

CLIENT ALERT

State Government Coalition Issues Draft Guidance For Assessing Alternatives to "Chemicals Of Concern"

March 26, 2013

On March 18, 2013, an association of state, local, and tribal governments released draft guidance for companies and regulators to use in analyzing potential alternatives for "chemicals of concern" found in products. With agency involvement from eleven states, this guidance document may become the framework for significant state action regarding the regulation and mandating of alternatives assessments at the state level. It may also be used as a tool by advocacy groups and others to bolster marketplace "de-selection" efforts. Public comments on this draft guidance are due April 19, 2013.

This guidance document, *Guidance for Alternatives Assessment and Risk Reduction ("AA Guidance")* was released by an eleven state consortium known as the Interstate Chemical Clearinghouse (IC2). The consortium, which includes member agencies from California, Connecticut, Maine, Massachusetts, Michigan, Minnesota, New York, Oregon, Vermont, and Washington, received substantial financial and technical support from the U.S. Environmental Protection Agency and EPA's Design for the Environment Program, in assembling the *AA Guidance*. The state of Washington—which has been increasingly active over the past several years in regulating chemicals in consumer products sold within the state—helped lead this effort.

The *AA Guidance* articulates a so-called "golden rule" that defines the overall objective of the alternatives assessment process: "to replace chemicals of concern in products or processes with inherently safer alternatives, thereby protecting and enhancing human health and the environment." In order to achieve this objective, the *AA Guidance* presents several decision-making frameworks for identifying and selecting alternatives to "chemicals of concern." Highlights of the draft guidance include:

- Two sets of analytical "modules" that are to be used to (i) identify potential alternatives and (ii) evaluate the desirability of selected alternatives. Each module examines a different aspect of the alternative being assessed (for example, there are modules for "hazard," "exposure," "performance," etc.) The guidance presents these modules as a "buffet" that allows users the flexibility to select whatever particular combination of modules they want to employ in conducting their assessment.
- Different levels of scrutiny are allowed within a given module, providing individual users the option of developing a more rigorous and robust analysis, or a less rigorous and robust analysis, depending on the individual user's needs and objectives. Different tools are provided for different levels of analysis.
- Decision rules are provided to guide the user in performing an assessment using the outputs from the various "modules." Alternate decision rules allow individual users the option of developing a more, or less, robust assessment depending on the individual user's needs and objectives.
- The draft guidance also articulates broad principles for conducting an alternatives assessment, including transparency in decision-making, flexibility in conducting the analysis, and consideration of the life-cycle impacts of a product.

Although the *AA Guidance* sets forth voluntary guidelines, it could become a document of both practical and legal significance when finalized. State efforts to regulate chemical substances and product content are becoming increasingly common in the

absence of federal Toxic Substances Control Act (TSCA) reform. (See, for example, our [prior discussion](#) of California's Green Chemistry regulations.) There is also speculation that states involved in the *AA Guidance* may build upon this framework to pass laws requiring businesses to conduct alternatives assessments. Similarly, advocacy groups and others can be expected to use this guidance to promote marketplace "de-selection" efforts for hot-button chemicals or products.

Forward-thinking businesses that manufacture or sell products containing chemical substances that may qualify as "chemicals of concern" should closely consider the impact of the *AA Guidance* on their customers, products, and commercial operations. The public comment period will be open until April 19, 2013.

Attorneys at Crowell & Moring are monitoring the development of this guidance, and are available to provide legal guidance on possible impacts of the *AA Guidance* on your business.

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

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