the economic and fiscal impact of the proposed regulation will only be quantifiable after the regulation is implemented and operating, or in other words, "Ready, Fire, Aim."

Given that DTSC has afforded the Proposed SCP Regulations "landmark" status, the Economic and Fiscal Impact Statement for proposed regulations is even more inadequate. DTSC appears to have failed to even attempt to provide meaningful data, choosing instead to rely on: Attachment 1 "*Attachment to the Economic and Fiscal Impact Statement (Std. Form 399)*"; and (2) "*Economic Analysis for California's Green Chemistry Regulations for Safer Consumer Products*," prepared by Matthew E. Kahn, Ph.D for the economic analysis.

The fundamental rationale cited time-and-again throughout both the Form 399 and Attachment 1 is that the regulation merely creates a process whose the impacts cannot be quantified until it is implemented. In an absolute sense, this is certainly true. However, the aim of such an impact analysis is not an absolute *ex-post* quantification of effects. Rather it is an attempt to anticipate the ways in which its implementation could result in economic effects, and to give informed judgments regarding the potential scale and consequences of such effects. By that measure, this "Economic and Fiscal Impact Statement" is

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an abdication that threatens to establish a highly damaging precedent for the State. It fails to make any reasonable attempt to anticipate the extent or nature of its potential impacts, and similarly fails any attempt at gauging the potential scale of such impacts. As a precedent potentially applying to any State regulation or legislation aimed at new “process,” it would essentially nullify any utility of impact assessments, regardless of how consequential such a new process may be.

With regard to Attachment 2 “*Economic Analysis for California’s Green Chemistry Regulations for Safer Consumer Products*,” prepared by Matthew E. Kahn, Ph.D., we find the tone of the economic analysis negatively portrays industry with unsubstantiated generalizations that characterize industry as “profit seeking” with “agendas” that do not align with the spirit and intent of the regulations. Much of the economic and social benefits that are purported to arise from the implementation of the proposed regulations are based on the supposition that industry does not currently take responsibility for the composition and safety of its products. Not only are these generalized assumptions grossly inaccurate, their inclusion in a document being used to justify a complex regulation to implement a law broadly supported by industry is offensive. For multiple reasons presented in these comments by the Green Chemistry Alliance, we conclude that Kahn’s economic analysis is sufficiently replete with bias, unsubstantiated supposition, and outright erroneous conclusions as to render it absolutely useless as a supporting document for DTSC’s Std. Form 399.

Moreover, the Kahn analysis, originally prepared in 2010 and updated in 2012, is a year old and obviously based upon review of regulations as then-proposed. The proposed regulations have been altered significantly since then, including in some significant aspects that would seem to undermine many of Kahn’s conclusions upon which DTSC rests many of the limited judgments it chooses to make. In particular, Kahn repeatedly cites the competitiveness of industry innovation in adapting to challenges such as those posed by the SCP. Importantly, he notes an obvious caveat that presupposes the competitive dynamics which drive innovation must remain in place. Specifically, he notes:

Requiring companies to reveal their “secret sauce” is a necessary step for discovering what chemicals are embodied in the products but the transfer of this information raises the possibility of firms losing valuable trade secrets. This is surely a low probability event but it would be very costly for those firms who have made enormous up front R&D investments to design a product that competes with similar differentiated products. If such blue prints could be accessed, then other producers could easily enter that firm’s product niche. Anticipating this low probability risk, DTSC has built into the regulations substantial trade secret protections to limit the likelihood that a costly information leakage could happen.(p. 15).

Unfortunately, one of the most far-reaching changes introduced in the proposed regulations subsequent to Kahn’s analysis is the elimination of trade-secret protection precisely for such innovation in chemicals (the regulations would allow protection only for chemical formulations being patented, which by definition, commits them to public access). How ironic that DTSC should now turn around and re-introduce this analysis in supposed defense of its proposal. We urge DTSC to strike the Kahn economic analysis in its entirety.

GCA encourages DTSC to continue to work with industry to evaluate the true costs of the proposed Safer Consumer Products Regulation to California. For further information or questions regarding the Green Chemistry Alliance, its members, or the attached comments contact John Ulrich (916) 989-9692 or Dawn Koepke (916) 930-1993. You may also visit GCA's website www.greenchemistryalliance.org.

Sincerely,



John Ulrich
Co-Chair
Chemical Industry Council of California



Dawn Koepke
Co-Chair
McHugh, Koepke & Associates

Attachment

CC: The Honorable Matt Rodriguez, Secretary, CalEPA
Miriam Ingenito, Deputy Secretary, CalEPA
Kristin Stauffacher, Assistant Secretary, CalEPA
Nancy McFadden, Cabinet Secretary, Office of the Governor
Mike Rossi, Senior Business & Economic Advisor, Office of the Governor
Cliff Rechtschaffen, Senior Advisor, Office of the Governor
Martha Guzman-Aceves, Deputy Legislative Affairs Secretary, Office of the Governor

APPENDIX 1

GCA Comments on Std. Form 399 - Attachment 1 entitled, “Attachment to the Economic and Fiscal Impact Statement”

DTSC’s Claims that an Economic Analysis Is Not Possible are Without Merit and DTSC Must Create a Regulatory Requirement for Economic Evaluation if Deferring to Future Triggers.

The Department has taken a very narrow perspective concerning the proposed regulation for purposes of the Economic Impact Statement and supplemental information. DTSC claims that the regulations are simply a process and therefore will have only a minimal impact on the economy that is currently unknowable. According to DTSC, it is the subsequent listing of Priority Products that will create the economic impacts and therefore trigger additional actions. The excerpt below from Attachment 1 (page 1) to the Economic Impact Statement (Std. Form 399) indicates that when Priority Products are identified for alternatives analysis, an Economic Impact Statement will be a part of that administrative process.

Using the process and prioritization factors set forth in these SCP regulations, DTSC will adopt a list of Priority Products for which manufacturers or other responsible entities must perform an alternatives analysis or take an alternate course of action. Whenever it lists Priority Products, DTSC will go through the rulemaking process pursuant to the Administrative Procedure Act (APA) (commencing with Government Code section 11340), including completion of an Economic and Fiscal Impact Statement (Std. Form 399) for those product-chemical combinations proposed to be listed as Priority Products. At the time that DTSC proposes specific Priority Products it will have sufficient information to provide much more specific responses to the questions asked in the Std. Form 399 (e.g., private sector impacts and benefits of the regulations) than is possible for these SCP process regulations.

The April 2013 draft of the Safer Consumer Products Regulation states only that the listing of Priority Products will be subjected to public comment. It does not specifically state that an Economic Impact Statement will be included as a part of that rulemaking process.

From Section 69503.5 - Priority Products List (April 2013 version of the Proposed Safer Consumer Products Regulation)

(2) The Priority Products list shall be established and updated through rulemaking under the Administrative Procedure Act (commencing with Government Code section 11340). Except as provided in section 69503.6, the Department shall hold one or more public workshop(s) to provide an opportunity for comment on candidate product-chemical combinations prior to issuing a proposed Priority Products list.

If the proposed Safer Consumer Products Regulation is truly a “process” regulation, then all steps within that process – especially a step that is as important as an Economic Impact Statement – should be clearly identified within the regulation. This will prevent any misinterpretation of the requirements of the regulation relative to the listing of Priority Products.

Additionally, § 69503.6d. Initial Priority Products List of the April 2013 version of the proposed SCP Regulations identifies *Procedural Exceptions*.

(1) Priority Product Work Plan. Section 69503.4 does not apply to the adoption of the initial list of Priority Products.

(2) Workshops. The provisions of section 69503.5(a)(2) requiring the Department to hold one or more public workshop(s) prior to issuing the proposed Priority Products list do not apply to the initial list of Priority Products.

It would appear from this wording that the procedures previously stated in Attachment 1 are not being followed.

. . . the rulemaking process pursuant to the Administrative Procedure Act (APA) (commencing with Government Code section 11340), including completion of an Economic and Fiscal Impact Statement (Std. Form 399) for those product-chemical combinations proposed to be listed as Priority Products.

Therefore, the Initial Priority Product List must be subjected to the same rulemaking process to ensure that all appropriate and necessary steps are followed in the “process,” including the filing of an Economic Impact Statement/Std. Form 399. Otherwise there is no guarantee that the Initial Priority Products list will receive a proper evaluation and be consistent with the stated position in the Economic Impact Statement. As an alternative, DTSC could file the Economic Impact Statement on the Initial List at this time.

