November 1, 2010

California Department of Toxic Substances Control
Office of Legislation & Regulatory Policy
Jeff Woled, MS 22A
P.O. Box 806
Sacramento, CA 95812

RE: SAFER CONSUMER PRODUCT ALTERNATIVES (SCPA)
Department Reference Number: R-2010-05
Office of Administrative Law Notice File Number: Z-2010-0908-01

To Whom It May Concern:

On behalf of the American Apparel & Footwear Association (AAFA) – the national trade association of the apparel and footwear industries, and their suppliers – I am submitting these comments relating to the above-captioned item, in which the DTSC is proposing to adopt regulations, by January 1, 2011, that would establish a process to evaluate, report on, and manage the use of chemicals of concern in consumer products sold in California.

AAFA's members include numerous companies that design, manufacture, distribute, and sell apparel and footwear in California. Collectively, they employ thousands of people throughout California

At the outset, we wish to stress – as we did in comments to the Department in November 2009 – our association's support for the broad goals of green chemistry initiatives to develop tools that will assist companies in their ongoing efforts to ensure that they make and market safe consumer products, and to ensure that consumers are aware of and have confidence in these efforts. Toward that end, we believe it is appropriate to identify, minimize, and eliminate (where feasible) risks associated with substances that present documented health and safety hazards.

It is with this in mind that we wish to convey our very strong concerns with the above-captioned proposed regulation.

In general, we believe this proposal establishes a complicated, costly, and burdensome approach that focuses considerable attention and scarce resources on compliance with requirements that are confusing, overreaching and, in large part, unnecessary. This proposal's overall lack of clarity and certainty will compound the compliance costs as small businesses and companies retain costly legal advisors to help assess and manage their new responsibilities. While ensuring compliance is an important part of any product safety and chemical management regime, we believe this rule has gone too far

in emphasizing compliance at the expense of more important efforts that contribute directly toward the design and production of safe products.

We are also disappointed that the regulation appears to be moving – especially compared to the Straw Proposal that was advanced during 2009 – away from the goal of a simple regulatory framework that maximizes product safety and public health while minimizing disruptions to businesses.

These concerns are magnified given the quickly approaching implementation date of January 1, 2011. That date, which is just two months after the comment deadline, provides little time for companies to learn and understand new rules; incorporate compliance procedures to implement those new rules into design protocols and legal reviews; and teach such rules to supply chain partners in a manner that they easily understand. Moreover, when layered with other state and federal rules and approaches, we believe this proposal will further complicate an already difficult regulatory environment, raising expenses to business while eroding public confidence. At the end of the day, we question whether the resulting benefits to public safety and health, if any, which are envisioned by this proposal, will offset these costs.

Our comments herein supplement those filed by the Green Chemistry Alliance (GCA), to which we belong.

Specific comments on the rules follow:

1. Lack of Harmonization with Federal and State Approaches (§69302.1, (§69303.1)

In the sections related to the establishment of chemicals of concern and products of concerns the proposed regulations appear to provide an exemption for products and chemicals that are already regulated by other federal and state regimes. Yet this exemption is conditioned by the need for a determination and undermined by the notion that such regimes need to parallel the life cycle analysis approach of the SCPA. We note further that the summary of the rule[1] specifically states that there is no comparable federal or state regulation, which would appear to foreclose the ability for the exemption of any chemicals or products. Further complicating this are the repeated references throughout the rule to other state, federal, and international regulatory activities.[2]

Our hope is that the Department can use the opportunity of this rule making to support a globally harmonized chemical management regime, rather than carve out a new

[1] Safer Consumer Product Alternatives Department Reference Number: R-2010-05 Page 28

[2] We note that references to other federal agencies fail to include references to the Consumer Product Safety Commission, an odd omission since a key purpose of this new regulation is consumer product safety.

approach that is specific to California. Given the role of California in world commerce, we would strongly recommend this approach.

