

## CALIFORNIA'S GREEN-CHEMISTRY INITIATIVE: RETAILERS, BE ON THE LOOKOUT

By *Daren S. Garcia* and *Steven Chang* on November 20, 2015

California—which boasts the largest consumer product market in the nation<sup>i</sup>—has taken the lead in enacting new comprehensive “green chemistry” laws aimed at reducing toxic chemicals found in everyday consumer products. California’s Green Chemistry Law, implemented as the “Safer Consumer Products Program” (SCP) by the California Department of Toxic Substances Control (DTSC), went into effect on October 1, 2013, promising what is to be a comprehensive change with respect to how potentially hazardous chemicals and other substances contained in a wide variety of consumer products are identified and regulated in California.



The goals of California’s SCP program are threefold: (1) to reduce toxic chemicals in consumer products; (2) to create new business opportunities in the emerging safer consumer products economy; and (3) to reduce the burden on consumers and businesses struggling to identify what is in the products they buy.<sup>ii</sup> The DTSC intends to accomplish these goals by relying on reports submitted by responsible entities (primarily manufacturers) regarding the availability of safer chemicals. If the manufacturer fails to comply, the law looks to entities down the supply chain—including retailers—to enforce compliance.

The law is generally seen as a template for new state-promulgated regulations designed to supplement the aging federal Toxic Substances Control Act.<sup>iii</sup> Although California’s Green Chemistry Law only regulates products that are entered into California’s stream of commerce, commentators have noted that the law will likely drive new standards for products sold nationwide.<sup>iv</sup> Even if other states do not follow suit, the impracticality of selling different products specific to California will nonetheless drive manufacturers to comply with California’s requirements on a nationwide basis, as many national retailers require that a product must be legal to sell throughout the U.S.<sup>v</sup>

Given the comprehensive nature of California’s Green Chemistry Law, the DTSC has been slow to implement its provisions. On March 13, 2014, it released only three initial “priority products” that it will focus on in 2015 and 2016: (1) children’s foam-padded sleeping products containing the flame retardant TDCPP; (2) insulation spray polyurethane foam systems containing methylene diphenyl diisocyanates; and (3) paint strippers, varnish removers, and industrial-strength surface cleaners containing methylene chloride.<sup>vi</sup> The DTSC is expected to finalize this list by the end of 2015, thereby requiring manufacturers to undergo a comprehensive “alternatives analysis” inquiry to determine whether safer chemical compounds are available. Further, the DTSC is expected to release additional “priority products” in 2016 and 2017, drawing from seven broad categories: (1) beauty, personal care, and hygiene products; (2) building products; (3) household, office furniture, and furnishings; (4) cleaning products; (5) clothing; (6) fishing and angling equipment; and (7) office machinery.

## RETAILER WATCH LIST: EXPECTED DEVELOPMENTS

Local and national retailers will need to pay close attention to the DTSC's actions in the coming months and years to ensure compliance. Specifically, retailers should keep a close eye on the following developments that are expected to occur in the latter half of this year through 2017:

### (1) Publication of the final list of the initial proposed priority products

The DTSC is expected to finalize the first three proposed priority products—children's foam padding, spray polyurethane foam systems, and paint strippers, varnish removers, and industrial-strength surface cleaners—by the end of the year. At least initially, the publication of this list does not impose the primary responsibility of compliance on retailers that are not manufacturers of these products. Rather, only if manufacturers do not comply with the law's notice and reporting requirements are retailers potentially responsible for taking any action with respect to these products.<sup>vii</sup>

Once the DTSC publishes the official list on its website, manufacturers and/or importers will be required under the law's provisions to abide by certain notice requirements and undergo an "alternatives analysis" inquiry for these products. A more detailed explanation of these requirements, and retailers' potential responsibility and liability if manufacturers fail to comply, is set forth below.

To keep informed of developments, the DTSC offers an "Elist" subscription, which can be accessed [here](#).

### (2) Publication of additional priority products from the seven broad categories identified by the DTSC

The DTSC is expected to announce up to three new priority products by the end of 2015, and an increased number of priority products in 2016 and 2017. These new priority products will be drawn from seven broad categories: (1) beauty, personal care, and hygiene products; (2) building products; (3) household, office furniture, and furnishings; (4) cleaning products; (5) clothing; (6) fishing and angling equipment; and (7) office machinery. Although the DTSC has not released any official product and chemical combinations, it has released a 35-page "Priority Product Work Plan," that explains, in greater detail, the reasoning behind each product category and the chemical compounds of concern. The work plan identifies several chemicals on which the DTSC will focus, including flame retardants, preservatives, surfactants, colorants, dyes and pigments, emulsifiers/plasticizers, antimicrobials, solvents, and water, oil or stain repellants.

The three-year work plan is available on the DTSC's website [here](#). A more detailed explanation of the seven categories and the specific chemicals of concern is set forth below.