The Discussion in Attachment 1 is Simplistic and Replete with Misleading Notions.

The notion that the proposed SCP Regulation, once adopted will be a landmark development in the evolution of health and environmental protection has been a recurrent theme throughout its long development. It is indeed a pioneering approach, in its promise to sift through the confusing array of supposed chemical threats, isolate those consumer products posing serious threats to Californians as a result of exposure to chemical hazard, and require systematic reduction in those threats by a broad array of regulatory responses. However, DTSC begins section after section with statements implying the regulation really does very little. For example:

The proposed SCP regulations do not require the private sector to take any actions specific to any chemicals or products and these process regulations do not have any physical impacts to public health or the environment. (p. 2)

The presumption behind this extraordinary statement seems to be that nothing really happens unless and until specific products are prioritized, and that only businesses directly affected undertake an alternatives analysis. Even though such analyses are extraordinarily complex, DTSC seems to argue that their impact will be minimal. The Department argues that costs for many products will be spread over industry consortia, seemingly ignoring, for example, the enormous complications which have ensued from efforts within the European Union to establish Substance Information Exchange Fora (SIEFs) which merely facilitate consolidation of data gathering for common chemicals under the EU REACH Program.

This seems to defy the fundamental challenge of enabling cooperation in finding marketable substitutes for particular products. DTSC’s analysis fails to pay any attention to the experience of the US EPA in pursuing such industry collaborative efforts through its voluntary Design for Environment Program (DfE). Examination of the DfE program could yield valuable insights into both the circumstances necessary to induce cooperation and the sizable costs that ensue

despite that cooperation.¹

The Department's analysis also argues that because most major companies already have R&D capabilities, the competitive forces previously referred to will contain any price impacts associated with additional work, even if the ultimate outcome is a product ban:

However, many of the elements contained in an Alternatives Analysis ...are typically already undertaken by the manufacturers of products as part of research and development of new products or improvements to existing products. (p. 8)

DTSC does not expect the future priority product regulations to result in cost increases given the wide variety of products readily available at competitive prices. Product competition will provide the incentive for companies that redesign their products to keep prices for the redesigned products competitive.(p. 21)

Even if DTSC ends up banning a product as regulatory response for a product listed in its future priority product regulations, significant cost impacts are not expected because comparable safer products should be readily available at competitive prices, and because economic feasibility is one of the key findings DTSC must make before imposing a ban on a priority product for which an alternative is not selected.(p. 21)

These simplistic views anticipate that implementation of this law will result in prioritizing a series of "easy fixes" for which a simple chemical substitution will do the job, and all that is needed to bring this to pass is a regulatory spur. Nothing could be further from the truth.

Competitive forces of innovation are definitely at work in the global marketplace, and much of the innovative effort is already aimed at understanding and overcoming the hazards of chemicals. What DTSC evidently fails to understand is that the science of chemistry is about harnessing the properties of chemicals and putting those to beneficial use. Many of those properties that can and do yield benefits are the very "hazards" that can cause environmental or health risk if not properly managed. The chemical industry has advanced by managing such risk in order to deliver utility.

Rather than simple fixes involving substitution of a "non-hazardous" chemical for a hazardous one, DTSC is much more likely to encounter far more complex challenges where the "hazardous" trait is also the key to unlocking the utility sought. In such cases, they will encounter highly competitive forces already at work searching for alternatives – where the task is enormously complex and the costs in terms of both R&D and potential lost utility are far higher than they seem to assume.

Indeed, DTSC's Std. Form 399 Attachment 1 analysis does include cost projections, but primarily just for the conduct of the formal alternatives analysis, and then with perhaps overly simplistic assumptions. While it is conceivable that the simple situations in which the costs run in the thousands or tens of thousands of dollars, the more complex challenges that are key to lucrative markets are likely to dominate, and the "hundreds of thousands" of dollars which DTSC cites may well prove to be only a fraction of what will actually be spent. It would not be uncommon for millions of dollars to be invested over years pursuing such "green chemistry" objectives where major markets are at stake.

¹ See also GCA Comments, p.10, re: the role of trade association research in light of Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") guidance

Such high-stakes, high-cost challenges may well be more the norm for these regulations, yet the Department concludes:

DTSC cannot estimate the costs of the future priority product regulations to California businesses ...until specific product-chemical combinations are identified for proposed listing as Priority Products. Therefore, DTSC does not know at this time if those future regulations will result in costs to California businesses in excess of \$10 million. (p. 18)

This, of course, is tantamount to estimating the total cost of these regulations being less than \$10 million. As a serious look at the experience of programs such as EPA's DfE (see above) will likely demonstrate, this too is a grossly misleading "estimate."

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**GCA Comments on Std. Form 399 - Attachment 2 entitled,
“Economic Analysis for California’s Green Chemistry Regulations
for Safer Consumer Products”**

prepared by Matthew E. Kahn, Ph.D.

It is disappointing and most unfortunate that the Department has once again relied on the subject analysis prepared by Matthew. Kahn, Ph.D., and includes it as Attachment 2 to Std. Form 399. This study from July 2012 has been critically reviewed by various stakeholders and found to contain serious errors and emissions. A careful review of this document reveals that Kahn’s analysis is based on a biased and largely unsubstantiated perspective.

“New Rules of the Game”

Numerous times throughout the economic analysis, there is reference to the phrase “new rules of the game.” It is suggested that it is not already incumbent upon manufacturers to manufacture products that are safe for their intended use and to provide hazard information to consumers. There is a supposition that through the proposed regulation this will now be realized.

The concept of manufacturing products safe for their intended use is not a “new rule” to industry. What will be new to industry is a regulatory framework which if exercised to the full extent of its authority, allows regulators to arbitrarily choose winners and losers in the marketplace under the guise of protecting public health and/ or the environment. The proposed SCP regulation, in fact, provides many rules for manufacturers, yet provides for very few rules for the regulators who are given unfettered authority to determine what is compliant and “safer” and what is not.

On page 27 of the analysis Kahn makes the following statement:

The DTSC has anticipated that the regulated firms and the regulator may not have aligned incentives. The DTSC will hope that firms hire the best assessor in judging the firm’s options. In contrast, the firm may seek out consultants who are low cost and have a reputation for embracing the firm’s agenda.

The justification for this statement is unknown as it receives no further discussion or substantiation in the document. The statement appears to be an editorial comment and one which is inappropriate and not germane to an economic analysis of the proposed regulation. The tone and implication of the statement is further evidence of an economic analysis that was constructed on a false, biased and unsubstantiated premise that industry does not care about the safety of its products.

Closing the “Information Gap”

There is a supposition that manufacturers of both consumer product and ingredients/components know little about the composition of the products they make. The term “profit-seeking” is used as a pejorative to describe manufacturers as though having this objective is mutually exclusive with manufacturing products that are safe for their intended uses. This is an extreme generalization of the manufacturing industry that is biased, unfair and unsubstantiated.

Kahn assumes there will be economic benefit to the State of California and consumers if industries, as a result of the proposed SCP Regulations, are forced to understand the composition of their products better than they do today. This too is an unsubstantiated

assumption. Most manufacturers already have a good understanding of what is in their products and use this information to provide information to consumers for the safe handling and use of the product.

It is presumed that information from a “trusted source” will drive consumers to change their behaviors. Based on established consumer behavior, the presumption that more information about product composition will change consumer behaviors is false. As an example, despite the warning labels on products such as cigarettes and alcohol as well as the widespread awareness that some fast foods can be unhealthy under some circumstances, consumers still use and/or consume all of these products.

Furthermore, where substantial compositional and hazard information is made readily available to consumers through product and point of purchase labeling and public education programs, consumers can currently make informed, but possibly unhealthy choices.

This unsubstantiated benefit of closing the “Information Gap” is at best highly speculative and should not be included as an economic benefit.

Inclusion of Workplace Exposures in Scope of Regulation

GCA has repeatedly argued the scope of the proposed regulation encompassing workplace exposures borders on inappropriate regulatory duplication. However, Professor Kahn clearly discusses economic benefits (p. 37) that will result from this expansion of scope. The benefits are not related to exposure to consumer products while using such products in the workplace. Instead, they are focused on potential exposures during the upstream manufacture of the consumer products and no explanation of the economic benefits – subjective or otherwise – are stated. We believe this is in large part due to the fact that these benefits are already driven by existing occupational health and safety regulations that address this concern. As such, this inclusion of workplace exposures in the proposed regulation duplicates existing obligations to prevent workplace exposures to hazardous chemicals and to warn workers of the potential hazards of the products they encounter in the workplace. Furthermore, because such protections already exist, the inclusion of workplace exposures will yield no economic benefit.

