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Department of Toxic Substances Control
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RE: Title 22, California Code of Regulations. **Safer Consumer Product Alternatives** Proposed Regulations, R-2011-02: **Comments on July 2012 Text of Proposed Regulations**

Dear Ms. Von Burg:

The California Retailers Association submits the following comments relative to the July 2012 Text of Proposed Regulations.

The California Retailers Association is the only statewide trade association representing all segments of the retail industry including general merchandise, department stores, apparel, mass merchandisers, convenience stores, supermarkets and grocery stores, chain drug, and "specialty" retail such as auto, vision, jewelry, hardware, furniture, home goods, and home improvement stores. California's retail industry currently operates over 164,200 stores with sales in excess of $571 billion annually. And our industry employs 2,776,000+ people—nearly one fifth of California's total employment.

We want to acknowledge the Department for its response to our comments on the previous draft regulation. Of the twelve recommendations CRA submitted to DTSC, five were accepted by the Department, relative to overall retailer responsibility in the Duty to Comply section, timeframe for the retailer off-ramp, elimination of product priority notifications by retailers, and removal of recall provisions. New changes in the July 2012 draft which we *support* include: 1) that there will be no more than 5 products on the first Priority Products list; the ability to petition for de-listing of a COC; and a Priority Products Workplan by 1/2014 that identifies the product categories to be evaluated for inclusion on the Priority Products list during the next three years, thus giving industry a chance to plan ahead accordingly.

There remain sections in the regulation where we urge changes be made to ensure clarity, for compliance's sake. Of critical importance is the definition of "manufacturer". We also have remaining concerns with portions of the Regulatory Response section, and some open-ended areas where we believe the Department has unnecessarily provided itself unlimited discretion. Our comments are organized by section, and in each case we have provided the Department with suggested language that accomplishes the goal of our commentary. We remain committed to working with the Department to develop a workable regulation.

1. Section 69501.1(a)(41): Definition of "Manufacturer"

"Manufacturer is defined as "any person who manufactures a product, or any person that controls the specifications and design of or use of materials in, a product." *The definition fails the clarity standard of the Administrative Procedures Act* ("APA"). The phrases "controls the specifications" and controls the "design of or use of materials in a products" are sufficiently unclear to be able to determine precisely which entities will be deemed manufacturers.

Prior to the October 11, 2011 draft, the definition of manufacturer read: "Manufacturer means any person who manufacturers a product". The explanation for the change in the definition to that currently proposed is provided by the Department in the Initial Statement of Reasons (ISOR): "The private label retailer may wish to have more control over production and may dictate to the manufacturer specifications for raw material, ingredients or designs in a contract".

We concur with the Department that a retailer that dictates *use of a specific chemical* could be determined to be a manufacturer. However, retailers, as part of the normal course of business, instruct their private label manufacturers as to the general *design* parameters of their order—color, fit, style, or embellishments. Other examples of "design" specifications include: fabric type, cut of garment, cuffs, collars, buttons, grommets, studs, beading, color of garment, thread color, scent, and size. In none of these instances does the retailer know if there is a Chemical of Concern ("COC") in these design determinations. The retailer is *not* manufacturing the product, but providing general directions as what the end product should look like. *Designating design specifications is the retailer's role as the "customer" of the manufacturer. Determining the chemical process or specific chemicals used to produce the desired product is the responsibility and function of the manufacturer*.

As an example, an apparel retailer may direct a manufacturer to make jeans in denim fabric, with a dark wash, with orange stitching on the pockets, in a boot cut style. Has the retailer, who has no knowledge or control of the chemicals contained in the fabric or the thread, become a "manufacturer" because the retailer has "controlled the design" of the jeans?

Has a retailer that orders men's wrinkle-resistant khakis, with pleats and no cuffs become a "manufacturer" because the wrinkle-resistant "spec" means a certain chemical or chemical process must be utilized, even though the retailer has no knowledge of those chemicals or processes about to be used?

Has a general merchandise retailer who asks a manufacturer to make a private label kitchen counter cleaning spray in a 16 ounce spray bottle with a lemon scent "controlled the specification" of the product? The retailer has no knowledge or control of the chemicals used in the packaging, the spray or the scent.