### (3) Failure to Comply Notices on the DTSC's Website

After the DTSC finalizes and publishes a list of new priority products, retailers should pay close attention to the DTSC's website to identify any manufacturers and/or importers that have failed to comply, which will be posted in a "Failure to Comply List," identifying and describing the product and brand name(s) at issue.<sup>viii</sup> This publication will likely be accompanied by an alert from the DTSC's Elist subscription. As explained in more detail below, the publication of specific products on this "Failure to Comply" list triggers retailers' notification and response requirements under the new law.

## RETAILER RESPONSIBILITY

Rather than attempting to determine how toxic specific chemicals are at certain levels, or banning specific chemicals altogether, California's new law places the primary impetus on manufacturers (and potentially other actors in the stream of commerce such as importers or retailers) to justify their use of potentially hazardous chemicals in consumer products—or to find safer alternatives. In order to enforce compliance, the law looks down the supply chain to the importer, assembler, or retailer in the event that a manufacturer does not comply.<sup>ix</sup> Generally, in the event of a manufacturer's non-compliance, a retailer must cease any new distributions of the product in California.<sup>x</sup> Consequently, regional and national retailers operating in California should be aware of the law's notice and compliance requirements.

Under the SCP regulations, the manufacturer is the default “responsible entity” and has the principal duty to comply with the notice and alternatives analysis requirements.<sup>xi</sup> A retailer is only required to comply with the requirements designated for a responsible entity if: (1) the manufacturer or importer has failed to comply with the regulations; and (2) the DTSC provides notice to the retailer or assembler of such non-compliance by posting the information on the “Failure to Comply List.”<sup>xii</sup>

The regulations set forth specific requirements for retailers if the manufacturer or importer fails to comply.<sup>xiii</sup> Again, “notice” under the regulations is satisfied by publishing a “Failure to Comply List” on the DTSC website.<sup>xiv</sup> Accordingly, retailers that sell or distribute any identified priority product should monitor the DTSC's website to ensure compliance for any products or manufacturers that appear on the Failure to Comply List.

In order to be exempt from the manufacturers' obligations with respect to any priority product under the new law, a retailer is generally required to cease ordering the product no later than ninety (90) days after publication of the Failure to Comply List.<sup>xv</sup> Further, the retailer will be required to submit to the DTSC a “Product Cease Ordering Notification” setting forth the retailer's and manufacturer's contact information, the locations where the priority product was sold, the length of time needed to exhaust the remaining inventory, and a certification that the retailer will not re-order the priority product until it is removed from the Failure to Comply List.<sup>xvi</sup>

A failure to comply with these requirements results in the retailer stepping into the shoes of the “responsible entity.”<sup>xvii</sup>

## BACKGROUND AND HISTORY

The California Green Chemistry Initiative began as a six-part initiative designed to reduce public and environmental exposure to potentially hazardous chemicals found in everyday consumer products.<sup>xviii</sup> In 2008, the California legislature passed two of those initiatives—AB 1879: Hazardous Materials and Toxic Substances Evaluation and Regulation and SB 509: Toxic Information Clearing House, collectively referred to as the “Green Chemistry Law.”<sup>xix</sup> By and large, California's Green Chemistry Law—and similar efforts taken by other states—were enacted as a response to Congress's inability to reform the aging federal Toxic Substances Control Act.<sup>xx</sup>

Under A.B. 1879, the DTSC was required to issue regulations on or before January 1, 2011 identifying chemicals of concern (CoC) and setting forth the procedures by which the DTSC would evaluate

products containing CoCs that were placed in the stream of commerce in California.<sup>xxi</sup> Unlike other similar state initiatives—that were generally limited to children’s products—California’s Green Chemistry Law was unprecedented in that it extends to all consumer products and their components.<sup>xxii</sup> Further, unlike other state regulations, the law focuses on entire classes of products—instead of banning specific chemicals from specific products—and places the impetus on manufacturers to identify safer chemicals that could be used.<sup>xxiii</sup>

## SAFER CONSUMER PRODUCTS PROGRAM: IMPLEMENTATION

The DTSC promulgated its “Safer Consumer Products” regulations, which took effect on October 1, 2013, after an extensive rulemaking procedure. The SCP regulations outlined four general stages of implementation:

- (1) Identification of candidate CoCs;
- (2) Identification of a list of priority products containing those CoCs for which an alternatives analysis must be conducted by a responsible entity (generally, the manufacturer);
- (3) Performance of alternatives analysis of the priority product and CoC by the responsible entity; and
- (4) DTSC issuance of a regulatory response.<sup>xxiv</sup>

The DTSC has been slow to implement its SCP program, but has taken significant steps forward in 2014 and 2015.

