AAFA american apparel & footwear association

we wear℠ safety

October 11, 2012

Deborah Raphael
Director
Department of Toxic Substances Control
1001 "I" Street
P.O. Box 806
Sacramento, CA 95812-0806

RE: Safer Consumer Products Proposed Regulations; Public Notice and Comment Period; Office of Administrative Law Notice File Number: Z–2012–0717–04 (July 27, 2012)

Dear Director Raphael,

On behalf of the American Apparel & Footwear Association (AAFA), I am submitting the following comments in response to the request for public comments by the California Department of Toxic Substances Control (DTSC) on the Safer Consumer Products proposed regulations as identified in the file number referenced above.

AAFA is the national trade association representing apparel, footwear, and other sewn products companies, and their suppliers, which compete in the global market. Our membership consists of 380 American companies which represent one of the largest consumer segments in the United States. Of these companies, 59 are headquartered in California and represent thousands of jobs in the state. Most others, although not headquartered in California, retain employees in California in retail, distribution, design, and other roles.

Thank you for this opportunity to submit comments. As we have noted in previous comments, we wish to stress our association's support for the broad goals of the Safer Consumer Product Alternatives Regulations to develop tools to assist companies in their ongoing efforts to ensure they make and market safe consumer products, and to ensure consumers are aware of and have confidence in these efforts. However, AAFA and its members feel regulations can be effective only when they are transparent, predictable and clear. Our comments today will underline this notion while addressing specific segments of the proposed regulations.

§ 69501.4 – Chemical and Product Information

Section (a) (4) under this heading, allows for the Department to request manufacturers or importers to generate new information and provide it to the Department[1]. Our concern with this requirement is the lack of specificity and details of what kind, how much, and how often this "new information" might be requested.

[1] Department of Toxic Substances Control, Safer Consumer Products Proposed Regulations: R-2011-02, Page 18, (July 2012).

1601 North Kent Street
Suite 1200
Arlington, VA 22209

(703) 524-1864
(800) 520-2262
(703) 522-6741 fax
www.wewear.org

At some point, there must be a limit to how much information the Department can request for manufacturers and expect them to still be able to run a functioning operation.

§ 69502.2 – Chemicals of Concern Identification

This section of the regulations deals extensively with how COCs will be identified through these regulations[2]. Specifically it outlines the mechanism by which the initial list of a certain number of COCs will be codified with the completion of the regulatory rulemaking process. In sum, chemicals that display a hazard trait and are on one of 22 separate lists of chemicals would automatically be included as COCs. In short, once the regulations are finalized, approximately 3,000 chemicals, according to documents released by DTSC, will be added as COCs. This is of concern to our industry for two reasons:

1) This change to the regulation has the effect of shortening the timeline for implementation of the regulation. Previous drafts of the regulation have called for the official process of generating a list of COCs to begin immediately upon completion of the regulations with an initial list of COCs due 6 months after the regulations have been finalized. This process significantly decreases the amount of time the business community would have to prepare compliance mechanisms for the regulations. It is important to note that for many industries, the apparel and footwear industry being one of them, supply chains can stretch as long as a full calendar year. In theory that means even if a company makes an immediate change to a product, it may be as long as year until the changes are reflected on the store shelf. In previous regulations like the Consumer Product Safety Improvement Act[3] (CPSIA), short and unreasonable timelines for implementation have led to enormous confusion and costs throughout our industry before the Consumer Product Safety Commission (CPSC) ultimately had to step in to extend deadlines anyway. It is essential to the success of regulations that there is enough time built into them to allow companies to adequately prepare compliance mechanisms and avoid mass confusion in the various consumer product industries.

2) We are concerned with the idea of the initial list of COCs being automatically adopted upon the finalization of the regulations. In previous drafts of these regulations, DTSC would release an initial list of COCs that would be open for public comment upon finalization of the regulations. This would be the same process when any chemicals were under consideration for inclusion in the COC list. Although we do note the provision for a 45-day comment period for any revisions to the list as outlined in section § 69502.3 (c) (1)[4], the current regulations do not allow for a dedicated public comment period for this initial list of over 3,000 chemicals.

As a final thought on the COCs, it would be very helpful if the list of COCs to be added immediately upon finalization of the current regulations, would be included in the regulations as a single appendix. Ideally, this list would be cross referenced with various other chemical management regulations such as REACH and TSCA, so industry would be able to see where there may be overlaps and redundancies. This would provide much needed clarity for companies and will also help companies which have comments or concerns to comment on the proposed COCs of which we are currently aware.