Has a chain drug store that asks a manufacturer to make a private label hand cream in a tube with a lavender scent "controlled the design" of the product? The retailer has no knowledge or control of the chemicals used in the packaging or product.

Even by providing the manufacturer with a private label brand logo to go on the product itself, has the retailer controlled the specs or design of the product such that the retailer is now deemed the manufacturer of the product?

In all of these examples, the retailer has provided the manufacturer with some general specifications and design information, but *does not have knowledge of, nor control of, the materials, chemicals and/or chemical processes used to meet those general specifications*. The actual manufacturer still has the ultimate responsibility for the chemical composition decisions for the product's manufacture.

Without correction, this definition fails the clarity requirement of the APA, since the retailer is subjected to requirements of a manufacturer in a manner that is inconsistent with the Duty to Comply Section 69501.2(a)(1): "A retailer is required to comply with the requirements applicable to a responsible entity ONLY (emphasis added) if the manufacturer and the importer have failed to comply and the Department notifies the retailer of such non-compliance by posting the information on the Failure to Comply List , under Subsection (d)(4)(c)". *Without clarification, the regulation as written will de facto turn thousands of retailers into "manufacturers" under the regulation, which is contrary to the intent of the statute, as well as to the Department's own framework of responsibility under the regulation, as delineated in the Duty to Comply section*.

Proposed Change:
Option 1: Return to the definition of manufacturer included in prior versions of the draft regulation: *"Manufacturer means any person that manufactures a product".* Without the second half of the definition, there are no clarity issues and the definition no longer would conflict with the responsibilities of manufacturers and retailers in the Duty to Comply section.
Option 2: Amend the definition to read: "*Manufacturer means any person that manufactures a product, or any person that controls the manufacturing processes and chemical ingredients or formulation used to produce the finished product. The use of quality, performance or design specifications, such as color, size or material, does not constitute control."*

2. Section 69501 (b)(1): Purpose and Applicability

It is not clear in the draft regulation whether businesses would have responsibilities for chemical products used internally in conducting business, when those products are *not themselves made available to the public*. One example would be the use of various solvents and adhesives as well as the solder used in the repair of electronic equipment used to support a retail business, but *not* directly sold to consumers. Another example would be wiring or cable used for electronic transmission in the conduct of a retail business, where that wiring and/or cable is *not* sold directly to consumers. We assume that Section 69501 (b)(1) ("…this chapter applies to all consumer products placed in the stream of commerce in California") means the regulations would not apply to chemical products or processes used internally within a business, because these "products" are not placed into the stream of commerce in California; we request confirmation of this assumption.

3. Section 69501.1(a)(22)(A) and (B): Definitions of "Consumer Product", "Product" and "Historic Product"

The definition of "consumer product" is one of the most important provisions of the proposed regulation, since it defines the scope of products subject to the regulation. While the proposed definition appropriately "carves out" products that ceased being manufactured prior to being named a Priority Product, it does not carve out products necessary to maintain or repair existing consumer products. Consumers who purchase durable goods such as appliances rightfully expect the product to have a long useful life. This means ensuring that the product can be serviced and repaired to extend this life.

A "historic product," which is appropriately exempt from the regulation, is defined as "a product that ceased to be manufactured prior to the date the product is listed as a Priority Product." *The definition fails to exclude replacement parts and supplies necessary to service and repair historic products*. When a manufacturer produces a product, they do not manufacture all of the anticipated necessary replacement parts for the product—doing so would result in enormous upfront manufacturing and warehousing costs. Instead, replacement parts are produced on an as-needed basis. Accordingly, a previously-manufactured product that is no longer manufactured when listed as a Priority Product will be exempt from any regulatory oversight, but the parts needed to repair or service the product would not. This is inconsistent.