Proposed Regulation Will Not Foster “Capitalist Competition”

The analysis suggests that firms that are nimble enough to identify alternative “green” products through innovation will thrive and enjoy a high rate of return on their investments. However, since intellectual property, trade secrets and confidential business information are not adequately protected by the proposed regulations the disclosure required by the proposed regulations is in fact a disincentive to innovate in California. Innovative firms will not risk disclosing their intellectual property to existing and future competitors. In fact, under the proposed regulations there is a negative incentive to being first to market with an alternative. Innovation will not occur when a company’s return on innovation is marginalized and its most guarded intellectual assets become community property.

Kahn’s economic analysis is further flawed by downplaying the likelihood that the loss of trade secrets will occur. In fact, he suggests that there is a low probability for such events. The Green Chemistry Alliance has repeatedly argued that the loss of trade secrets for affected companies seeking to innovate in California is a high probability, and we do not agree that there are substantial trade secret protections afforded by the proposed regulations.

Kahn also suggests that to reduce costs, “A group of firms who produce similar products could contribute money to a collective pot to finance the overall analysis.” Although GCA agrees that there may be a role for trade association research, DTSC should consider the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) guidance set forth in 2000² outlining concerns with industry collaboration as well as guidance for when it may be in the consumer interest to do so and under what conditions it may be acceptable. In Section 2.2, the FTC guidance outlines potential anticompetitive harms:

Competitor collaborations may harm competition and consumers by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. Such effects may arise through a variety of mechanisms. Among other things, agreements may limit independent decision making or combine the control of or financial interests in production, key assets, or decisions regarding price, output, or other competitively sensitive variables, or may otherwise reduce the participants’ ability or incentive to compete independently.

Competitor collaborations also may facilitate explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration. Such collusion may involve the relevant market in which the collaboration operates or another market in which the participants in the collaboration are actual or potential competitors.

DTSC must keep in mind that there is conflict between the purported benefits of industry collaboration on Alternative Assessments as part of compliance with the proposed regulations and the DOJ and FTC enforcement responsibilities to avoid anticompetitive company actions under various statutes.³ Any time competitors work together there exists at least some degree of antitrust risk. Principled manufacturers would seek to avoid even the appearance of such behavior given the increased enforcement activities of the DOJ in recent years.⁴

Higher Short Run Costs Justified Based on Lower Long Run Costs

The economic analysis suggests that higher short run costs are justified by lower long run costs. What it has failed to acknowledge is that companies that cannot tolerate the short run financial impact will not benefit from lower long run costs because such companies will no longer be in business. They will be forced to abandon the California market or possibly discontinue their business altogether.

Contradictory statements are made in Kahn’s Executive Summary regarding the potential impacts to California employment. It is suggested that short run costs will be minimal since most product manufacturing takes place outside of California; but in the next paragraph, it suggests that California firms will have an advantage in gaining market share. If most manufacturing takes place outside of California, it is unclear how the proposed regulations will make it possible for

² Department of Justice and Federal Trade Commission, “Antitrust Guidelines for Collaborations among Competitors”, 2000.

³ Some of the statutes enforced by the DOJ Antitrust Division include: Sherman Antitrust Act, 15 U.S.C. §§1-7; Wilson Tariff Act, 15 U.S.C. §§8 – 11; Clayton Act, 15 U.S.C. §§12 – 27; Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14; and the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201-12.

⁴ Recent DOJ Antitrust Case Filings are available for review on DOJ’s website: <http://www.justice.gov/atr/>

companies to be able to gain market share in California or Europe, as is also suggested in the economic analysis. The potential negative impact on the economy will be particularly hard felt by small captive manufactures located throughout California which may not be able to invest the resources to comply with such complicated regulation.

Social Benefits Are At Risk Based on Proposed Regulation

Section 6 of the economic analysis indicates that the essential factors in realizing the social benefits of the proposed regulations are: 1) how well DTSC prioritizes chemicals; 2) how many Priority Products DTSC identifies and how quickly they do so; 3) how motivated firms are to test their products and develop safer alternatives; and 4) whether consumers will use the new risk information to reduce exposures.

Unfortunately, none of these key factors are well conceived within the proposed regulation. There is insufficient clarity for how DTSC will prioritize chemicals and identify priority products. The author himself made the following statement when discussing those key factors relative to employment impacts:

Given the fundamental uncertainty about the details of how DTSC will implement the regulations in terms of choosing priority products and the decisions it will make in the alternatives analysis, it is impossible to offer precise predictions concerning how California jobs will be affected.

The “fundamental uncertainty” he references applies to all aspects of the purported benefits, including the social benefits. Furthermore, for the numerous reasons outlined above, the regulation creates a negative incentive that will hinder the development of safer alternatives. Finally, as detailed above, consumers do not have a track record of making “healthier” choices to reduce exposures, even when provided information about the risks of the products available to them. The economic analysis presumes that the information provided to consumers today is insufficient and that the huge volume of highly technical and complex information proposed to be provided will somehow simplify and enhance consumers’ current level of decision making. The analysis failed to provide any compelling or substantiated evidence to support this presumption. As a result, it is unlikely that the rule will result in either true societal benefits or corresponding economic benefits.

Flawed Comparisons between the Proposed Regulation and REACH

Throughout the economic analysis, Kahn draws parallels between the proposed regulations and the European REACH framework (the EU regulation Registration, Evaluation, Authorization and Restriction of Chemical Substances (EC 1907/2006) referred to herein as “REACH”). It is suggested that alternatives to existing products will be available from manufacturers who are complying with REACH which will result in negligible impacts to consumers in terms of the availability of alternatives to products that must be phased out under the proposed regulations. This demonstrates a clear lack of understanding on the part of the author concerning the REACH regulation as implemented and the proposed regulations as drafted and negates any mitigation of the economic impacts of the proposed regulations that rely upon these flawed assumptions.

Specifically, DTSC has described the costs of the SCP regulation as “minimal” in the economic impact statement, although the SCP regulation is more demanding for industry than REACH on several fronts. The EU Commission noted in its latest review in February 2013 that 1) REACH is considered by SMEs as one of the 10 most burdensome pieces of EU legislation and 2) the

costs for the first registration period (2010) have been estimated at \$2.76 billion (industry estimates are even higher considering all internal costs). Given this, how can the Department describe the economic impact of the SCP as “minimal” when it includes the potential for full, robust alternative assessments?

Additional flaws in the comparison of REACH to the SCP regulation include (but are not limited to) the following:

- Chemicals that are present in the product but do not contribute to the hazard of the product do not drive restrictions or bans of the product under REACH. If a component, impure or otherwise, is present but does not influence the outcome of the classification, it is not regulated. In Europe, 1.0% and 0.1% de minimis concentrations are applied. Conversely, the proposed regulations give the regulators the latitude to set concentration limits on a case-by-case basis which leaves open the possibility for those limits to be set lower. As such, the assumption that REACH compliance will equal compliance with the proposed regulations is incorrect as is the assumption that this somehow would mitigate the economic impact of the proposed regulations for California consumers and retailers.
- Compliance with the Substance of Very High Concern (SVHC) provisions of REACH does not automatically exclude presence of SVHCs or candidate SVHCs in consumer products. The obligation to comply (related to SVHC) in the case of the import of articles into Europe is to provide information to the consumer about the presence of the SVHC upon request if the SVHC is at levels > 0.1%. The same obligation applies to the manufacture of articles containing candidate SVHCs.
- The REACH framework allows for the demonstration of negative exposure even where a SVHC may be known to be present in a finished article. This is in stark contrast to the proposed regulations where the mere presence of a substance in a product is presumed to result in exposure and triggers an alternatives analysis.
- The analysis also includes a presumption that “drop in” alternatives are readily available from within the European market. However, polymers and articles – common components of consumer goods – are not directly regulated under REACH so they would not have the same safety standard applied to them. Within the REACH framework, there is shared responsibility for compliance where the end user is responsible for ensuring its use is consistent with the way the product has been registered. This allows for establishing safe use conditions that are communicated to end users in order to mitigate their risk of exposure to the substances in the product. The proposed regulations fail to provide any provision for this shared responsibility concept that has been incorporated into REACH which plays a significant role in mitigating human health and environmental exposure concerns.
- The exposure and risk assessments under REACH try to determine what the exposure is and what the risk is likely to be over the life cycle of the product. If that risk is found to be acceptable, there is no reason not to include hazardous substances into articles used by consumers. In this regard, REACH is a risk based approach vs. the strictly hazard-based approach that is contemplated by the proposed regulations.