[2] Department of Toxic Substances Control, Safer Consumer Products Proposed Regulations: R-2011-02, Pages 21-24, (July 2012).
[3] United States Consumer Product Safety Commission, The Consumer Product Safety Improvement Act of 2008: Public Law 110-314, (August 14, 2008).
[4] Department of Toxic Substances Control, Safer Consumer Products Proposed Regulations: R-2011-02, Page 24, (July 2012).

§ 69503.2 – Priority Products Prioritization Factors

We appreciate the approach DTSC has taken with regard to prioritizing products, rather than requiring every manufacturer with a COC in a product to perform an Alternatives Analysis (AA). However, we still have concerns with the product prioritization process.

The proposed regulations are fairly clear in what information will be used in determining whether a product should be included in the Priority Product (PP) list. We see that the priority determination will be based essentially on an evaluation of the COCs potential adverse impacts and exposures[5]. However, we are concerned that while the regulations are complete in what information will be used, it does not give insight into the process by which the information will be used. In this regard, the process lacks transparency and predictability, both of which are necessary for our industry to adequately prepare and understand the regulations.

With regard to measuring exposure as it relates to the product prioritization, we are pleased to see the department has included the concept of "intended use" of a product. We understand the department needs to look at total exposure potential when evaluating products. However, intended use should play a significant role in that evaluation process as the intended use is by and large the use for which the product will be utilized. Not giving weight to the intended use of a product when evaluating potential exposures has the unfortunate effect of punishing manufacturers for the consumers misusing their product, something over which the manufacturers have no control.

§ 69503.4 – Priority Products List

The promise of one or more public workshops to provide opportunity for oral comment on products being considered for the proposed PP list[6] is a welcome step towards transparency in the process and we applaud DTSC for this initiative.

At the same time, the proposed regulations require the initial PP list be released for public comment by DTSC no more than 180 days after the regulations are finalized. Initial drafts of these regulations put that same deadline at 24 months after the finalization of the regulations. As was previously mentioned in these comments, allowing adequate time for implementation of the regulations is essential to avoid rampant confusion within the industry and ensure a smooth transition. This is especially true in relation to the PP list, as manufacturing a product contained on the PP list is the trigger to initiate a compliance process for manufacturers. Once a PP list is finalized, it automatically starts the clock on preliminary alternatives assessments. Therefore, it is essential there be adequate time built into this step of the process to allow companies time to put in place compliance mechanisms.

§ 69503.5 – Alternatives Analysis Threshold Exemption

While we are pleased that the department has included an Alternatives Analysis Threshold Exemption[7], similar to what was previously known as a *de minimis* exemption, the concerns surrounding the practical use of the *de minimis* exemption remain in this new context.

As previous comments and past experience have shown, set threshold levels are not one-size-fits-all and attempting to approach it in this way undermines the outcome of such initiatives. Levels should be set on

[5] Department of Toxic Substances Control, Safer Consumer Products Proposed Regulations: R-2011-02, Page 25-27, (July 2012).
[6] Department of Toxic Substances Control, Safer Consumer Products Proposed Regulations: R-2011-02, Page 30, (July 2012).
[7] Department of Toxic Substances Control, Safer Consumer Products Proposed Regulations: R-2011-02, Page 31-32, (July 2012).

a case-by-case basis, as conducting evaluations based on potential COC exposure for each product and determining an individual threshold level based on that evaluation only strengthens the legitimacy of the levels and provides a sounder scientific basis for the levels.

Section 69503.5 (c) of the proposed regulations alludes to a process which is based on this notion of setting levels on an individual chemical basis[8], but we ask that DTSC better define the process that will be used for setting levels. For example, section 69503.5 (e) allows DTSC to lower or raise a previously established AA threshold based on new, or newly considered, information[9]. Yet, there is no indication of what kind of new information would constitute a change in threshold levels.

§ 69503.6 – Alternatives Analysis Threshold Exemption Notifications

We strongly believe that the Alternatives Analysis Threshold Exemption notification process is unwarranted and undermines the reason behind having AA threshold levels in the regulations. Under the current regulations, a company must petition DTSC to accept that COCs in their product fall below the assigned threshold levels in order to avoid the AA process.[10] The main purpose of the threshold level is to establish a concentration under which the chemical poses no appreciable risk. Having to undertake a tedious process of submitting the required notifications when COCs exist in amounts under the approved threshold level amounts to a burdensome requirement with no appreciable gain to consumer safety or chemical innovation.

Furthermore, standardized analytical testing methods for detecting COCs in certain products may not exist. In the absence of established testing methods, the 60-day time period allotted by DTSC for AA threshold exemption notification is generally insufficient time to develop testing methods and be able to notify DTSC of the results.