Recommendation: Provide a simple and clear way for chemicals and products to be exempt from SCPA regulations if those chemicals or products are already regulated by federal or CA state regulation for health or environmental reasons. State at the outset a number of rules that already exist that the SCPA will recognize and which will cover existing products.

2. Unclear *De Minimis* Approach (§69305.3)

While we are pleased that the Department has included a *de minimis* provision, it is unclear how this provision can effectively work.

One of industry's central advocacy objectives has been the inclusion of a robust *de minimis* exemption to the burdensome AA process. Although the draft regulation now includes a de minimis provision, it is in the form a petition process that gives the Department authority to grant or deny the exemption on a case-by-case. A simpler and more predictable approach would be for Department to set a de minimis threshold for each Priority Chemical and Priority Product and leave it to manufacturers to report whether their Priority Product falls above or below the threshold. This approach makes sense from a practical standpoint as well. The time to make full evaluation of a chemical or product's risk is during the point where it is being assessed for inclusion as a priority chemical, and thus whether products containing such chemicals are priority products. Central to that analysis of risk is whether the chemical is even present in amounts that are great enough to even warrant attention. It does not make sense to reserve this analysis to an ad hoc petition process.

Moreover, the use of nano materials and processes has been completely excluded from *de minimis* provisions. Nano materials and production techniques offer incredible promise, including the ability to substitute for other materials where there have been demonstrated health concerns. Such a *de jure* exclusion from *de minimis* provisions appears to be without factual basis and raises concerns over the Department's approach to other responsibilities under this regulation that will require scientific and technical analysis. Should specific applications of certain nano processes and materials prove to be an issue, we would expect the Department to follow the procedures outlined in other parts of the proposed regulation to cover those circumstances. Any *de jure* exclusion before then seems unwarranted.

Recommendation: Include *de minimis* analysis as an automatic factor in the decision making over listing of priority chemicals and products. Permit companies to self report whether their products meet that *de minimis* level. Remove all references that would exclude nano materials from *de minimis* consideration. Treat any concerns over nano technologies in a manner consistent with the rest of the proposed regulation.

3. Need for Gradual Approach and Prioritization of Risk (§69302.3)

Rather than establish clear, simple, and workable priorities for the development of chemicals of concern, the draft regulations identify an exhaustive list of potential risk factors that could end up covering all chemicals. While we appreciate the Department's desire to be comprehensive, this approach appears to abandon any sense of priority. It opens the door for the companies involved in non-risky chemicals and products to spend scarce time and resources engaged in activities to prove that their chemicals and products are safe. This also means that the Department and other product safety officials will be similarly consumed, spending equal time on very dangerous products that they spend on products that present no risk.

Recommendation: The Department should greatly streamline the prioritization process, focusing only on those chemicals and substances that present documented risks.

4. Alternative Assessment (AA) Presents Enormous Costs (§69305)

We have several concerns related to the two tier Alternative Assessment (AA) procedures. The basic purpose behind the AA seems to be to provide manufacturers a pathway toward reformulation when a priority product contains a priority chemical. Yet the system created by the draft regulations is burdensome, costly, and difficult to follow. Specific concerns include:

1. A costly mandate for third-party auditing by California-based firms;

2. Release of information on alternative assessment that may be misleading; and

3. Requirements that appear to undermine the development of the priority products list (by requiring AA for all products, not just priority products, that contain chemicals under consideration or priority chemicals).

A simpler approach would be to enable manufacturers who choose to reformulate or remove a chemical to simply send a chemical removal notification to the Department that includes the effective date of the change. Such a system would also give the Department a simpler workload so they can easily understand and trace industry reactions to the publication of various lists.

Recommendation: Streamline the AA process to remove excessive costs and permit simple reporting on reformulation.

