September 9, 2013

Manpreet Singh, Regulations Coordinator
Regulations Section
Department of Toxic Substances Control
P.O. Box 806
Sacramento, California  95812-0806
Submitted via: gcregs@dtsc.ca.gov

RE: 15-DAY PUBLIC NOTICE AND COMMENT PERIOD
NOTICE OF PUBLIC AVAILABILITY OF
CHANGES TO PROPOSED REGULATIONS TEXT
SAFER CONSUMER PRODUCTS

Department Reference Number: R-2011-02
Office of Administrative Law Notice File Number: Z-2012-0717-04
Office of Administrative Law File No: 2013-0718-03 S

Dear Ms. Singh:

The American Chemistry Council (“ACC”) appreciates the opportunity to provide comments on the changes to the Safer Consumer Product Regulations (the “Regulations.”). ACC ¹ is an active member of the Green Chemistry Alliance.

The Department of Toxic Substance Control (“DTSC”), in its public notice, states that DTSC submitted the final rulemaking package for the Regulations to the Office of Administrative Law in July 2013. Based on feedback received from the Office of Administrative Law, DTSC has determined that the changes to the Regulations that are the subject of this notice are therefore necessary.

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.
Although ACC is not concerned with the substance of the specific changes, ACC does have concerns with the process DTSC has used to enact the Regulations. In addition, the changes now proposed do not address any of the serious concerns ACC and others have previously articulated regarding the treatment of trade secrets under the Regulations.

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 affected entities be able to understand the what, how, when, and why of any proposed regulation.

DTSC, by continuing its pattern of taking a piecemeal approach to rule-making, has denied entities effected by the Regulations the opportunity to comment on the entirety of the regulatory proposal. Instead, comment had to be submitted on different components of the proposed Regulation at different times. This approach, which in effect never allowed any entity to comment on the entirety of the Regulation, with all of the supporting documentation required by law, does not comport with the spirit of the California Administrative Procedures Act, and perhaps not the law itself.

Second, DTSC’s approach to trade secret claims in the Regulations, and to confidential chemical identity in particular, is contrary to the Agency’s objective to promote innovation in consumer products and to reduce or replace the presence of substances, in those products, considered to pose a risk of harm. As proposed, the regulation could actually hinder innovation. ACC reiterates that DTSC should address the concerns previously submitted2 and specifically ensure that the proposed Regulations conform to the California Uniform Trade Secrets Act.

ACC appreciates the opportunity to comment and express our concerns about these changes. We remain committed to working with both the Executive and Legislative Branches of California State government in the development of Safer Consumer Products regulations that are practical, meaningful, and legally defensible.

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2 ACC Comments on Proposed Additional Post-Hearing Changes of the Safer Consumer Products Regulation (R-2011-02), filed and dated April 25, 2013 (see attachment).
Please contact me at Emily_Tipaldo@americanchemistry.com or 202-249-6127, if you have any questions or require clarification on any aspect of our comments.

Sincerely,

Emily V. Tipaldo
Manager
Regulatory and Technical Affairs


CC: The Honorable Matt Rodriquez, Secretary, CalEPA
Nancy McFadden, Senior Advisor, Office of the Governor