§ 69504 – Applicability and Petition Contents

The proposed regulations state a person may petition DTSC to add to or remove from the Chemicals of Concern list one or more chemicals, or to add the entirety of an existing chemicals list to the lists specified in section 69502.2 (a).[11] While we agree that private individuals should be able to petition the DTSC regarding COCs or PPs, the proposed regulations do not require the person be a California resident. As the regulations are in fact for the state of California, it seems odd that private citizens from outside the state would be able to petition for the DTSC to evaluate chemicals and products. We would recommend limiting the petitioning process to citizens of California and organizations with a presence in California.

§ 69504.1 – Merits Review of Petitions

We believe that the petitioning process described in Article 4 should provide an opportunity for all stakeholders, including industry, to comment and be notified of decisions. Earlier sections of the proposed regulations state additions to the COC list and PP list will be subject to a public comment period. This being established, this section of the regulations is unclear as to whether chemicals and products that are reviewed and accepted by DTSC will be included outright on the lists, or if they will be put on proposed lists which are subsequently open to public comment. We would strongly urge DTSC to

[8] Department of Toxic Substances Control, Safer Consumer Products Proposed Regulations: R-2011-02, Page 31, (July 2012).
[9] Department of Toxic Substances Control, Safer Consumer Products Proposed Regulations: R-2011-02, Page 32, (July 2012).
[10] Department of Toxic Substances Control, Safer Consumer Products Proposed Regulations: R-2011-02, Page 32 -33, (July 2012).
[11] Department of Toxic Substances Control, Safer Consumer Products Proposed Regulations: R-2011-02, Page 34, (July 2012).

embrace the latter of the two options. If chemicals and products whose petitions are accepted by DTSC are placed on the COC and PP lists outright, it completely excludes industry and other stakeholders from the opportunity to comment on the regulations.

§ 69505.1 – Alternatives Analysis: General Provisions, § 69505.3 – Alternatives Analysis: First Stage, and § 69505.4 – Alternatives Analysis: Second Stage

We have several concerns related to the two-stage AA procedures outlined in Article 5 of the proposed regulations.[12] The basic purpose behind the AA seems to be to provide manufacturers a pathway toward reformulation when a PP contains a priority chemical. We appreciate the need to outline a regimented process and the fact that DTSC will be providing further guidance on completing AAs prior to the first PP list being published, however the process that has been created will be extremely expensive for companies who need to complete an AA. One approach to alleviate that burden would be to cut down on the number of AAs that must be completed. We have three suggestions to accomplish this goal.

1. Currently the regulations require companies to submit an AA if they are responsible for a product which is named to the final PP list, even if all the COCs from the priority product are removed. A simpler approach would be to enable manufacturers who choose to remove a chemical to simply send a chemical removal notification to DTSC which includes the effective date of the change. Such a system would also give DTSC a simpler workload so they can easily understand and trace industry reactions to the publication of various lists.

2. Another option to reduce the amount of AAs being conducted is to allow companies to collaborate. AAs for assembled products center on the components of the product which contain the COCs. If a number of companies within the industry share common components, for example zippers, it would greatly reduce the number of AAs to be completed, if the companies could submit a joint AA. The proposed regulations make it difficult to determine whether or not this kind of cooperation would be acceptable. We ask that the process be made clearer going forward.

3. Finally, it would be helpful if the use of third party chemical management certifications could be incorporated into the AA process. A number of companies already use these certifications to help with various chemical management regulations. A clear explanation of how these certifications may be used in the regulations may not help reduce the number of AAs which must be conducted, but it would certainly make the process much easier and less resource intensive.

We appreciate that the regulations no longer require the use of a third party to do the AAs, as was the case in previous regulations. However, the regulations still require the use of a certified assessor for all AAs completed two years after the effective date of the regulations be performed by a certified assessor as outlined in Article 8.[13] This is an unnecessary expense for our members to incur. Regardless of whether they hire an outside certified assessor, which amounts to a third party assessor, or if they have one of their staff certified to do the AAs, it represents a superfluous and burdensome expense.

Most of the companies in our industry have very qualified personnel already in their employ and may be more than capable already to perform the AA. The argument gains credence, especially when one considers that ultimately it is the responsible entity that is responsible for the content of the AA and complying with the regulations, not the certified assessor. Forcing companies to use a certified assessor needlessly cedes power from those responsible for compliance to those with no stake in it. Companies are ultimately responsible for their AAs and compliance. Therefore, it should be left up to each individual

[12] Department of Toxic Substances Control, Safer Consumer Products Proposed Regulations: R-2011-02, Page 36-52, (July 2012).