GCA also reminds DTSC that the European Union filed comments critical of the proposed regulation as well as a Technical Barrier to Trade (TBT) petition with the World Trade Organization⁵

GCA Summary Comments regarding Kahn Economic Analysis

The Kahn Economic Analysis is not effective as a supporting document for DTSC's Std. Form 399 or for the proposed Safer Consumer Products regulations in general. The analysis is rife with bias, unsubstantiated supposition, and outright erroneous conclusions. We urge DTSC to strike the document in its entirety.

#

⁵ G/TBT/N/USA/727 - Draft Regulation of the Californian Department of Toxic Substances Control (DTSC) ON "SAFER CONSUMER PRODUCTS" - EU comments; available through the TBT Information Management System, <http://tbtims.wto.org/Default.aspx?Lang=0>.



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June 6, 2013

Ms. Jackie Buttle
Acting Regulations Coordinator
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

Re: Economic and Fiscal Impact Statement to the proposed Safer Consumer Products Regulations
Department Reference Number: R-2011-02
Office of Administrative Law Notice File Number: Z-2012-0717-04

Dear Ms. Buttle:

On behalf of the International Fragrance Association North America (IFRA North America) and its members, we appreciate the opportunity to comment on the Department of Toxic Substances Control's (DTSC) Economic and Fiscal Impact Statement (Statement) concerning the Safer Consumer Products Regulations.

IFRA North America is the principal trade association representing the interests of the U.S. fragrance industry. Our members create and manufacture fragrances for personal care, home care, industrial and institutional use as well as home design products, all of which are manufactured by consumer goods companies. Our Association also represents companies that source and supply individual fragrance ingredients, such as essential oils and other raw materials, which are used in perfumes and fragrance mixtures.

The California Administrative Procedure Act mandates that agencies such as DTSC perform an economic analysis when engaged in rulemaking concerning any potential economic impact on businesses and individuals in California. Consequently, if adopted, the proposed Safer Consumer Products Regulations (Regulations) would undoubtedly result in serious costs for business enterprises across California and beyond. While we appreciate DTSC's effort to examine the financial impact of the Regulations, IFRA North America believes there are several issues overlooked in the Statement which would result in significant costs for responsible entities.

IFRA North America is understanding and supportive of the intention behind the Regulations; the fragrance industry is committed to not only the protection of, but the improvement of both public health and the environment. However as currently drafted, the Regulations do so in a manner that would likely result in adverse impacts to businesses conducting commerce in the state of California. Below are a number of points we raise for consideration regarding the Economic and Fiscal Impact Statement:

Estimated Private Sector Cost Impacts

The Economic Impact Statement asserts, "The proposed SCP regulations are process regulations and do not have any significant impacts on private sector costs."

IFRA North America suggests this statement does not consider the regulatory response aspect of the Regulations. Specifically, if an ingredient or product is banned and no suitable replacement is found, it would

result in lost business throughout the supply chain and possibly the elimination of jobs for the manufacturers of the product or ingredient. Further, if a suitable replacement or alternative were to be identified, the product would need to be reformulated and consequently would become more expensive to produce. In theory, this cost would then be passed on to the consumer resulting in an increase in household expenditures for your average citizen or absorbed by the company possibly resulting in lost jobs.

IFRA North America believes the statement that the Regulations do not have any significant impacts on private sector costs to be inaccurate and urges DTSC to view this more pragmatically.

Estimated Lifetime Costs

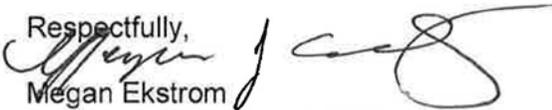
The economic impact statement suggests that the costs that businesses may incur to comply with this regulation over its lifetime is "minimal" because "the only costs businesses may incur is the cost to provide information to DTSC if the business chooses to provide such information."

We encourage DTSC to reexamine this statement while taking into consideration the regulatory response aspect for the reasons stated above. In addition, we urge DTSC to bear in mind the considerable cost of performing an alternatives analysis. While the costs of compliance with the Regulations will have short term effects, many of these will carry over in the longer term that will have to be accounted for financially by both small and large businesses.

Lack of Definitive Answers

Throughout the economic impact statement, DTSC consistently states that at this time they are unable to definitively determine the overall cost impact of the Regulations until the chemical of concern and priority product lists are released. Instead, DTSC maintains that after the Regulations are adopted, they will be better able to determine with any certainty to what degree businesses are impacted. IFRA North America has grave concerns with this approach. While we understand the difficulty in estimating specific financial effects, there appears to be a significant lack of empirical evidence to support the estimate of the overall cost of compliance. Though DTSC states that the estimated costs will not be greater than \$10 million, we feel it necessary to point out that with so many unknowns and lack of definitive answers, the cost of implementing the Regulations could far and above exceed \$10 million. Without concrete answers, and no intention of resolving these until after the regulations are adopted, IFRA North America is left to believe that the Regulations continue to fall short in achieving the creation of a meaningful and practical regulatory environment in the state of California.

IFRA North America again thanks DTSC for the opportunity to submit comments on the Economic and Fiscal Impact Statement and remains fully supportive of the principles behind the Regulations. However we would be remiss if we did not suggest that more thoughtful and pragmatic actions are necessary. We stand ready and willing to assist DTSC in achieving this and look forward to working with the Department in the near future.

Respectfully,

Megan Ekstrom
Manager, Government Affairs

Comments on ECONOMIC AND FISCAL IMPACT STATEMENT (Safer Consumer Products Regulation)

- JEITA (Japan Electronics and Information Technology Industries Association)
- CIAJ (Communications and Information network Association of Japan)
- JBMIA (Japan Business Machine and Information System Industries Association)
- JEMA (Japan Electrical Manufacturers' Association)

Page	Section	Comments	Proposed change
	Overall Comment	<p>In the Economic and Fiscal Impact Statement, there are no quantified Cost/Benefit, and concluded as cost is Minimal, benefit is Unknowable.</p> <p>For cost estimation, minimal is not appropriate because the SCPR covers almost every consumer products and have strong influence to them, and cost of investigation on ingredients for Priority Product Notification or cost of Alternative Analysis which practically corresponds to Research and Development practice will be huge, and total cost for whole industry will easily be reached to astronomical number, well exceeds \$10 million. Therefore, cost cannot be “Minimal”.</p> <p>Also “Unknown” benefit is understandable that SCPR do not designate regulated substance prior to its promulgation and risk to be eliminated is not identified, as a consequence, benefit/cost analysis cannot be implemented and no one can justify the rationality of the regulation.</p> <p>Revision will be required with well validated and rationally quantified cost/benefit estimation before SCPR will be promulgated.</p>	

1	B. Estimated cost	<p>“Total statewide dollar cost that businesses and individuals may incur to comply with the regulation over its lifetime” is estimated as “Minimal” will be inappropriate. That will be “Possibly extremely huge”.</p> <p>Rational for the estimation:</p> <p>1) Priority Product Notification</p> <p>In case of a consumer product which consist of 1,000 parts, assume that investigation cost per 1 substance will be \$5 and 5 suppliers will be participated in the whole supply chain, the cost will be $\\$5 \times 1000 \times 5 = \\$25,000$ /substance/product. Total cost will be multiplied by number of substances and number of affected products on the market, which will be some hundreds of thousands, possibly deriving astronomical number.</p> <p>2) Alternative Analysis</p> <p>AA is practically R&D of the products itself and heart of the business of manufacturing. Research of alternative, evaluation of functionality including deterioration/environmental durability and safety evaluation will need huge cost and will time consuming. In addition, the result of the alteration of the substance will affect product performance, and failure of achieving required quality will damage sustainability of the business, as a result, will cause loss of employment and tax revenue. AA can be extremely costly.</p>	<p>“Total statewide dollar cost that businesses and individuals may incur to comply with the regulation over its lifetime” is estimated as “Minimal” will be inappropriate. That will be “Possibly extremely huge”.</p>
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Dear DTSC,

While reading Attachment 2, "[Economic Analysis of California's Green Chemistry Regulations for Safer Consumer Products](#)" by Matthew E. Kahn, I was struck by a particular passage. In section 3.6, "Regulatory response costs associated with implementing an alternative product", Professor Kahn gives the example of

Substituting one chemical input for a safer chemical input. Alternatives that involve only switching of one chemical for another are likely to be among the least complex and perhaps the cheapest. For example, in the production of electronics equipment manufacturers could substitute tin-copper solder for tin-lead solder.

