

CLIENT ALERT

California's Proposed "Green Chemistry" Regulations Will Impact Consumer Product Manufacturers, Importers and Retailers

August 2, 2012

On July 27, 2012, California released a revised draft of its Safer Consumer Products Regulations—commonly known as the "Green Chemistry Initiative." The proposed regulations establish a process for California's Department of Toxic Substances Control (DTSC) and product manufacturers to assess whether consumer products containing certain "chemicals of concern" can be made with safer ingredients. Once implemented, the regulations will empower DTSC to order companies to use substitute chemicals when manufacturing certain consumer products or face a ban on the sale of those products in California.

Manufacturers, importers and retailers of consumer goods—defined as "responsible entities"—should be aware of these prospective regulations. All responsible entities will be required to provide information on the source, ingredients, and toxicity characteristics of each of their consumer products sold in California, regardless of whether the products contain any chemicals of concern (COCs). Responsible entities with a "priority product" in the stream of commerce will have a heightened obligation to produce detailed reports—known as "alternatives assessments"—to DTSC. These reports will identify potential alternatives, detail the alternatives assessment conducted, document the findings, and propose next steps. Based on these findings, manufacturers could be required to reformulate certain products to continue sales in California.

The proposed regulations are presently undergoing a 45-day public comment period. DTSC intends to issue final regulations by the end of this year or early 2013. DTSC will hold a hearing on the proposed regulations on **September 10, 2012**. Written comments on the proposal are due by **September 11 at 5 PM PST**, and should be marked Reference Number R-2011-02 and emailed to gcregs@dtsc.ca.gov. If substantial changes are made to the proposed regulations, the modified full text will be made available for public comment for at least 15 days prior to adoption.

More Information About the Proposed Regulations:

DTSC has been drafting these regulations since California undertook its "Green Chemicals Initiative" in 2008. This is the eighth draft circulated, and it reflects changes suggested by the public and interested parties. Some key provisions include:

- **"Chemicals of Concern":** DTSC's directive to establish a list of COCs within 30 days after the regulations are implemented is particularly important. DTSC plans to release an initial list of approximately 1,200 COCs. DTSC has shortened an earlier list of over 3,000 COCs, noting that chemicals covered by other regulations (*e.g.*, pesticides) and chemicals determined not to be relevant to consumer products have been excluded.
- **"Priority Products":** In conjunction with the COC list, DTSC will identify up to five "priority products" (PPs) that contain one or more COCs. Responsible entities will then be required to notify DTSC within 60 days of a PP's listing that its product is a PP or satisfies an exemption. PPs not exempted will be subject to a mandatory alternatives assessment.
- **The burden on business:** If a product is considered a PP, the manufacturer will be required to conduct an alternative analysis to determine how to make the product without the COCs at issue. Based on the outcome of that analysis, DTSC

will determine whether safer alternatives to the COCs are available that are "functionally acceptable and technologically and economically feasible." Upon such a finding, the manufacturer must implement the alternative within one year or face a state-wide ban on sales of the product. DTSC will also require companies to submit their product design and development processes for public review, unless certain information is deemed a trade secret. Some industry representatives estimate that alternatives assessments could cost companies between \$500,000 and \$6 million per ingredient.

- **All consumer products are impacted:** Regardless of whether the product is considered a PP or contains an ingredient listed as a COC, responsible entities will be required to provide information on the source, ingredients, and toxicity characteristics of each of their consumer products sold in California. Companies that do not comply will be named on a publicly accessible "failure to comply" list on DTSC's website. Moreover, manufacturers that currently sell products only outside of California will have to be increasingly vigilant about whether their products end up being sold in California, and subject to these regulations.
- **All entities in the distribution chain should remain vigilant:** While the obligations for responsible entities under the regulations are tiered, no level of commerce is exempt. Primary reporting and compliance responsibility will lie with the manufacturer. The importer will have responsibility if the manufacturer fails to comply, and retailers will be required to comply only if the manufacturer and importer (if any) fail to comply. Retailers will be responsible for tracking information posted on a "Failure to Comply" list on DTSC's website, and ensuring compliance for listed products.

In a press briefing on the proposal, DTSC Director Deborah Raphael stated, "[w]e believe these regulations will be good not only for the health of our consumers but for the health of our economy." When companies "make products with the environment and human health in mind, they will have a phenomenal set of customers around the globe who want to buy those products."

To view the draft regulations and related documents go to: www.dtsc.ca.gov/SCPRegulations.cfm.

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