[13] Department of Toxic Substances Control, Safer Consumer Products Proposed Regulations: R-2011-02, Page 37 and 65-66, (July 2012).

company to decide whether or not it is necessary to enlist an outside assessor or to have their own personnel certified in order comply with the regulations.

§ 69505.2 – Analysis of Priority Products and Alternatives

We are appreciative of DTSC for showing flexibility and an openness to cooperate with the inclusion of section 69505.2 (c) which allows companies to utilize an AA process which differs from the process previously outlined within the regulations.[14] This type of flexibility allows companies to streamline some of the compliance requirements with internal procedures they may already have in place. It reduces the burden, and could prevent companies from being forced to recreate the wheel internally, so-to-speak.

§ 69507.6 – Department Procedures for Requests for Review

The regulations are clear on which of the decisions from DTSC qualify for the formal dispute resolution procedure and the informal dispute resolution procedure. Our main concern lies with the formal dispute resolution procedure. Under no circumstances do we support a procedure in which DTSC can deny a review of a dispute.[15] This is the main protection built into the regulations for industry. The allowance for DTSC to simply deny a request undermines the entire principle of the safeguard. We request that a more robust system be put in place that does not allow DTSC to deny requests for dispute resolution.

§ 69508 – Qualifications and Certification for Assessors and § 69508.1 – Qualifications for Accreditation Bodies

We have already outlined our serious misgivings with the requirement of a certified assessor for AAs and the corresponding accreditation program for organizations. However, if such a program must exist, we want to stress that it should not preclude those organizations with which industry already has relationships. It is common for our members to already use testing labs for various services including product safety compliance. These organizations often are already equipped with their own labs to do the testing required under this regulation. It would seem that they are a natural fit to serve as accrediting bodies so their employees can become certified and conduct the AA's for their already existing clientele.

§ 69510 – Assertion of a Claim of Trade Secret Protection

We remain deeply concerned about the inadequate provisions laid out in these regulations to protect trade secret information. We acknowledge there are several provisions that permit companies to claim information is of a sensitive nature and 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, making the redacted copy available at the discretion of DTSC is inconsistent with Sections 69501.5 (b) (6) of these regulations.

The trade secret provisions in Article 10[16] contain troubling requirements for companies to justify why they believe information is confidential. For example, filing a request for trade secret protection requires companies to speculate as to how much the information would be worth to competitors, and how readily competitors would be able to replicate the information on their own. It would be very difficult for companies to attempt to quantify this type of information for themselves, let alone a competitor who may have very different internal mechanisms and cost structures. Therefore, we feel t the process by which

[14] Department of Toxic Substances Control, Safer Consumer Products Proposed Regulations: R-2011-02, Page 39-40, (July 2012).
[15] Department of Toxic Substances Control, Safer Consumer Products Proposed Regulations: R-2011-02, Page 64-65, (July 2012).
[16] Department of Toxic Substances Control, Safer Consumer Products Proposed Regulations: R-2011-02, Page 75-77, (July 2012).

companies apply for trade secret protection should be reexamined with an eye for keeping information requirements within the realm of what can be reasonably expected for companies to know.

Some of the questions in the trade secret protection provision appear to attempt to establish a dollar figure for the information. This is an ultimately unwieldy strategy, as the value of this information is often in name recognition and product reputation in addition to dollar amounts. Furthermore, information that can be quantified materially is at serious risk of being taken out of context. For example if a dollar amount is assigned to a piece of information, how is that assigned worth? Companies vary in size and revenue structures, and information valued at X dollars can be worth drastically different things to different companies. Nowhere in Article 10, which deals with trade secret information, is there any attempt to capture information which would put a dollar value into context. It is our recommendation that questions of this nature be completely excluded from the trade secret protection process.

General Comments

Our industry's main concern within this field is the growing patchwork quilt of chemical management regulations we are seeing across the United States. We understand and fully support a state's prerogative to enact legislation it deems will protect its citizens in absence of federal action. However, we would be remiss if we did not make regulators aware of the difficult position in which this places business. It is our hope that regulators continue to look at different ways to work with other states to streamline the regulatory requirements for products as much as possible.

Thank you for your time and consideration in this matter. Please do not hesitate to contact AAFA if we can be of any help to you. Please feel free to contact me or Marie D'Avignon of my staff at 703-797-9038 or by e-mail at mdavignon@wewear.org if you have any questions or would like additional information.

Sincerely,

Kevin M. Burke
President & CEO