Substitution is *almost never* simple or cheap. And this is certainly a very poor example of "switching of one chemical for another" that would be "among the least complex and perhaps the cheapest."

To be specific, the most common substitution the electronics industry made¹, in this case, was to replace the lead content (37% by volume) in standard tin-lead eutectic solder with a combination of three other metals: tin, silver, and copper (though not all substitutions use similar amounts of tin, silver, and copper in their specific alloys; and in some cases other metals are used in addition to, or in place of some of, these metals). It is not a one-for-one replacement, nor is it a "drop-in" replacement.

Tin/lead eutectic solder melts at 183°C. Assemblies that use this solder require an oven temperature of approximately 230°C to guarantee adequate and reliable melting and reflow of the solder alloy paste used to attach electronic components to printed circuit boards. This is the solder the electronics industry standardized on decades ago and has been using ever since. It is extremely well-understood, so well understood in fact that the industry had forgotten problems that the tin/lead alloy solved all those decades ago². On the other hand, tin/silver/copper (SAC) alloys melt at around 220°C. Oven temperatures must now be on the order of 260°C in order to achieve equivalently adequate reflow.

While the casual observer may simply say "well just turn up the oven temperature!" as though the sophisticated assembly thermal chambers used to ensure reliable and durable electrical attachment of parts to boards were little more than really large home ovens, the actual approach to dealing with a seemingly simple change in solder alloys was not nearly so straightforward.

To start with, the alloys are comprised of different elements; therefore they have [different technical properties](#) – different tensile strengths, different shear strengths, different wettability characteristics, different fatigue strengths, etc. They also have different optical properties – reflowed SAC alloy reflectivity is different from reflowed tin/lead alloy (depending on whether the reflow was done in a standard atmosphere or a 100% nitrogen – or inert – atmosphere). Since these solders become part of a system which is subject to many different types of stresses over the life of a product (including during manufacturing/assembly and use), the different properties must be [understood and characterized](#) under a wide variety of circumstances based, often, on the specifics of the application of the product, the specific devices being soldered to a specific board, and the expectations of the customer.

¹ In order to comply with the European Union's directive 2002/95/EC, restriction of the use of certain hazardous substances in electrical and electronic equipment. The provisions restricting lead in solders for most electrical and electronic equipment came into force on July 1, 2006.

² See below, on tin whiskers

This takes time and costs money.

Simple appearance differences also need to be taken into consideration. Boards inspected after soldering with the SAC alloy solders were initially rejected when the solder joints looked dull as opposed to shiny, since that was a property that indicated a poor solder joint using tin/lead alloy solder. However, it is fine when using SAC alloy solder. This required characterization of the joint's appearance, understanding of whether or not visual indicators could continue to be used to identify bad or suspect solder joints, and updates to the industry standard, *IPC-A-610 Acceptability of Electronics Assemblies*.

So what about just turning up the temperature? Unfortunately for electronics assemblers (and fortunately for the business prospects of assembly oven manufacturers), most ovens in use were not designed to achieve the 260°C necessary to ensure adequate reflow of SAC alloy. This resulted in widespread need to replace assembly equipment around the world with new equipment. Again, this isn't a simple drop-in operation. By virtue of the higher temperature, the ovens draw more power. They may also have a different footprint. Thus infrastructure and layout of many assembly facilities had to be addressed in order to enable use of the new ovens.

This also cost lots and lots of money...and time ... for every manufacturer of electronic products that use printed circuit boards (essentially all of them).

Another aspect that came to light during this process was that electronic components that are encapsulated in plastic (thermoset epoxy resin), such as integrated circuits, become very sensitive to the increased temperature in a number of ways. These are very sophisticated devices – and the plastic mold compounds are themselves very sophisticated and complex – with a multitude of materials and layers, all of which are suddenly subjected to greater thermal stresses than they were designed to withstand. An interesting issue that became a huge problem was that the thermoset plastic absorbs moisture and this moisture, when subject to the increased temperature of the new ovens, boils and expands rapidly. Sometimes this would crack the packages, causing either immediate or, worse, long-term functional failures. While this phenomenon was already well-understood in the industry, components of all sorts needed to be recharacterized since they were assessed for use in a 230°C environment; many dropped a level or more³ once assessed for use in a 260°C environment. This required extensive changes to handling procedures in production environments.

This all cost time and money.

In addition, there were exemptions and exclusions from the RoHS requirement that meant that not all electrical and electronic equipment needed to switch over to SAC alloy; network infrastructure and similar products, medical devices, monitoring and control equipment, etc. could all continue to use tin/lead solder (as could anything that ships to many places besides the European Union). So both captive and contract manufacturers needed to decide how they would align their capabilities to the bifurcated demand. Many assemblers decided to replace some of their tin/lead lines with SAC lines, meaning that they would produce products with both types of solder. But this raises risks, particularly of inventory control and mixing of RoHS-compliant with non-RoHS-compliant parts, or errors like running

³³ See J-STD-020, Moisture/Reflow Sensitivity Classification for Nonhermetic Solid State Surface Mount Devices

product on a non-compliant line when they should be run on a compliant line. So schemes for inventory control and segregation of lines had to be put in place. And mistakes were made.

These, too, cost time and money.

So what did industry forget? Industry forgot about [tin whiskers](#), electrically conductive growths that form from surfaces where tin is used as a final finish. A relatively small percentage of lead puts a stop to their growth. But they reappeared and began to wreak havoc once lead was removed from solder, and it came as a surprise. The industry had to learn all over again what they were, how and why they came into being (still unclear – see the NASA link above), and how to prevent them.

This cost time and money.

In 2008, Technology Forecasters published the “Cost of RoHS” study that I was a significant participant in the development and analysis of. The Auto Alliance put that into the record on [page 47 of the most recent set of comments on SCP](#). While we did not ask questions that would tell us how expensive this specific change was to the electronics industry, and while the RoHS directive required the industry to change perhaps 60 to 80 different substances⁴ out of hundreds or even thousands of applications, we did find that compliance to RoHS cost the electronics industry on the order of \$32.7B (plus around 11%/year to maintain compliance).

As this particular change, of solder, impacted a huge number of manufacturers across a broad swath of the industry and had such extensive implications (I have only indicated some of them above; there were more – I haven’t even touched on quality and reliability assessment costs to manufacturers, for instance, or the impact of stress analysis on multilayer printed circuit boards with more than 8 layers), I have often said since (and it’s probably in the record at one or more Green Ribbon Science Panel meetings) that a huge chunk of this cost was related to simply getting lead out of solder. My estimate – based on knowledge of the industry as well as extensive experience with this and other substitutions and characterization projects I’ve been involved in – is that between \$15B and \$20B of the total cost of compliance is related to this change.

Therefore, I take issue with Matthew Kahn’s assessment of this change-out as “simple” or “cheap”. Requiring a change to a fundamental technical process across nearly the entire breadth of an enormous (\$3T/year) industry is a substantial and significant undertaking. Compliance ultimately cost the industry the equivalent of a quarter of an entire year’s research and development budget.

⁴ RoHS covers 6 substance categories, which expands to around 80 to 100 unique substances (“Lead and Lead Compounds” includes elemental lead, a variety of lead oxides, and so on; same for all the metals. There are perhaps 6-10 different congeners of PBB and PBDE that are also applicable, maybe more), and every single application of those substances...and there are many. SCP, by contrast, will focus on only one substance and one application at a time.

The bottom line is that, while I agree that “Economic and Fiscal Impact” costs to industry cannot be described today for SCP as DTSC has indicated in Form 399, once a Product/Chemical combination is identified as a Priority Product, there can be many foreseeable and unforeseeable costs and risks in any substitution, even “simple” and “cheap” ones. It will be at this time that costs should be assessed, but this must be done by people with deep knowledge of industry, manufacturing, and the impact of material change for meaningful numbers to be arrived at.

Michael Kirschner
Member, Green Ribbon Science Panel
June 6, 2013
415-342-3217



CORPORATE ENVIRONMENTAL EXCELLENCE

June 6, 2013

Ms. Jackie Buttle
Acting Regulations Coordinator
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

Via Mail and Email: gcregs@dtsc.ca.gov

RE: DTSC Reference Number R-2011-02, OAL File Number Z-2012-0717-04

Dear Ms. Buttle:

On behalf of Koch Industries, Inc. (KII) and its affiliate companies, we appreciate this opportunity to comment on DTSC's Economic and Fiscal Impact Statement (Std. Form 399) evaluating the Safer Consumer Products rulemaking, R-2011-02 ("Form 399"). KII owns a diverse group of companies involved in refining and chemicals; process and pollution control equipment and technologies; minerals; fertilizers; polymers and fibers; commodity trading and services; and forest and consumer products. KII companies have a presence in nearly 60 countries with approximately 70,000 employees – over 1,400 of which are in California. KII has been working with the Green Chemistry Alliance (GCA) and several of our trade associations. KII supports the comments submitted on behalf of GCA to DTSC on this important issue.