5. Exposure Elements Essential to Robust Priority Designations (§69302.4, §69303.4)

Critical to any chemical management regime is an analysis of the exposure or actual risk of a chemical or substance. Chemicals are often used in amounts or manners that do not present risk because exposure is limited or the amount of chemical used is tool small to cause harm. Thus, we are pleased to see language in the Priority Chemical and Priority Product provisions that require the Department to consider "the potential for

exposure to the chemical and the potential harm resulting from potential exposures," "the frequency of use, and the concentration of the chemical in . . . products," and "chemical potency" in priority setting decisions. This is a significant improvement over previous drafts of this regulation.

Recommendation: Retain a robust exposure analysis and ensure that all decisions are based on that analysis.

6. Need for Continuing and Increased Protection of Confidential Business Information (CBI) (§69310)

We remain deeply concerned that the SCPA contains inadequate provisions to protect Confidential Business Information (CBI) in Article 10 (§69310). We recognize that there are several provisions that permit companies to claim that information is of a sensitive nature and that it must be kept confidential. Yet those same provisions also require the public filing of redacted information, even when the non-redacted portions would end up divulging confidential information through context. Moreover, these provisions contain troubling requirements for companies to justify why they believe information is confidential. We believe such substantiation requirements are wholly unnecessary and far exceed other requirements that exist in California law.

Recommendation: The CBI provisions must be rewritten to be consistent with existing legal precedent to prevent extremely sensitive information from potentially being released into the public (and thus competitive) domain.

7. Maximize Transparency and Predictability To Facilitate Compliance and the Publication of Accurate Information (§69304.1) (§69302) (§69303) (§69301.8)

We are pleased that the Department will publish lists on its website for public review and comment. We believe increased transparency, provided companies have full opportunities to prevent disclosure of confidential business information, is an important ingredient in ensuring public confidence in the process. With that in mind, we would expect the Department to fully take into account industry comments on such lists since the companies would be in the best position to know what risk factors are presented by any chemicals in their products, as well as the products themselves.

Article 4 establishes a petition process to add new products and chemicals to the lists of Chemicals of Concern. We believe that such petitions should provide an opportunity for all stakeholders, including industry, to comment and be notified of decisions. It does not appear from our reading of §69304.1 that parties other than petitioners will be involved in this process. We believe this is an oversight that should be remedied in any final regulation.

Article 1 (§69301.8) lays out timelines for implementation. Specifically, that schedule states:

June 1 2011	Proposed Initial List of Chemicals Under Consideration
March 1 2012	Final Initial List of Chemicals Under Consideration
July 1 2012	Proposed Initial List of Priority Chemicals
March 1 2013	Proposed Initial List of Products Under Consideration
September 1 2013	Proposed Initial List of Priority Products
December 1 2013	Final List of Priority Products

We applaud the Department for publishing such a timeline. We would expect that if any dates slip that the timeline will be adjusted accordingly with public confirmation. Moreover, we ask that the Department clarify when such lists will have legal effect, particularly the Proposed Final List of Priority Products. We also believe two important steps have been omitted from the timeline: Publication of the Final List of Priority Chemicals and Publication of Final List of Products Under Consideration. These two steps are important to ensuring full predictability in the process. Similarly, we also believe there should be longer time in the later stages of the process. The timeline envisions 21 months between publication of the initial chemicals list to the publication of the initial products list, yet only 9 months between publication of proposed and final product lists. We believe that is insufficient time to explore risk and exposure issues associated with chemicals in products. Moreover, there needs to be sufficient time to allow companies to phase out and eliminate problem chemicals.

Recommendation: Ensure that industry stakeholders have full opportunity to offer comments, and have such comments considered, in all decisions related to petitions (§69304.1) and proposed listing of priority chemicals and products (§69302) (§69303)

Conclusion

We appreciate the opportunity to comment on these rules and the Department's consideration to these comments. For further information, please contact me at slamar@apparelandfootwear.org or 703-797-9041.

Sincerely,

Stephen Lamar
Executive Vice President