The state's Song-Beverly Consumer Warranty Act (Civil Code Sections 1790 et seq) establishes specific requirements that must be adhered to when offering a warranty or service contract for a new consumer product. This law is enforced by the California Bureau of Electronic Appliance Repair, within the Department of Consumer Affairs. For specified electronic goods, manufacturers must make replacement parts available for three to seven years after the product was manufactured, even if this period is longer than the applicable warranty period. If the manufacturer fails to adhere to the warranty requirements, the consumer may seek redress against the selling *retailer*, who must either repair the product; direct the buyer to a service facility that will repair the product; replace the product; or refund the purchase price. Without the availability of replacement parts for repairs, the alternatives are costly.

Failure to exempt replacement parts for historic products conflicts with the ISOR. The ISOR states that "existing products, especially durable goods, may need to have replacement parts available for service, repair, and maintenance. By allowing these three exclusions, repair and maintenance of existing products can continue without the involvement of this regulatory program." The ISOR goes on to provide examples of ink cartridges and flame sensor switches, explaining the need to ensure the availability of replacement parts, recognizing that "non-original parts may result in compatibility issues," and noting the problems that would be encountered by consumers if replacement parts containing chemicals of concern were subject to regulatory responses—effectively requiring the purchase of a replacement product instead of repair. *Despite this statement of intent recognizing the need for reliable replacement parts, the Department's failure to exempt replacement parts for historic products would subject such parts to the regulation* and jeopardize the useful life of historic products themselves. The Department acknowledges in the ISOR that replacement parts are critical components of durable goods, and do not represent a high volume chemical in commerce. Since these products represent a low-risk exception for a high-value product, regulation of replacement parts for historic products is unnecessary.

Proposed Change:
Add: "'Consumer Product' or 'Product' does not include a product that is used as a spare part or component for repair or maintenance of a historic product."

4. Section 69501.1(a)(54): Definition of "Responsible Entity":

The definition of "responsible entity" lacks clarity. The definition of responsible entity includes product manufacturers, importers, and retailers *without distinction*. This definition is used throughout the draft regulation to denote which party is responsible for compliance for the substantive provisions of the Green Chemistry program. While proposed Section 69501.2 (Duty to Comply) does provide subsequent clarification as to which parties have primary responsibility for compliance with the regulation, consistent language should be added to the definition of responsible entity.

Proposed Change:
Include language that describes the limited circumstances under which a retailer may be considered a responsible entity, in a manner consistent with the "Duty to Comply" provisions of Section 69501.2:
(54) "Responsible entity" means any of the following:

(A) The manufacturer of a consumer product.
(B) The importer of a consumer product.
(C) The retailer of a consumer product *may become a responsible entity for one or more specific duties under this chapter related to such consumer product only if notified by the Department, pursuant to subdivision (a) of section 69501.2, of the failure of the manufacturer and, if applicable, importer of such consumer product to comply with the duty or duties, and the notification includes all of the information provided in paragraph (4) of subdivision (d) of section 69501.2.*

5. Section 69501.2(c): Retailer Option

This section provides that retailers are not responsible for complying with the requirements in a Priority Product Replacement Notification if: 1) the retailer issues a Priority Product Cease Ordering Notification no later than 90 days after the Department has notified retailers of a manufacturer's and an importer's failure to comply; or 2) if the manufacturer or importer complies within 60 days after being listed on the Department's Failure to Comply List.

It is possible that a manufacturer could fail to comply within the 60-day window, but then come into compliance sometime thereafter. The potential for confusion or duplication arises because a retailer has a 60-day window and the manufacturer or importer has a 60-day window. If a retailer sees that a manufacturer has not complied as of the 61st day, the retailer can initiate the stop-order of the product, only to find out that the manufacturer complied on the 88th day. Thus the retailer could have made its stop-order determination and only days later have to reverse the determination because the manufacturer came into compliance. To avoid this potentiality, both timeframes should be consistent.

Proposed Change:
Change Section 69501.2(c)(1) to read "The manufacturer or importer complies with the requirement specified in the Department's notice, or fulfills the requirements of subsection (b), within *ninety (90)* days after the Department issues the notice…"

6. Section 69503.3 (d): Process to Evaluate Products

This section provides that "The Department may, at its discretion, consider whether there is a readily available safer alternative, that is functionally acceptable and technically and economically feasible, to further adjust the prioritization prior to listing a product as a Priority Product."