The GCA Comments outline the concerns with DTSC's Economic Impact Analysis Std. Form 399, and provide specific citations and examples to help DTSC understand why the Economic Impacts Analysis is inadequate. Overall, Form 399, including the two attachments, fails to fully evaluate the economic impacts of the Proposed Regulations and as such, does not present a meaningful assessment of the true costs that will be imposed on California, consumers, and the regulated community.

KII agrees with GCA that due to the lack of substantive information, DTSC has in essence failed to provide the required Std. Form 399 - Economic and Fiscal Impact Statement for proposed regulations. The form itself has no meaningful data, and DTSC appears to have chosen instead to rely on the documents attached to the form: (1) Attachment 1: "*Attachment to the Economic and Fiscal Impact Statement (Std. Form 399)*"; and (2) "*Economic Analysis for California's Green Chemistry Regulations for Safer Consumer Products*" prepared by Matthew E. Kahn for the economic analysis.

KII supports and incorporates by reference the detailed GCA Comments submitted in response to DTSC's Economic and Fiscal Impact Statement. KII encourages DTSC to continue to work with industry to evaluate the true costs of the Safer Consumer Products Regulation to California. Should you have any questions, KII would welcome the opportunity to provide further clarification. Please contact our California representative, Dawn Koepke (dkoepke@mchughgr.com, 916-930-1993) for further information.

Sincerely,

A handwritten signature in cursive script that reads 'Anne Monine'.

Anne Monine
Director, KII Environmental Excellence

Attachment 1

Specific Comments on Attachment 1 “Attachment to the Economic and Fiscal Impact Statement (Std. Form 399).”

DTSC claims throughout the Attachment to Std. Form 399 that “DTSC cannot estimate the costs to business of providing requested information or reports until implementation is underway.” However, DTSC does not provide conclusive evidence that it has made any good faith attempts to determine the costs to business, citizens or the government in California of the proposed regulations.

In addition to the detailed comments prepared by GCA, KII wishes to highlight DTSC’s failure to attempt to estimate the economic impacts resulting from the lack of adequate protections for confidential and proprietary information in the proposed regulations. Industry has repeatedly commented on the lack of adequate protections for confidential and proprietary information in each version of the proposed regulation. DTSC is clearly aware of this major flaw in the proposed regulation but has failed to acknowledge or act on these comments. The potential loss of Confidential Business Information (CBI) as a result of the regulation represents a major negative impact to both the regulated entities and the economy of California. DTSC has failed to make any attempt to quantify this negative economic impact despite the availability of information that would make such a good faith effort possible.

Background on Confidential Business Information

Competitive intelligence refers to the gathering of information about another company through legal and ethical means. This is in contrast to industrial espionage referring to obtaining another company’s trade secrets or other confidential information without permission and by illegal means. The lines between these two types of activities are not always clear and were examined in the September 2011 *Business Communication Quarterly* article “The Rhetoric of Industrial Espionage: The Case of Starwood v. Hilton”¹. Although that situation involved information used when employees left one company and joined another, it is illustrative of the real world efforts of corporations obtaining information through whatever means possible.

Potential Economic Impacts of Failure to Protect Confidential Information

If California ignores the concerns of industry about the lack of adequate CBI protections in the Proposed Regulations, California will become a new source and repository for information that competitors will use to obtain previously unobtainable competitive intelligence. DTSC will be directly responsible for causing a competitive loss due to the lack of adequate protections for trade secrets and confidential business information, as this information will be readily and legally available through DTSC. The cost of this loss to California and US companies will include the loss of resources invested in innovation, loss of market advantages, and increased access by competitors to competitive intelligence. The threat and exposure to companies of this type of disclosure is real. A 2011 Iowa Law Review Article² outlines some of the recent activity in this area, the concerns to companies, and why governments should not ignore these legitimate concerns. As manufacturers have continually suggested to DTSC, finding a balance between disclosing information necessary for compliance and protecting proprietary information should be in both the government’s and industry’s best interests. KII urges DTSC to remember, as mentioned in the law review article, that for trade secrets – “once it is revealed, it loses all of its value, the loss is irreparable, and the company may not be made whole by monetary damages.”³ This does not excuse DTSC from

¹ *Business Communication Quarterly*, Volume 74, Number 3, September 2011 289-297, DOI: 10.1177/1080569911413811.

² “Striking a Balance: When Should Trade-Secret Law Shield Disclosures to the Government?” Elizabeth A. Rowe, Iowa Law Review Volume 96, 791 – 835 (2011).

³ *Id.*, at 800-801, citing *Wearly v. FTC*, 462 F. Supp. 589, 599–600 (D.N.J. 1978), *vacated*, 616 F.2d 662, 663 (3d Cir. 1980) (holding that the matter was not “ripe” for judicial review).

evaluating the economic impact of failing to provide adequate protections. Instead, DTSC should recognize the choice it is making and evaluate the costs associated with the lack of adequate protections.

As to the potential costs involved with the release of confidential information, key findings from an InfoWatch Research Center report "Global Data Leakages & Insider Threat Report, 2012"⁴, included the following points:

- In 2012, 934 confidential information leaks were recorded and reported in the media worldwide. This is a 16% increase compared with the previous year.
- According to official media reports, direct losses suffered by credit and financial institutions as a result of leaks during the first half of 2012 amounted to slightly more than \$37.8 million.
- More than 1.8 billion records were compromised, including those containing financial and personally identifiable data.
- The proportion of accidental leaks is steadily decreasing, representing 38% of the total.
- Government and municipal organizations accounted for a higher share of leaks at 29% (9% higher than in 2011).
- The majority of leaks – 89.4% – involved personal data.
- The most common channel for data leaks was hard copy documents (22.3%).

Conclusion

This information shows that it is possible for DTSC to understand the economic impacts of the regulation that will be created by the inadequate protections for confidential business information required to be submitted. This is just one of several aspects of the proposed regulation that DTSC could have, and should have, evaluated from an economic perspective using available information.

⁴ A copy of the InfoWatch "Global Data Leakage Report, 2012" is currently available on the following InfoWatch website: <http://infowatch.com/analytics/reports/2674>

Attachment 2

Specific Comments on “*Economic Analysis for California’s Green Chemistry Regulations for Safer Consumer Products*” prepared by Matthew E. Kahn

It is unfortunate that DTSC continues to rely on Mr. Kahn’s analysis included in Attachment 2. This July 1, 2012 study was previously reviewed by various stakeholders many of whom found serious errors and omissions in that study. A careful review of this document reveals that Mr. Kahn’s analysis is based on a biased and largely unsubstantiated perspective. A reiteration of the analysis of Mr. Kahn’s document follows which was submitted in July when it was first provided to the stakeholders for comment.

Proposed Regulation Will Not Foster “Capitalist Competition”

The economic analysis is further flawed by downplaying the likelihood that the loss of trade secrets will occur by suggesting it is a low probability event. There are significant information disclosure requirements that can include highly competitive information about manufacturing processes and product composition. Information that must be disclosed will do little to benefit the public and much to benefit existing and future competitors. Intellectual property protection is a real business concern, not a hypothetical one. Intellectual property is highly competitive, and intellectual property disputes are vigorously litigated as is illustrated by the recent *Apple vs. Samsung* trial. See, *Apple Inc. v. Samsung Electronics Co. Ltd.*, 11-cv-01846, U.S. District Court, Northern District of California (San Jose). Transparency must be confined only to that information essential to address the public safety and environmental impacts of the products and balanced with protection of confidential business information to prevent the loss of IP, including trade secrets, and avoid stifling innovation. We agree with the author’s assertion that loss of trade secret information would be very costly for firms. However, we do not agree it is a low probability event. Nor do we agree that there are substantial trade secret protections afforded by the Proposed Regulations.

