

June 10, 2013

TO: Members, California State Legislature

FROM: Alliance of Automobile Manufacturers  
American Chemistry Council  
American Cleaning Institute  
American Coatings Association  
Association of Home Appliance Manufacturers  
Art and Creative Materials Institute  
Automotive Aftermarket Industry Association  
Behr Process Corporation  
California Attractions and Parks Association  
California Chamber of Commerce  
California Manufacturers and Technology Association  
California Metals Coalition  
California League of Food Processors  
California Paint Council  
California Travel Association  
Can Manufacturers Institute  
Chemical Industry Council of California  
Coast Wood Preserving, Inc.  
Consumer Healthcare Products Association  
Consumer Specialty Products Association  
Defoamer Industry Trade Association  
Dow Chemical Company  
Du Pont  
Eaton and Cooper Lighting  
Florida Chemical Company  
Fontana Wood Preserving, Inc.  
Grocery Manufacturers Association  
Industrial Environmental Association  
International Fragrance Association, North America  
IPC – Association Connecting Electronics Industries  
Metal Finishing Association of Northern California  
Metal Finishing Association of Southern California  
National Aerosol Association  
National Association of Chemical Distributors  
PABCO Building Products, LLC  
Pharmaceutical Researchers and Manufacturers of America  
Plumbing Manufacturers International  
Procter & Gamble  
SPI, the Plastics Industry Trade Association  
Styrene Information Research Center  
TechAmerica  
Toy Industry Association  
West Coast Lumber & Building Material Association  
Western Plant Health Association  
Writing Instrument Manufacturers Association

**SUBJECT: TRAILER BILL LANGUAGE - FEE AUTHORITY FOR THE SAFER CONSUMER PRODUCTS INITIATIVE  
OPPOSE**

Dear Members of the California State Legislature:

Last week the above-listed organizations received word that fee authority is being sought, likely as part of a budget trailer bill, that would grant the Department of Toxic Substances Control (DTSC) authority to impose a fee to fund its responsibilities related to the Safer Consumer Products Regulations (Proposal or Proposed Regulations), sometimes referred to as the Green Chemistry Initiative. For the reasons detailed below, we **OPPOSE** this proposal and ask that you vote “No” if and when it comes before you.

**FEE AUTHORITY IS PREMATURE BECAUSE DTSC HAS NOT FINISHED DRAFTING THE FULL REGULATORY PROGRAM ENVISIONED BY THE LEGISLATURE.**

On May 21, 2013, DTSC released an updated economic impact assessment and Std. Form 399 for the Proposed Regulations, along with two supporting documents. Nowhere in these documents did the Department mention that businesses might be required to pay a fee. Instead, DTSC stated that nearly all of the impacts the Proposal would have on businesses are unknowable at this time. At the same time, DTSC asserted that any costs businesses would incur complying with the regulation would be minimal. For example, the Department stated:

- “The only impacts to the private sector are that DTSC may request businesses to provide existing information or generate new information necessary to implement the regulations.”
- “The proposed SCP regulations are process regulations and do not have any direct impacts on any chemical or product, therefore this regulation will not make it more costly to produce goods or services here.”
- “The costs 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.”
- “...there are no significant costs or benefits associated with these regulations.”

The reason DTSC does not know what the economic impacts of the Proposal are at this time, and the reason the Proposal imposes a minimal cost on businesses, is because the Proposed Regulations do not fully effectuate the intent of the Legislature set forth in the authorizing statute. Instead, the Department intends to engage in additional rounds of rulemaking at a later date, filling out the details of the regulatory program as it goes. It is inappropriate to grant an agency fee authority before the agency has finished crafting the program that fee will help fund.

**AN EXACTION IMPOSED ON BUSINESSES WOULD BE A TAX REQUIRING A TWO-THIRDS VOTE ACCORDING TO PROPOSITION 26.**

In its own words, the Proposed Regulations the Department is seeking to finalize this summer “establish a process for identifying and prioritizing chemical and product-chemical combinations and a process by which chemicals of concern in products and their potential alternatives are eventuated to determine how best to limit exposure or reduce the level of hazard posed by a chemical of concern.” Through subsequent rulemaking efforts, DTSC will decide which product-chemical combinations and which businesses will be subject to regulation, and what the details of that regulation will be. DTSC, under such a regulatory scheme, will bear costs related to:

- Later rounds of drafting and rulemaking
- Evaluating information manufacturers provide upon request, prior to the Alternatives Analysis
- Evaluating information manufacturers provide in their Alternative Analyses and other analytical reports
- Selecting and enforcing Regulatory Responses

Without trailer bill language in front of us, it is impossible to know exactly how the Department proposes to determine the amount of the exaction or who it will be imposed upon, but it is safe to assume that regulated manufacturers will be asked to pay the bulk of the exaction, if not all of it, and that the revenue will be used to cover costs associated with some or all of the activities listed above.

Proposition 26 states that an administrative exaction imposed by the state is a tax requiring approval by two-thirds of the Legislature unless it is *“imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits, performing investigations, inspections, and audits enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.”* In addition, Proposition 26 requires that, to be a fee, the amount of the exaction be, *“no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity.”*

Based on the language of Proposition 26, the only activity DTSC will engage in when implementing the Proposed Regulations that even arguably meets the definition of an administrative fee is the enforcement of regulatory responses, which could involve “investigations, inspections, and audits” depending on which regulatory response is selected by the Department. All of the other activities fall outside of this definition. Thus, should the Legislature see fit to authorize DTSC to impose an exaction on manufacturers or other businesses, it must do so with a two-thirds vote of the Legislature.

In addition, the proposed exaction is also apt to run afoul of the second portion of Proposition 26 requiring that 1) the amount charged be no more than necessary to cover the reasonable costs of the regulatory activity and 2) that the costs be allocated to a payor such that they bear a fair and reasonable relationship to the payor’s burdens on the governmental activity. Since the Department has not, according to its responses on the Std. Form 399 and supporting documents, identified how many businesses will be impacted by the Proposed Regulation or what product-chemical combinations it plans to regulate, there is no way to properly evaluate what costs the agency will incur implementing the Proposal or to determine how to allocate that cost regulated entities. As such, the proposed fee is actually a tax, and as mentioned above, is also premature because DTSC does not yet know what its costs will actually incur or who to pass those costs on to.

For these reasons, we **OPPOSE** the proposed fee authority and ask you to vote “No” should it come before you for a vote.

Sincerely,

Mira Guertin



Policy Advocate  
California Chamber of Commerce

cc: Gareth Elliott, Office of the Governor  
Joshua Tooker, Department of Toxic Substances Control

MG: ar