



February 28, 2013

Krycia Von Burg, Regulations Coordinator
Department of Toxic Substances Control
Regulations Section
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Sacramento, CA 95812-0806

Via Fax (916) 323-5542 and E-Mail gcregs@dtsc.ca.gov

SUBJECT: Draft Regulations for Safer Consumer Products (January 29, 2013 Release)

Dear Ms. Von Burg:

The California Chamber of Commerce (CalChamber) submits these comments to the Department of Toxic Substances Control (DTSC or Department) regarding its proposed Safer Consumer Products Regulations (Proposal or Proposed Regulations) as released on January 29, 2013.

The CalChamber represents the interests of more than 13,000 California businesses. Nearly three-fourths of CalChamber members are small businesses with 100 or fewer employees. Nearly one-quarter of all jobs in the private sector in California are provided by our members.

Simply put, businesses need to be able to objectively determine what their regulatory compliance obligations and associated costs will be in order to plan, hire and invest appropriately. The CalChamber's primary objective throughout the development of the Proposed Regulations has been to help educate the Department about the way businesses operate to ensure that the final program will be workable, and allow for efficient regulation of truly hazardous chemicals that pose real health risks to consumers. While we appreciate all the work the Department has put in over the past four years to develop such a program, and acknowledge there have been numerous changes and additions to the various drafts to try and address specific concerns raised by the business community, the most recent version still fundamentally fails to meet these basic objectives.

The Proposed Regulations still do not provide adequate information about how large and small businesses will be impacted, how they will be regulated, or how their compliance will be judged by the Department. There is no way to accurately predict how many thousands of CalChamber members will eventually be regulated under the program by looking at the expansive list of chemicals that may be targeted by DTSC, based on their use in any number of still-undefined product categories. Furthermore, because the Department has failed to articulate the specific obligations regulated entities will be asked to comply with, we cannot advise our members about what these Proposed Regulations will cost or how to best plan for compliance.

The CalChamber continues to believe that the Proposed Regulations can be dramatically improved to adequately define the responsibilities and liabilities of regulated businesses, and provide them with adequate tools to fulfill their obligations, while ensuring protection of consumers. However, we also understand that the Department intends to wrap up this process within the next few months, and it may not be possible to address the many residual concerns raised by the CalChamber and other business groups during prior comment periods. At a bare minimum then, we would like to see the final draft of the Proposal include four key changes:

- 1) **A meaningful peer-reviewed economic analysis completed prior to submission of the Proposal to the Office of Administrative Law (OAL).**
- 2) **Elimination of the public review and comment component for Preliminary AA Reports, draft Abridged AA Reports, and Alternate Process AA Work Plans.**
- 3) **A penalty exemption (financial and otherwise) for the first round of regulated entities.**
- 4) **Addition of a review and revision period to follow completion of the first round of implementation.**

Perform a Meaningful Economic Analysis

On October 5, 2012, in a letter responding to Senator Michael Rubio and 15 other legislators, Director Deborah Raphael stated that DTSC intends to conduct a “rigorous and comprehensive economic analysis at the time of Priority Product selection,” that will include information about the effects of the regulations on job creation/elimination, business competitiveness in California, investments in the state, incentives for innovation, and benefits of the regulations. As an explanation for the delayed timing of the analysis, Ms. Raphael stated, “the regulations that DTSC has proposed establish a process only and, “at this point, the regulations do not impose any duties on any business in California.” Therefore, “the economic impact of the regulations cannot be known,” until implementation is underway.

While the CalChamber is pleased that the Department plans, at some point, to conduct an economic impact analysis as required by California Government Code Section 11346.3, enacted by SB 617 (Calderon; D-Montebello) in 2011, and 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 analysis the Department has in mind complies with the new law.

The language of Government Code Section 11346.3 (e) states that an economic analysis 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 ultimately adopted in the most cost-effective way to effectuate the purpose of the underlying statute.

While it is true that work on the Proposed Regulations began before passage of SB 617, the law requires an economic analysis for regulations promulgated before November 1, 2013¹ prior to submission of those proposed regulations to the OAL. As such, it would be contrary to law, not to mention illogical, for the Department to wait until implementation has begun to evaluate whether the program itself should be implemented in its current form.

Nor is it sufficient for the Department to answer that the information sought by the economic analysis is “unknowable at this time” because the Proposed Regulations “do not yet impose any duties on any business in California,²” or identify which chemicals will be regulated as part of which product categories.

¹ Government Code Section 11346.3 (a)(3) “An economic analysis prepared pursuant to this subdivision for a proposed regulation that is not a major regulation or that is a major regulation proposed prior to November 1, 2013, shall be prepared in accordance with subdivision (b).”

² See page 2, letter to Members of the Legislature, October 5, 2012, by Director Deborah O. Raphael, which states, “The characterization of the economic impacts as ‘unknown’ may have been better stated as ‘unknowable at this time.’ It is important to note that the regulations that DTSC has proposed establish a process only and at this point, the regulations do not impose any duties on any business in California. The economic impact

The Department has, draft after draft, refused to narrow the list of chemicals it may choose to regulate or to define how it will select chemicals from that list and identify product categories for regulation. It cannot now use that lack of specificity as a justification for not knowing what the economic impact of the regulatory program will be. If the Department cannot determine, in any way, what possible range of economic impacts the Proposed Regulations might have on the economy, it is an indication that the Proposal is too vague to be implemented, as the business community has argued from the beginning, not a justification to proceed with implementation regardless of the potentially enormous economic impact it could have, depending on what the Department chooses to do with its unlimited discretion down the road.