The Department should be *required* to consider readily available safer alternatives, rather than allowing it the discretion to do so.

Proposed Change:
Change "may" to "shall".

7. Section 69506 (c): Regulatory Response: Selection Principles

This section states "In selecting regulatory responses, the Department may consider any or all of the following factors", followed by a list of five factors. To provide clarity to the regulated community as to what criteria the Department will use in selecting which regulatory responses to impose, these five factors should be *required* to be considered by the Department.

Proposed Change:
Change "may consider" to "shall consider".

8. Section 69506.1 (b): Applicability and Determination Process

This section requires the Department to notify all responsible entities of a regulatory response the Department is proposing, and to hold one or more public workshops for comments, as well a s a 45-day comment period on the proposed regulatory response. We support this process. However, this public notification and input process ONLY applies to: use restriction, product bans, engineering and administrative controls, R&D grants and reevaluation. *Product Information for Consumers and End of Life Management regulatory response options are EXCLUDED from the notice and public comment requirements*. Sub (b) includes reference to Sections 69506.5, .6, .7, .9 and 10; it excludes Sections 69506.4 and .8. This is an inconsistent application of the Applicability and Determination Process. It is also questionable if the Department has the authority to decide that some regulatory responses will be subject to the public notice requirements and others will not.

Proposed Change:
Amend to include both Product Information and End of Life regulatory responses in (b).

9. Section 69506.4 (b)(2)(A) and (B): Product Information for Consumers

These sections allow a product manufacturer to provide required consumer information either on the product packaging OR "posting the information in a prominent place at the point of retail display." If the manufacturer picks the retail point of display option, the Department will have adopted an option violating the consistency provisions of the APA by mandating a burden on retail that could be met by manufacturers properly labeling their products, inconsistent with the Duty to Comply section that specifies retailers are required to fulfill responsibilities only when the manufacturer and then the importer have failed to do so (Section 69501.2). This will also result in an unmanageable amount of signage at the store level.

Example: An apparel retailer carries 50 different types of denim jeans: dark wash, light wash, various colors, different pocket designs, zippers, decorative stitching, leg widths, etc. These jeans are made by 10 or more companies. If a COC is used in the dyeing or washing of the denim, each manufacturer could provide a sign for each of its denim products. Thus, at least 10 signs, and probably more like 30-40, would be required to be posted at retail *just for those jeans*. Extrapolate that for all the SKUs in a retail store—all the shirts, pants, tops, sweaters, coats, jackets, and other clothing items in an apparel or general merchandise store. This potential posting of *dozens of signs per priority product SKU and manufacturer* is not authorized expressly nor implicitly in the statute.

Although the Department indicated it *prefers* warning labels to be available "prior to purchase", we believe warning labels ON consumer products are more valuable to the consumer than a sign, because the consumer is bringing the product home, where the information will more likely be read, than while walking past signage in a store environment. We recommend the Department not require product information signage as a Regulatory Response when the hazard is implicit with use of the product, and safe handling instructions are communicated on the product. CRA recommends that the Department shift

its goal to the provision of information to consumer prior to use. For the rare consumer who will read the warning post-purchase and decide against keeping the product, the item can always be returned to the point of purchase. The majority of consumers will read the use instructions, the optimal point for communication of any warning.

The Department could also consider how the Federal Hazardous Substances Act specifies required warnings and utilize its process. As a last resort, the Department could consider "tiering" the information provision requirements. For example, manufacturers would be required to post the information on their website, provide an 800 number for consumers to access for further information, and provide the specified information on the product packaging or label (such as an accordion label). Only in those instances where manufacturer labeling is legally prohibited could signage be posted in a retail location.

Proposed Change:
Amend (2)(b)(2) to read "Use the following means of informing consumers of the information specified in subsection (a):". Delete "and/or" in (A). Strike all of (B) and insert: "Where chemical ingredient information on the labels of consumer products is prohibited by federal or state law, signage at retail may suffice for compliance with (A)."

10. Section 69506.5: Use Restrictions on Chemicals of Concern and Consumer Products

This section spells out what use restrictions might be imposed by the Department, but contains no standards as to when, or under what circumstances, these restrictions may be imposed.

