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File No. 038258-0007

August 22, 2014

George Borlase
Associate Executive Director
Office of Hazard Identification and Reduction
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Dear Mr. Borlase:

With the report of the Chronic Hazard Advisory Panel on Phthalates now released, we request on behalf of ExxonMobil Chemical Corporation a meeting of ExxonMobil's senior scientists with CPSC Health Sciences staff to discuss technical aspects of the CHAP Report that relate to ExxonMobil's products, diisononyl phthalate (DINP) and diisodecyl phthalate (DIDP). The scientists would like to provide information to your technical staff of where the CHAP Report uses erroneous data and methodologies, and where newer data would yield a different result from that reached by the CHAP.

We have been given to understand that there is some question about meeting with stakeholders while the Commission is preparing its proposed rule (or other decision). The Commission's rulemaking under the Consumer Product Safety Improvement Act (CPSIA) is to be conducted pursuant to section 553 of the Administrative Procedures Act (APA). CPSIA §108(b)(3). Under the APA, it is not improper for CPSC staff to have such meetings prior to issuance of a proposed rule.[1] In fact, agencies regularly meet with stakeholders during the process of drafting a proposed rule so that the proposal can be as sound as possible and not founded on erroneous or incomplete information. This can ultimately save time and resources by reducing the likelihood of need for significant changes to the proposed rule.

We believe a meeting among the scientists would be fruitful. It would provide opportunity to engage in active discussion among the scientists, so that any areas of uncertainty or potential misunderstanding can be addressed. This would facilitate development of a proposed rule based on a balanced and accurate assessment of the ExxonMobil products. Indeed, in meetings on August 14, 2014 with Commissioners Buerkle and Adler, both suggested ExxonMobil meet with the CPSC Health Sciences staff to present its perspectives on the CHAP Report and its conclusions.

Accordingly, we respectfully request you provide a meeting of CPSC Health Sciences staff with ExxonMobil senior scientists in the near future. Thank you for your timely response. If you have any questions, please feel free to contact me at 202-637-2229.

Sincerely,

Ann Claassen (ecm)

Ann Claassen
of LATHAM & WATKINS LLP

cc: Chairman Elliot F. Kaye
Commissioner Robert S. Adler
Commissioner Anne Marie Buerkle
Stephanie Tsacoumis, General Counsel
DeWane Ray, Acting Executive Director, Office of the Executive Director
Mary Ann Danello, Associate Executive Director, Directorate for Health Sciences
Shawn Foster, Counsel, ExxonMobil Chemical Company

Endnote:

[1] The Sunshine Act prohibition on *ex parte* communications is with respect to adjudicative proceedings. 5 USC §557(a) &(d). *See Marketing Assistance Program v. Bergland*, 562 F.2d 1305, 1309 (DC Cir. 1977) (finding 557(d) *ex parte* prohibition did not apply to a notice and comment rulemaking that did not involve an adjudication or a hearing required to be "on the record"). The CPSC Sunshine Act regulations, at 16 CFR 1025.1, detail that such proceedings are those under section 15 (c), (d), and (f) and 17(b) of the Consumer Product Safety Act (CPSA), section 15 of the Federal Hazardous Substances Act, and sections 3 and 8(b) of the Flammable Fabrics Act. None of those provisions are applicable here. The CPSIA provides that any rule promulgated by the Commission under CPSIA section 108(b)(3) is a consumer product safety standard under the CPSA. CPSIA §108(d). Consumer product safety standards are promulgated pursuant to CPSA sections 7 and 9. The CPSIA also authorizes the Commission to declare a children's product containing phthalates to be a banned hazardous product under CPSC section 8, which also refers to CPSA section 9 for rulemaking. CPSIA §108(b)(3). Thus, 5 USC 557(d) does not apply to the phthalate rulemaking the Commission is to engage in under the CPSIA.

Even if the ban on *ex parte* communications were applicable, an *ex parte* communication is "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." 5 USC §551(14). ExxonMobil is not requesting an off-the-record meeting. As has been the case for all our meetings with the Commission, we assume that a meeting of the CPSC and ExxonMobil scientists would be noticed in the Commission calendar and that any materials provided at the meeting would be made part of the public record.

The courts have indicated that where rulemaking does not involve "formal rulemaking, adjudication, or quasi-adjudication among 'conflicting private claims to a valuable privilege,' the concept of *ex parte* contacts has limited value. *Sierra Club v. Costle*, 657 F.2d 298, 400 (DC Cir. 1980). In fact, even where they occur after the close of the comment period, *ex parte* contacts may be of value to the agency and the rulemaking process.

> Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. As judges we are insulated from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in the judicial context. Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs.

*Id.* at 400-401. The primary issue is whether the public record as a whole supports the agency's decision, and whether, based on the *ex parte* information, the final rule is so changed from the proposed rule as to constitute a surprise. *Id.* at 201; *Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 6-7 (DC Cir. 1999).

Here, we are not asking for a communication after the comment period, but before the proposal is even issued. It is highly appropriate and desirable for the Commission staff to have such a meeting at this point to allow for the provision of information which the Commission needs to make a rational and scientifically sound decision.