

CLIENT ALERT

California Revises Green Chemistry Regulations--Again

February 8, 2013

After the requisite public comment period, California's Department of Toxic Substances Control ("DTSC") has released yet another set of revisions to the State's proposed Safer Consumer Products Regulations ("Regulations," aka the "Green Chemistry Initiative"). This is the State's ninth attempt in the last four years to create a comprehensive process for manufacturers to identify and examine safer alternatives for their products. This latest iteration indicates the State is nearing its final implementation goal.

According to the DTSC, the stated purpose of the Regulations is to "require manufacturers to seek alternative ingredients in widely used products, offering California industry the opportunity to lead the way in producing safer versions of goods already in demand around the world." The Regulations would apply across the life cycle of affected products, including their design, manufacture, use, and disposal, and would create a process by which manufacturers would have to identify and use safer alternatives. The DTSC intends to finalize the Regulations later this year, assuming additional changes are not warranted as a result of the current public comment period, and subsequent peer-review period.

Many companies that make consumer care products (e.g., nail polish), adhesives, paints, coatings, and durable goods (e.g., cars and trucks) have consistently opposed prior versions of the Regulations. Even the European Union has criticized them as "excessively complex and burdensome," especially for smaller companies in developing countries. In particular, the EU has noted the Regulations appear to be at odds with U.S. efforts to reduce or avoid administrative burdens on business.

Critics contend that the Regulations would give California too much power over how consumer goods are made and sold, make goods too costly to manufacture, stifle innovation, fail to protect trade secrets, and discourage the use of recycled materials.

The current version of the proposed Regulations articulates a four-step "science-based, iterative process" to identify safer consumer product alternatives. These include significant changes which the DTSC hopes will satisfy critics and allow this version to become final:

1) The Regulations apply to "responsible entities," which includes manufacturers, importers, assemblers and retailers who sell products in the State. The definition of "manufacturer" has been redefined to include "any person who manufactures a product that is subject to the requirements of this chapter, or any person that controls the manufacturing process for, or has the capacity to specify the use of chemicals in, such a product." The terms "manufacture" and "manufacturer" are distinguished from "assemble" and the "assembler" which fits, joins, or puts together components to create a consumer product. In the event that a manufacturer and importer of a Priority Product (discussed below) component do not comply with applicable requirements of the Regulations, assemblers who use that component have the same option as do retailers -- they can comply with the requirements, or cease ordering the Priority Product component.

2) The DTSC will create and post a list of "Candidate Chemicals" (approximately 1200), based on previous evaluations by other organizations. The DTSC will evaluate Product/Candidate Chemical combinations to develop a list of "Priority Products" for

which "Alternative Analyses" must be conducted by the manufacturers. A Candidate Chemical that is the basis for the item being listed as a Priority Product is then designated as a "Chemical of Concern" for that product. Unlike its treatment in prior drafts, a Candidate Chemical is not subject to an Alternative Analysis until it becomes a "Chemical of Concern." This draft proposes that the DTSC can require companies to make changes only to ingredients on the DTSC list of Chemicals of Concern; prior drafts had allowed the agency to force companies to address product ingredients not on the list. Of note, the DTSC has added Candidate Chemicals classified by the European Union as Category 1 respiratory sensitizers and other materials identified as California Clean Water Act pollutants, including nickel, silver, zinc, and copper.

3) Responsible Entities (manufacturers, importers, assemblers, and retailers) must notify the DTSC when their product is listed as a Priority Product, and DTSC will post this information on its website. The Responsible Entity must then perform an Alternative Analysis for the product and the Chemical(s) of Concern to determine how best to limit potential exposures. Significantly, the current draft eliminates the requirement that the Alternative Analyses be performed by "certified assessors" and accreditation bodies. And, to provide a quality assurance mechanism, the Regulations now provide a public review and comment process.

4) The DTSC will identify and require implementation of a "Regulatory Response" designed to protect public health and the environment, and to maximize the use of "acceptable and feasible alternatives of least concern." A new addition to the Regulations is that the Regulatory Response will be subject to public notice and comment, and a public workshop.

The current draft gives the DTSC the ability to add to the initial list of Candidate Chemicals by examining their "potential" (rather than their actual "ability") to cause adverse impacts. It also provides mechanisms to petition the DTSC to add or delete Candidate Chemicals and Priority Products.

The new public comment period runs through February 28, 2013.

The revised Regulations can be found [here](#).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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