Proposed Change:
Reduce the arbitrary discretion left to the Department by enumerating the criteria required for the Department to choose a use restriction regulatory response.

11. Section 69506.6 (c), (d) and (e): Product Sales Prohibitions

Section (c) imposes a timeframe within which responsible entities must cease placing a Priority Product into the stream of commerce when the regulatory response adopted by the Department is a sales ban. The responsible entity has one year after the Department issues the notification, "unless the notification specifies a shorter period of time". Subsections (d)(4) and (e)(2) also specify timeframes of one year, with the same open-ended ability of the Department to specify a shorter timeframe. There are no qualifications or criteria or circumstances established for when or why the Department may shorten the specified timeframe.
Proposed Change:
Option 1: If shortening of the time frame is needed, there must be criteria established for that necessity. The regulated community must know under what set of circumstances the Department is authorized to shorten the timeframes.
Option 2: Remove the ability of the Department to arbitrarily determine a shorter timeframe.

12. Section 69506.8 (a)(2) and (a)(2)(A)(7)(a): End of Life Management Requirements

Subsection (a)(2) requires that the "responsible entity shall fund, establish and maintain an end-of-life management program for the product." Subsection (a)(2)(A)(7)(a) requires the responsible entity to provide a "financial guarantee" to ensure a sustainable EOL management program for the product. *The Department does not have the authority to expand the responsibility for an EOL program beyond manufacturers of a Priority Product because the enabling statute clearly states that "manufacturers" have the responsibility for EOL programs. See California Health & Safety Code Section 25253(b)(7):* "Imposing requirements for the manufacturer to manage the product at the end of its useful life, including recycling or responsible disposal of the consumer product." Such expansion would violate the *Crees* decision that a regulation "may not make a rule or regulation that alters or enlarges the terms of a legislative enactment."

Proposed Change:
Change "responsible entity" to "manufacturer", in Section 69506.8 (a)(2), and in (a)(2)(A)(7)(a).

13. Section 69506.8 (a)(2)(A): End of Life Management Requirements

This section requires the development and maintenance of a comprehensive product stewardship program with specified components. One of those components (a)(2)(A)(3) includes the "roles and responsibilities for manufacturers, importers, retailers, consumers and government…and identification of retailers who have agreed to participate in the program". This language appears to leave open the possibility for a manufacturer to create a plan that imposes responsibilities on retailers without consent. In addition, the ISOR references holding "various parties accountable." There is no authority to impose responsibilities for EOL programs on any entity other than manufacturers, per the statute. Retailers, importers, and other entities can participate in a stewardship program as voluntary participants and the regulation should so note.

Proposed Change:
The Section relating to End of Life Management Requirements must be amended to conform with the enabling statute, which requires the obligation to be placed solely on manufacturers.

14. Section 69506.8 (a)(2)(B): End of Life Management Requirements

In (B) there is a conflict between the regulatory language and the ISOR, which may just be a drafting error. The language currently reads: "The collection program must include *one or both* of the following in the collection program. 1. Collection mechanisms; *and/or 2*. Compensation to retailers and other persons who agree to administer or participate in the collection program." The ISOR explains that both a collection mechanism and compensation to persons participating in the program should be provided.

Proposed Change:
Delete "one or" in (B), and delete "/or" in (B)1. With this change, the regulation will be consistent with the intent of the Department, with which we concur, as expressed in the ISOR.

15. Section 69506.8 (a)(2)(C): End of Life Management Requirements

Subsection (a)(2)(C) requires a responsible entity to provide its product stewardship plan to the Department for review and approval. The term "manufacturer" should replace "responsible entity" because *product stewardship is an EOL program, which, under the statute, must be imposed only on manufacturers*. Additionally, no public hearing process is required prior to the Department's approval of the plan. Because the plan may ultimately involve retailers, consumers and other entities, we recommend that a public workshop and a comment period of a minimum of 45 days be required prior to action by the Department to approve or reject the product stewardship plan.