In a competitive market environment, competitors will not be interested in forming “clubs” or trade associations to identify alternatives particularly in markets that are highly competitive and that depend on maintaining their trade secrets to be competitive. The suggestion that this is one way the industry can mitigate its short run vs. long run costs to comply is not realistic. It is highly unlikely that competitors could form consortiums to develop alternative products without being perceived as engaging in anti-trust activities. The Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) set forth guidance in 2000⁵ outlining concerns with industry collaboration as well as guidance for when it may be in the consumer interest to do so and under what conditions it may be acceptable. In Section 2.2, the guidance outlines potential anticompetitive harms:

Competitor collaborations may harm competition and consumers by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. Such effects may arise through a variety of mechanisms. Among other things, agreements may limit independent decision making or combine the control of or financial interests in production, key assets, or decisions regarding price, output, or other competitively sensitive variables, or may otherwise reduce the participants’ ability or incentive to compete independently.

Competitor collaborations also may facilitate explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration. Such collusion may involve the relevant market in which the collaboration operates or another market in which the participants in the collaboration are actual or potential competitors.

⁵ Department of Justice and Federal Trade Commission, “Antitrust Guidelines for Collaborations among Competitors”, 2000.

DTSC must keep in mind that there is conflict between the purported benefits of industry collaboration on Alternative Assessments as part of compliance with the Proposed Regulations and the DOJ and FTC enforcement responsibilities to avoid anticompetitive company actions under various statutes⁶. Any time that competitors work together there exists at least some degree of antitrust risk. Principled manufacturers would seek to avoid even the appearance of such behavior given the increased enforcement activities of the DOJ in recent years⁷.

It is suggested that regulatory responses to fund green chemistry grants will be a way to provide funding to smaller firms to conduct research and development of “green” alternatives. This is yet another provision within the regulation that is counterintuitive to the premise that this will somehow foster market based competition. Those firms who preferentially receive government funding will have an unfair and non-market based advantage over those firms who do not. Furthermore, it suggests this regulatory response will be a way that the regulation will be able to foster innovation. This provides yet another mechanism for regulators to pick the winners and losers.

Flawed Comparisons Between the Proposed Regulation and REACH

The GCA Comments outline specific flaws in the analysis of comparisons between the proposed DTSC regulations and the EU REACH directive requirements. Throughout the economic analysis, many comparisons are made between the Proposed Regulation and REACH. The Executive Summary suggests there is empirical support for the claim that the time allowed for firms to adapt to the new regulation provides for lower regulatory compliance costs. However, the empirical support for this is not discussed elsewhere in the analysis. The author failed to provide any examples of instances where firms have innovated in ways that lead to a lower cost of compliance through the introduction of alternative products. Additionally, so few chemicals have been through the SVHC process thus far that could have resulted in direct impacts to consumer products that this appears to be a speculative extrapolation rather than a fact-based hypothesis.

For example, in the case of a product that must be phased out, the manufacturer of the incumbent product will lose profit and business while the manufacturer making the replacement will win. The user will switch from one to the other – if fortunate, at same cost and performance. The potential benefit to society will be if that change reduces mortality, illness, environmental impacts, etc. However, there is no lower compliance cost in this instance. In fact, compliance costs will rise including the time that will be spent managing supply chain communications whether chemicals of concern are present in products or not. Onerous alternative assessments that are not currently required will drive added compliance costs. Identifying and implementing alternatives for hazardous substances that do not present an actual risk in a finished product is a waste of resources rather than a saving of compliance costs.

⁶ Some of the statutes enforced by the DOJ Antitrust Division include: Sherman Antitrust Act, 15 U.S.C. §§1-7; Wilson Tariff Act, 15 U.S.C. §§8 – 11; Clayton Act, 15 U.S.C. §§12 – 27; Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14; and the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201-12.

⁷ Recent DOJ Antitrust Case Filings are available for review on DOJ’s website: <http://www.justice.gov/atr/>



RUBBER
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June 6, 2013

Ms. Jackie Buttle
Acting Regulations Coordinator
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

Re: The Economic and Fiscal Impact Statement based on the April 10, 2013 Safer Consumer Products Regulations

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 April 2013 Safer Consumer Products (SCP) Proposed Regulations because they manufacture tires, a consumer product, available for sale or placed into the stream of commerce in the state of California (CA). We thank the Department of Toxic Substances Control (DTSC) for your consideration of these comments on Economic and Fiscal Impact Statement based on the April 10, 2013 Safer Consumer Products Regulations.

Under the CA Administrative Procedures Act (APA), DTSC is required to “assess the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance requirements.” CAL. Code Regs. Tit. 2 § 11346.3. The economic and fiscal impact statement for the April 2013 SCP regulations does not address certain cost implications for businesses and underestimates the overall costs of the regulations. RMA recommends DTSC revise the economic and fiscal impact statement to provide other agencies in CA and the public additional economic information to “determine whether the regulatory proposal is an efficient and effective means of implementing the policy decisions in the least burdensome manner,” as required under the CA APA. Id.

II. Economic and Fiscal Impact Statement

A. Estimated Private Sector Cost Impacts

RMA recommends that Attachment 1 for the economic and fiscal impact statement be revised to indicate that the SCP regulations have the potential to cause significant impacts on

private sector costs. The economic and fiscal impact statement specifies that the SCP regulations are “process regulations and do not have any significant impacts on private sector costs.” (Page 2 of 22, Attachment 1). Additionally, the Economic and Fiscal Impact Statement indicates that there are no Federal regulations that are comparable to the SCP regulations. Thus, the requirements under the SCP regulation are new regulations that require businesses to undergo Alternatives Analysis (AA) to identify chemical substitutes if their product is listed as a priority product.

DTSC argues that “many of the elements contained in an Alternatives Analysis...are typically already undertaken by the manufacturers of products as part of research and development of new products or improvements to existing products.” (Page 8 of 22, Attachment 1). RMA disagrees that the elements contained in an AA are typically conducted by manufacturers. Changes in tire manufacturing are driven by safety and performance standards established by Federal law.

For example, tire manufacturers must self-certify that tires sold in the U.S. meet Federal Motor Vehicle Safety Standards (FMVSS) as established by The National Highway Traffic Safety Administration (NHTSA). The chemical ingredients in tires are present because they impart critical functions to meet NHTSA FMVSS 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 and other safety-related features. Any change in the composition of tires typically requires feasibility studies and lengthy, multiple tests to ensure that the tires continue to meet FMVSS.

The SCP regulation applies to all consumer products sold in CA and for many industries, requires for the first time that an AA be conducted if the product is classified as a priority product that contains a chemical of concern. This novel approach has the potential to significantly increase the cost of manufacturing the product for industries that do not currently incorporate AA into their product design. Again, RMA recommends that the economic and fiscal impact statement reflect the potential for the SCP regulation to increase cost for industries that do not currently conduct AA as part of their product design.

B. Cost to generate data in response to a request by DTSC under the SCP regulation

RMA recommends that DTSC revise the economic impact statement to indicate that generating new data in response to a request by DTSC under the SCP regulations has the potential to increase costs for manufacturers. As part of the estimated costs the private sector may incur, DTSC predicts that the SCP regulations will not increase costs for the private sector to generate data in response to the regulation.

The SCP regulations provide DTSC the authority “to request one or more chemical or product manufacturers, importers, assemblers, and/or retailers to provide existing information or to generate new information based on a schedule developed by DTSC. Businesses that would receive a request from DTSC for information are not required by the regulations to provide the information. DTSC may request the information from businesses in CA and outside of CA

including businesses located out of the country.” (Page 3 of 22, Attachment 1). DTSC further specifies that if a business already has the information that DTSC is requesting, then the costs to respond to the request are expected to be insignificant and would only include the costs of collecting the information and sending it DTSC.” (Page 6 of 22, Attachment 1). Additionally, for businesses that “generate new data in response to information requested by DTSC, the cost to generate the data is expected to be minimal because businesses are not required to provide the information and would not do so if the costs were too high.” Id.

Generating data in anticipation or in response to regulations carries cost for the business generating the data. DTSC claims that if a business already has the information or data that is requested by DTSC under the SCP regulations, the cost to provide the information would be insignificant for businesses. We disagree; the timing of when data is generated does not negate the cost to manufacturers to generate the data in the first place. Additionally, DTSC claims that the cost to generate new data in response to the regulation will be minimal because businesses are not required to provide data to DTSC. However, failure to provide data requested by DTSC under the SCP regulations may have regulatory implications. For example, if DTSC requests data regarding whether the chemical of concern in the priority product is essential to the products performance and a business fails to provide this data, DTSC may pursue regulatory requirements to ban the chemical in the product or limit the use of the chemical in the product. Banning or limiting the use of a chemical in a priority product will have an economic impact on the manufacturers of the product. RMA recommends that DTSC revise the economic impact statement to specify that the SCP regulations have, at a minimum, the potential to increase cost to businesses. Additionally, we recommend that DTSC revise the economic impact statement to indicate that generating data in anticipation or in response to the SCP regulation has the potential to increase costs to businesses that must comply with these regulations.