Furthermore, other regulations set forth a process without imposing an automatic duty on a business. Are all future regulations of this type to be exempt from the economic analysis requirement established by SB 617? Looking to the California Environmental Quality Act (CEQA) as an example, that law and the related regulations establish a process by which an agency, having decided to undertake a project, must determine whether the project could have a significant impact on the environment, whether that project is exempt from CEQA, and whether the agency needs to do an Economic Impact Analysis or some other type of analysis. Until an agency decides to undertake a project, CEQA imposes no duty on anyone, and even once an agency identifies a project it wants to undertake, the range of costs faced by that agency can vary dramatically depending on whether the project qualifies for an exemption or requires a full EIR, and on whether that EIR is challenged in court down the road, not to mention all the economic impacts the project may have on others outside of the agency.

The Legislature, in enacting SB 617, cannot have intended to let new regulatory schemes of this magnitude go without an economic impact analysis, yet the Department seems to be asserting that if the economic impact cannot be assessed with certainty, or if the regulation merely proposes a process, a regulatory agency can skip this step altogether or at least wait until implementation is already underway before conducting its analysis. The CalChamber wholeheartedly disagrees with this view and asks that the Department conduct a meaningful, peer-reviewed economic impact analysis of the Proposed Regulations *prior* to submitting them to OAL for approval, as is required by law.

Delete the Onerous Public Comment Component

In the Proposed Regulations, Article 5, Section 69505.1 (d) now clarifies that DTSC plans to post each Preliminary Alternatives Analysis (AA) Report, draft Abridged AA Report, and Alternate Process AA Work Plan on its website for public review and comment. These comments are to be submitted directly to the regulated entity who drafted the document so that that entity can summarize its consideration of these comments in its final report to the Department. To the best of our knowledge, this is the only proposal of its kind in California which, if enacted, would impose a substantial and inappropriate burden on businesses.

Public review and comment requirements within the regulatory realm are usually imposed to make sure a regulatory body complies with statutory requirements, creates a feasible program, and considers a variety of stakeholder concerns when doing so. Again looking to CEQA as an example, within the CEQA review process the goal of publishing documents and allowing for public comment is to give the public the opportunity to hold government entities (lead agencies) accountable for their decision making as it affects the environment. While those lead agencies may confer with business to inform their responses to the public, it is the agency that is ultimately accountable and responsible for responding to the public. This proposal would turn that model on its head, requiring businesses that are already required to be responsive to the Department to then respond to any and all questions and alternatives raised by members of the public, without regard to their reasonableness or germaneness.

Furthermore, asking a business to respond to public comments is not appropriate during the AA process. These documents are a regulated entities' chance to explain to the Department what it deems feasible

of the regulations cannot be known until DTSC, in carrying out this process, identifies a particular chemical of concern in a consumer product that is subject to the duty to perform an alternatives analysis.”

and cost-effective, based on its unique business concerns and constraints. It should be the Department's responsibility to use its scientific expertise and understanding of industry concerns to weigh this input against other feedback it receives when determining what regulatory responses are necessary and appropriate in any given circumstance.

Provide Penalty Relief and the Promise of Certainty

California Health & Safety Code section 25253 (c) charges the Department with making, "every feasible effort to devise simplified and accessible tools that consumer product manufacturers, consumer product distributors, product retailers, and consumers can use to make consumer product manufacturing, sales, and purchasing decisions." Rather than providing simplified and accessible tools at the outset, though, the Department has repeatedly stated that it will be in a better position to clarify what it needs from regulated entities, and to develop tools to help those businesses comply, once it begins implementation of the program. This viewpoint effectively treats the first group of regulated entities as guinea pigs who will be subject to whims of the Department while it figures out what it wants through trial and error. Under this approach, those first businesses will be subject to higher costs, more burdensome information requests, and greater uncertainty than those who are regulated in the future.

The CalChamber feels that the Department should fulfill its statutory obligation and provide manufacturers, distributors, and retailers with adequate tools up front. However, if the Department feels this cannot be done until it has begun implementation of the program, it should, alternatively, build a review and revision period into the regulations, and commit to taking the time to create those tools and add necessary details to the regulations once the first round of compliance concludes. This will make sure that entities subject to regulation in the future have the guidance they need and were promised by the law, and that the deadlines and requirements in the regulations are both feasible and reasonable.

In addition, if the Department chooses to finalize the Proposal without addressing this pervasive lack of specificity and guidance, we ask that the final regulations at least include a penalty relief provision so that the first group of regulated entities can collaborate with the Department without fear of possible financial penalties³ or formal declarations that they are out of compliance⁴.

Conclusion

While many of CalChamber's specific concerns with the language in the Proposal, as raised in our prior comment letters and through our participation in the Green Chemistry Alliance, remain unresolved, we are cognizant of the Department's desire to move ahead and begin implementation. As such, we have chosen to focus on those issues that are most critical to ensuring the long term success of the Safer Consumer Products Initiative. It is our sincere hope that the four recommendations discussed in this letter will be adopted prior to submission of the Draft Proposal to OAL.

We look forward to assisting the Department as it reconsiders and revises its Proposal. Should you have any questions, please feel free to contact me at 916-444-6670.

Sincerely,



Mira Guertin
Policy Advocate

³ See California's Health and Safety Code, Section 25251.2.

⁴ See section 69501.2 of the Proposed Regulations, Duty to Comply and Consequences of Non-Compliance.

cc: Debbie Raphael, Director, Department of Toxic Substances Control
Martha Guzman-Aceves, Deputy Legislative Secretary, Office of Governor Edmund G. Brown