

California's Proposed Green Chemistry Regulations Could Cause Companies to See Red

California's proposed Safer Consumer Products (SCP) regulations, the first of California EPA's regulations to implement its Green Chemistry Initiative – if adopted as presently drafted – will have a significant impact on virtually all companies manufacturing, selling or distributing consumer products in California, *regardless of where they are manufactured or produced*. “Consumer product” is broadly defined to include (with a few exceptions for certain types of products already regulated) “a product or part of the product that is used, brought, or leased for use by a person for any purposes.”

In September 2008, California's Green Chemistry Initiative became law. Since then, California EPA's Department of Toxic Substances Control (DTSC), which is charged with implementing the law, has been on a rollercoaster in its efforts to adopt regulations that both industry stakeholders and environmental groups find acceptable. No easy task. On July 27, 2012, DTSC released its most recent draft SCP regulations for public notice and comment. This follows so-called “informal draft regulations” that were issued in the fall of last year.

Because of the length and complexity of the rulemaking, DTSC recently extended the public comment period for the draft SCP regulations, by one month, to October 11, 2012.

The goal of the California regulations is, ultimately, to either cause the reformulation of products that are designated as “priority products” or ban their sale, manufacture, import or distribution in California. In its press release announcing the draft SCP regulations, DTSC said, “[t]he proposal *requires 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...[i]f an alternative is not feasible, DTSC will identify the steps the manufacturer *must* take to ensure the product is safely used, disposed of, or phased out.” (emphasis added)

The Four-Step Process

The proposed regulations establish what is described by DTSC as “a four-step continuous, science-based, iterative process to identify safer consumer product alternatives”:

1. **Development of a List of Chemicals of Concern.**

The regulations establish an immediate list of approximately 1,200 Chemicals of Concern (COCs). The initial COCs include (i) all chemicals listed under California's Proposition 65 as carcinogens or reproductive toxins; (ii) chemicals classified as causing mutagenic effects under regulations of the European Union; and (iii) chemicals that US EPA has determined are persistent in the environment, bioaccumulate and are toxic. Subsequently, additional chemicals will be listed based on a number of factors identified in the proposed regulations.

ALERT: The number of consumer products potentially covered is huge. Any product that contains a chemical on California's broad and expansive Proposition 65 list may be subject to these new regulations.

2. **Prioritization of Products.** DTSC will then evaluate and prioritize product/COC combinations and develop a list of “Priority Products.” Following this analysis, DTSC will assess whether other laws already provide adequate protection of public health and/or the environment, and decide whether listing the product as a Priority Product will actually have any meaningful impact. Under the draft regulations, DTSC has the authority to demand product information from responsible entities and chemical manufacturers/importers. Retailers will be required to obtain a certificate of compliance from the manufacturer or supplier for each Priority Product stating that, as applied to the specific product, the manufacturer is in compliance with (or exempt from) the SCP regulations.
3. **Notification by Responsible Entities and Product Alternatives Analysis.** The responsible entities (manufacturers, importers and retailers) are required to notify DTSC when their product(s) are listed on the Priority Products list. DTSC also will post this information on its website. The responsible entities of a product listed as a Priority Product are then required to perform an Alternatives Analysis (AA) for the product (and the COCs in the product) to determine how best to limit exposures to, or the level of adverse public health and environmental impacts posed by, the product. A short timeframe is proposed for this process, which could involve significant research and development, and take months or longer. Importantly, the AA must be conducted by a certified assessor, as determined by a DTSC-designated accreditation body.

ALERT: For companies with a wide variety of products or many stock-keeping units (SKUs), the product evaluation and “Alternatives Analysis” could be time consuming and expensive.
4. **Regulatory Responses to Limit Potential Health and Environmental Impacts.** The regulations give DTSC broad authority to implement an array of potentially draconian regulatory responses to protect public health and the environment from the sale or use of Priority Products, such as prohibiting the sale of the product, requiring detailed product information to be provided to consumers, restricting the use of the product, and establishing and funding an end-of-life product management program, among others.

Potential Impact of the SCP Regulations

The proposed regulations require compliance by manufacturers, the US importers of the product and the retailers that sell the product. The primary compliance responsibilities are imposed upon the manufacturer. If the manufacturer (or importer) fails to comply with the SCP requirements, the retailer has a duty to comply with the product evaluation and analyses provisions of the regulations. This poses significant difficulties for retailers, which may not have access to the manufacturing information needed to comply. The retailer, of course, has the option of ceasing to order the product at issue and notifying DTSC.

The draft regulations specify that DTSC can initiate enforcement actions (including fines and penalties) against *responsible entities* (which encompasses virtually the entire supply chain, including retailers and importers). What’s more – the regulations require DTSC to post a “Failure to Comply List” on its website. DTSC also has wide-ranging authority to conduct audits to determine compliance with the regulations.

Further, any person (including competitors and private citizens) may petition DTSC to evaluate a chemical or product. The draft regulations also provide a *de minimis* exemption for products that contain so-called *de minimis* levels of COCs, but it is unclear whether this exemption will provide responsible entities much relief from the breadth and scope of the proposed regulations.

One of the most significant issues facing the myriad companies that will be impacted by the SCP regulations is how the proposed SCP regulations will interface with the many other state, federal and international laws that have been implemented over the years to address chemicals in consumer products, such as Proposition 65, REACH, the Consumer Product Safety Improvement Act, the Toxic Substances Control Act and the Toxics in Packaging Act, to name a few.

In addition, in January 2012, US EPA and DTSC entered into a “cooperation agreement” under which DTSC and US EPA agreed to cooperate in reducing toxic chemicals in consumer products. The stated objective of the agreement is to facilitate technical support and collaboration between DTSC and EPA on “advancing the science of alternative assessment,” as well as the “development of chemical information databases.” The alliance has been touted by DTSC as a way to “minimize duplication of effort and promote consistency in methodology” between the two agencies.

Steps Companies Should Consider Taking Now

For products manufactured, sold or used in California, responsible entities (defined as the manufacturer, importer or retailer of a product) should consider taking the following steps:

- Participate in the regulatory process. Consider commenting on the proposed regulations, either individually or through a trade or industry association.
- Perform a preliminary evaluation of your products that potentially may be impacted by the regulations (based primarily on the list of chemicals identified under Proposition 65).
- Give careful attention to the initial COC list. Consider whether a company or industry effort should be initiated to petition for removal of any chemicals.
- Work with counsel to ensure maximum confidentiality protections for any business information submitted to DTSC.
- Consider what your competitors are doing. In its press release announcing the draft regulations, DTSC stated “[t]he regulation levels the playing field for those who want to do the right thing.”
- Consider how existing agreements with suppliers, vendors, manufacturers, distributors or retailers should be amended to address the certification requirements and the potential for non-compliance with the regulatory requirements.

How Squire Sanders Can Help

At Squire Sanders, we have a team of environmental lawyers who understand the legal and business issues presented by far-reaching regulatory initiatives, such as the SCP regulations. We are prepared to help you understand the complexities of the proposed SCP regulations, how they might impact your business(es) and how to navigate through various strategic alternatives in implementing the regulations, once they are adopted. We have comprehensive and broad experience working on similar matters, particularly as they pertain to toxic chemicals in products, such as Proposition 65.

For more information about Squire Sanders’ California environmental practice, or to discuss how the proposed SCP regulations may impact your business, please contact one of the Squire Sanders lawyers listed in this publication or one of the Squire Sanders lawyers with whom you routinely work.

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