III. Major Regulation Classification

RMA recommends that DTSC classify the SCP regulations as major regulations and specify that the cost to comply with regulation will exceed \$10 million dollars. DTSC does not classify the SCP regulations as “major regulations” because they indicate that the cost to CA business enterprises will not exceed \$10 million dollars. (Page 18 of 22, Attachment 1). According to DTSC the “SCP regulations set forth the processes that businesses, who have a product, listed in a future priority product regulation, must use to test products for chemicals of concern; conduct alternatives analyses; implement the selected alternative, if any, which could include product redesign, reformulation or substitution of a different product, and comply with any regulatory responses imposed by DTSC.” (Page 18 of 22, Attachment 1).

The regulatory impact analysis for “major regulations” under the CA Administrative Procedures Act (APA) must include an analysis of the following: “(A) The creation or elimination of jobs within the state; (B) The creation of new businesses or the elimination of existing businesses within the state; (C) The competitive advantages or disadvantages for businesses currently doing business within the state; (D) The increase or decrease of investment in the State; (E) The incentives for innovation in products, materials, or processes; and (F) The benefits of the regulations, including, but not limited to, benefits to the health, safety, and welfare of California residents, worker safety, and the state’s environment and quality of life,

among any other benefits identified by the agency.” CAL. Code Regs. Tit. 2 § 11346.2(c). Under the CA APA major regulations require DTSC to provide an analysis of the competitive advantage or disadvantages for businesses doing business in CA, the increase or decrease of investment in the state, and the benefits of the regulations. This analysis, which is required for all major regulations, is not included in the economic and fiscal impact statement for the SCP regulations.

We recommend that DTSC revise the economic and fiscal impact statement to specify that the SCP regulations will impose costs for regulated businesses; although the exact dollar amount cannot be quantified at this time. The SCP regulations will increase costs for businesses because as DTSC indicates, there are currently no other US regulations that carry the same requirements as the SCP regulation. (Economic and Fiscal Impact Statement cont. (STD. 399, Rev. 12/2008). Additionally, the SCP regulations apply broadly to all consumer products including products manufactured in CA, outside of CA and outside of the US. RMA recommends that DTSC revise the economic and fiscal impact statement to specify that the SCP regulations are major regulations and will cost CA businesses more than \$10 million dollars.

A. Impacts that can/will be more specifically identified and evaluated as part of future APA rulemaking processes for the proposed listing of product-chemical combinations as Priority Products. (Page 7 of 22, Attachment 1).

RMA recommends that DTSC revise the economic impact statement to specify that AA for priority products that must comply with other State and Federal safety regulations, could cost hundreds of thousands of dollars or more. The economic and fiscal impact statement indicates that, “a simple single chemical hazard analysis to look for a substitute chemical could cost as little as \$2,000 to \$3,000. A more comprehensive AA involving the review of existing data without testing could cost in the tens of thousands of dollars.” (Page 8 or 22, Attachment 1).

Conducting an AA for consumer products that are required to meet State or Federal safety standards will involve a more comprehensive AA. For example, 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 and other safety-related components. NHTSA requires that all tire manufacturers self-certify that tires sold in the U.S. meet 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. This testing will exceed the estimated \$2,000 to \$3,000 DTSC estimates as the cost for a simple single chemical substitute. RMA recommends that the Economic and Fiscal Impact Statement be revised to specify that for priority products that must meet other State or Federal safety and performance standards, the cost to complete an AA will likely cost tens of thousands of dollars or more.

VI. Economic Analysis of California’s Green Chemistry Regulations for Safer Consumer Products (Attachment 2)

DTSC has provided notice and request comment on Attachment 2, “Economic Analysis of California’s Green Chemistry Regulations for Safer Consumer Products.” However, this

document is not referenced on the Economic and Fiscal Impact Statement (STD. 399. 12/2008). If this document is included in the Economic and Fiscal Impact analysis for the CA Safer Consumer Products Regulation, RMA recommends DTSC revise the Economic and Fiscal Impact Statement (STD. 399. 12/2008) form to reference and incorporate Attachment 2 into the analysis.

A. Impact on Retailers

Attachment 2 for the economic and fiscal impact statement includes an analysis of the impacts that the SCP regulations will have on retailers. This analysis fails to consider manufacturers who have direct retail stores. Attachment 2 indicates that “retailers of products are unlikely to be significantly affected by the SCP regulations because they can substitute and sell products that have not been regulated by the DTSC.” (Page 4 of 44, Attachment 2). The analysis also specifies that when a product line is banned, “retailers can import products designed in other countries such as Europe that are likely to meet DTSC’s regulatory requirements.” *Id.* Additionally, the analysis suggests that retailers have the option to stop selling products regulated under the SCP regulations and sell other products that do not face DTSC regulation, which will protect retailers from lost profits due to the SCP regulations. *Id.*

This analysis fails to consider manufacturers that have direct retail operations. Several RMA members have direct retail stores. Direct retail operations do not have the option to substitute and sell products that are not regulated by the SCP regulations. These retailers may face lost profits if DTSC seeks regulatory action to ban the use of a chemical in a product or requires labeling for the use of the chemical in the product. We recommend that Attachment 2 include consideration of the impact the SCP regulations will have on direct retail operations that are unable to sell substitute products.

B. Firm Response Times for Product Testing and Alternatives Adoption (6.2, Page 32 of 44, Attachment 2)

RMA recommends that section 6.2 in Attachment 2, “Firm Response Times for Product Testing and Alternatives Adoption,” be revised to include consideration of additional time needed to comply with the SCP regulations for products that must meet other State and Federal safety regulations. Attachment 2 states that the SCP regulations “will offer larger social benefits if firms quickly take action to 1) release information on their products and 2) reduce the possible chemical exposure associated with purchases of priority products.” (Page 32 of 44, Attachment 2). This analysis also states that the “benefits of these regulations will be larger if this transition to “greener” products can take place more quickly.” (Page 32 of 44, Attachment 2). However, for products that must meet safety and performance standards established by other State and Federal laws, the benefits of these regulations may decrease if the transition to “greener” products takes place quickly and there is not enough time to test products as required by other State and Federal laws.

For example, changes in tire composition could affect critical attributes such as stopping distance, tire wear, tire fuel efficiency and other safety-related components. NHTSA requires that all tire manufacturers self-certify that tires sold in the U.S. meet 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. Again, we recommend that section 6.2 in Attachment 2, specify that for some consumer products, the time to transition to greener products must be balanced with the time needed to conduct safety and performance testing as required by other State and Federal laws.

C. Product Labeling Requirements

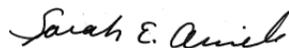
RMA recommends that section 3.5 in Attachment 2 be revised to specify that labeling requirements can be costly for products that do not have packaging. Section 3.5 in Attachment 2 states that DTSC may require product labeling for products that are submitted to DTSC for a regulatory response. This section further states that, “while changing the product packaging to include the labeling would be low cost, it would result in additional consumers being aware of the product’s potentially harmful nature than when the product was listed on the DTSC web site, and could result in additional loss of sales.” (Page 16 of 44, Attachment 2). The analysis of product labels in Attachment 2 fails to distinguish the labeling costs for products that have packaging from products that do not have packaging. For consumer products that have packaging, the cost to add a label may be low. However, for consumer products that have no packaging, such as tires, the cost to label the product can be substantial.

In 2009 NHTSA introduced the Replacement Tire Consumer Information Program proposed rule. This proposed rulemaking contained product labeling requirements for tires. In response to the product labeling requirements contained in the proposed rule, RMA conducted an economic analysis of the cost to develop, print and affix the proposed labels to all in-scope passenger car replacement tires. The total annualized cost for RMA members was \$14,665,420, to develop, print and affix the labels to passenger car replacement tires. Product labeling requirements for products without packaging, such as tires, are costly and an analysis of these costs should be included in Attachment 2.

VII. Conclusion

RMA again thanks the California Department of Toxic Substances Control for this opportunity to comment on the Economic and Fiscal Impact Statement based on the April 10, 2013 Safer Consumer Products Regulations. Please contact me at (202) 682-4836 if you have questions or require additional information.

Respectfully Submitted,



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