January 22, 2013

BY ELECTRONIC MAIL

Ms. Krysia Von Burg
Regulations Coordinator
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA  95812-0806

RE: 30 DAY PUBLIC NOTICE AND COMMENT PERIOD
NOTICE OF PUBLIC AVAILABILITY OF POST-HEARING CHANGES
SAFER CONSUMER PRODUCT ALTERNATIVES
Department Reference Number: R-2011-02
Office of Administrative Law Notice File Number: Z-2012-0717-04

Dear Ms. Von Burg:

The American Chemistry Council (“ACC”) appreciates the opportunity to provide comments on the revision of the Initial Statement of Reasons (“ISOR”) for the Safer Consumer Product Regulations. ACC is an active member of the Green Chemistry Alliance.

The Department of Toxic Substance Control (“DTSC”), in its public notice, states that it is revising the ISOR to correct: typographical, spelling, cross-referencing, punctuation and other formatting errors. In addition, DTSC states that it has revised the ISOR to address some substantive drafting issues raised regarding the ISOR. These include, but are not limited to, making more explicit the necessity statement for each provision.

1 The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people’s lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy is designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $720 billion enterprise and a key element of the Nation’s economy. It is one of the Nation’s largest exporters, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the Nation’s critical infrastructure.
It may appear that these changes are mainly ministerial in nature, ensuring that the ISOR satisfies Administrative Procedure Act (“APA”) section 11346.2(b), which requires that the ISOR include a “statement of the specific purpose of each adoption . . . and the rationale for the determination by the agency that each adoption . . . is reasonably necessary to carry out the purpose and address the problem for which it is proposed.” However, the manner in which DTSC has re-issued the ISOR conflicts with the very purpose for procedures governing the adoption of regulations in the State of California.

The Legislative findings contained in §11340 of the California Administrative Procedure Act contains pronouncements of how “the language of many regulations is frequently unclear and unnecessarily complex... (and) often confusing to the persons who must comply with the regulations.” Therefore, the Legislature established an Office of Administrative Law and administrative procedures to, as APA §11340.1 states, “improve the quality of those regulations that are adopted.” The California courts have articulated the purpose for administrative procedure as well. The Court, in Morales v. CA Dept. of Corrections and Rehabilitation (App. 1 Dist. 2008, 85 Cal. Rptr. 3d 724) stated “A major purpose of the Administrative Procedures Act is to provide a procedure for persons or entities affected by a regulation to be heard on its merits in its creation...” It is clear the intent underlying California administrative procedure law is that effected entities be able to understand the what, how, when, and why of any proposed regulation.

APA §11346.2 provides that an agency, when proposing a regulatory action, needs to make available a copy of the express terms of the regulation. Furthermore the agency must also provide an initial statement of reasoning for the regulatory action. The initial statement must at least contain information concerning the purpose of each provision, rationale for the agencies determining that the proposed provisions are necessary, and descriptions of reasonable alternatives and the reasons for the rejection of those alternatives, as well as other information as set forth in §11346.2.

DTSC has now undertaken an action that appears to be contrary to the spirit and perhaps letter of California administrative procedure law. In order for the population affected by the proposed regulatory action to be best informed and therefore able to “be heard on the merits” in comments on regulations, the proposed regulations are supposed to be accompanied by an explanatory document, the ISOR. Without understanding the rhyme and reason behind all aspects of the proposed regulation, it would be difficult for the affected public to provide informed comments to be considered by the agency. With the current revised ISOR, we now have DTSC letting the public know after the fact – after comments on the regulations were provided – what was the actual necessity for provisions. This action does not comport with the purpose of California administrative procedure law and denied the persons and entities affected by the proposal the opportunity to be heard on the merits of all aspects of the proposal. Accordingly, to ensure that all are able to provide DTSC with thoughtful comments on all aspects of the proposal, we ask that no regulatory proposal for Safer Consumer Product Alternatives be presented for comment and review without a final Initial Statement of Reasons upon which all affected entities can comment in tandem.

As noted, ACC appreciates the opportunity to comment and express our concerns about this revision. We remain committed to working with both the Executive and Legislative Branches of California State government in the development of Safer Consumer Product Alternative regulations that are practical, meaningful, and legally defensible.
Please feel free to contact me or my colleague, Emily Tipaldo (emily_tipaldo@americanchemistry.com), if you have any questions or require clarification on any aspect of our comments.

Sincerely,

Judah Prero
Assistant General Counsel