Proposed Change:
Replace "responsible entity" with "manufacturer". Add language to require public workshop and comment period prior to the Department's approval or rejection of a product stewardship plan.

16. Section 69506.8 (D)(2)(c) and (d): End of Life Management Requirements

Proposed Change:
In (D)(2)(c) and (d) change "responsible entity" to "manufacturer" in both locations because the statute requires EOL programs to be conducted by manufacturers only and the Department does not have the authority to change the statute's meaning.

17. Section 69506.8 (D)(2)(c): End of Life Management Requirements

This section permits a responsible entity to seek the Department's "approval to substitute an alternative end-of-life management program that achieves, to the maximum extent feasible, the same results as the program required by this section." *However, there are no criteria or delineation of the grounds upon which the Department would make an assessment as to whether the alternative achieves the "same results".* This again allows the Department unbounded discretion. The concern for the retail industry in this section is that the manufacturing community does not support EOL programs unless they can recover their costs through a point-of-sale fee on consumers. (This statement is based on manufacturer positions on EOL legislative proposals on light bulbs, batteries, mattresses, carpet and paint.) Manufacturers have also previously supported mandatory in-store take-back programs for retailers, to avoid the responsibility for manufacturers to have to pay for EOL programs. Because retailers sell tens of *thousands* of products, a POS fee on individual products is not workable for our industry. In-store take back is also unworkable due to space and liability issues. Because the statute clearly imposes the responsibility for EOL programs solely on manufacturers, it is important that the Department *not* approve alternatives that shift the burden to another segment of the supply chain.

Proposed Change:
Establish criteria under which the Department would consider approving an "alternative" EOL program than that specified in the proposed regulation.

18. Section 69506.10 (a): Regulatory Response Selection and Re-Evaluation

This section permits the Department to impose one or more regulatory responses to "situations other than those specified in those sections". *What* possible situations does the Department envision? The section is not clear, and overly broad. The Department confers upon itself unlimited discretion to impose any regulatory response it choses, under any circumstances, which exceeds the authority of the statute.

Proposed Change:
Delete, or narrowly define and clarify what is meant by "situations other than those specified".

19. Section 69506.12: Regulatory Response Report and Notifications

A manufacturer (or, if applicable, importer) that is subject to a regulatory response must provide a Notice of the impending regulatory response to retailers of the covered product(s). Included in the Notice is the "due date for implementing the regulatory response". The Department is also required to post on its website a Regulatory Response Summary that includes "the implementation due date".

It is not clear in the regulation how the due date of a regulatory response will be determined, by whom, and what the timeframe will be for implementation of each of the possible regulatory responses.

If the regulatory response involves a product stewardship program, a sales restriction, a sales ban, or signage, the retail industry will need sufficient notice and time to comply. The absence of established due dates in the regulation leaves open the possibility that manufacturers and the Department could agree on an effective date for a particular regulatory response that is operationally unworkable for the affected retailers. For example, the Notice could arbitrarily announce that the selected regulatory response takes effect in 14 days, or 30 days, or any other timeframe that would be insufficient for compliance.

Proposed Change:
We request that the section be amended accordingly, to provide a minimum time threshold for retailer compliance with the specified regulatory response: "A description of the required regulatory response(s) and the due date for implementing the regulatory response(s), which in no case shall be less than 180 days from the date of the notification."

20. Section 69507.1 Informal Dispute Resolution Procedures

The section specifies that if a request for dispute resolution is not received within a certain time period, the Department's decision is "final and not eligible for any dispute resolution procedures under this Article." It is unclear if the Department intends by this statement that the failure to pursue an administrative dispute resolution precludes a responsible entity from seeking judicial review; usually failure to exhaust administrative remedies precludes judicial review.

Proposed Change:
Clarification of relationship of informal dispute resolution with judicial review.

Thank you for your consideration of our comments. If there are questions about any of our concerns and related recommendations, please let us know. And again, we appreciate the enormous amount of effort that Director Rafael, Odette Madriago, Colleen Heck and their staff members have put into the very difficult task of developing the Safer Consumer Products regulation.

Sincerely,

Pamela B Williams

Pamela Boyd Williams
Executive Vice President