### General Timeframe for Implementation

Below is the general timeline that the DTSC has set forth for implementation of its SCP program, and the current status of each step:<sup>xxv</sup>

- **Initial Candidate Chemical List** → Effective date of the regulations.
  - The DTSC released its initial Candidate Chemical list on March 13, 2014, identifying approximately 1,200 CoCs.<sup>xxvi</sup>
- **First “Proposed” Priority Products List** → 180 days after the regulations effective date.
  - The DTSC released its first three “proposed” priority products on March 13, 2014.<sup>xxvii</sup>
  - The DTSC also released its “three-year plan” for 2015-2017, identifying seven product categories from which it will draw additional priority products during this timeframe.<sup>xxviii</sup>
- **First Priority Products List Finalized** → Requires rulemaking (may take up to one year).
  - To date, the DTSC has not finalized the list of its initial proposed priority products.
- **Priority Product Notification** → 60 days after listing on final Priority Products list.
  - Because no list has been finalized, the 60-day timeframe has not yet been triggered for any priority products.

- **Preliminary Alternatives Analysis Report** → Due to DTSC 180 days after listing on final Priority Products list.
  - On September 24, 2015, the DTSC released its “Draft Stage 1 Alternatives Analysis Guide” on its website. The guide is intended to help manufacturers (or other responsible entities) meet the alternatives analysis regulatory requirements.<sup>xxix</sup>
  - The draft guide was open for public comment until and through November 16, 2015 through the DTSC’s website. Public comments to the draft can be viewed [here](#).
  
- **Final AA Report** → Due to DTSC 1 year after the notice of compliance for the Preliminary AA Report.
  - The DTSC has not yet released guidance for the final AA report.
  
- **Regulatory Response Implementation** → To be specified by the DTSC in the regulatory response determination.
  - Once the AA process is complete, the DTSC will issue a regulatory response, which can vary widely from a simple notice to consumers to a broad prohibition on the distribution or sale of the priority product in California.

## Description of Implementation Stages

### **Stage 1: Candidate Chemical List**

The “Candidate Chemical” list is an inventory of chemicals drawn from several state, federal, and international laws and regulations that exhibit a “hazard trait and/or an environmental or toxicological endpoint.”<sup>xxx</sup>

The DTSC issued its initial chemical list, which includes approximately 1,200 CoCs, on March 13, 2014. The DTSC maintains a “Candidate Chemical Database,” on its website, which can be accessed [here](#).

The DTSC’s publication of the Candidate Chemicals list itself imposes no requirements on manufacturers of products that contain any chemical on the list. It merely provides responsible entities with notice of CoCs that the DTSC will evaluate in determining “priority products.”<sup>xxxi</sup>

### **Stage 2: Identification of Priority Products**

The next step under the SCP regulations is for the DTSC to identify no more than five initial priority products that contain one or more CoCs.<sup>xxxii</sup> Once the list is finalized, after formal rulemaking and opportunity for public comment, the final list of priority products will be published. That publication then triggers the notice and compliance requirements for “responsible entities” under the new regulations.<sup>xxxiii</sup>

#### DTSC’s Initial Priority Products List

On March 13, 2014, the DTSC released its initial proposed “priority products” list, which identified the following three proposed priority products and CoCs:

- **Children’s foam-padded sleeping products** containing the flame retardant TDCPP (chlorinated tris).
  - Includes nap mats and cots, sleep positioners, travel beds, bassinet foam, portable crib mattresses, play pens, and car bed pads.

- **Spray polyurethane foam systems** containing unreacted Methylene Diphenyl Diisocyanates (MDI).
  - Commonly used in home insulation.
- **Paint strippers, varnish removers, and industrial-strength surface cleaners** containing methylene chloride.<sup>xxxiv</sup>

The criteria utilized by the DTSC in choosing this initial list included: (1) the potential for the chemical to create significant harm to the public or the environment; (2) the potential for the product to create a pathway for exposure to the CoC; and (3) whether the chemical exposure impacts sensitive groups, such as children or the elderly.<sup>xxxv</sup>

To date, the DTSC has not finalized this initial list of priority products. As set forth below, manufacturers and other potentially responsible entities (such as retailers), should watch for this publication in the near future.

*DTSC's Three-Year Priority Product Work Plan for 2015–2017*

In April 2015, the DTSC released a three-year “Priority Product Work Plan,” which describes product categories from which the DTSC will select Priority Products over the next three years. The three-year plan includes the following broad product categories:

- **Beauty, Personal Care, and Hygiene Products**
  - Including body wash and soaps, deodorants, lip balms and gloss, lotions, ointments, pomades, hair care products, cosmetics, nail care products, and sunscreen.
  - The DTSC will focus on products that contain the following chemicals: aldehydes or formaldehydes (cross-linking agent, modifier, and preservatives), alkylphenol ethoxylates (surfactant), azo dyes, coal tars, lead, and lead acetate (colorants, dyes, and pigments), phthalates (emulsifier/plasticizer), triclosan (antimicrobial), and toluene.
- **Building Products**
  - Including paints and primers, paint removers, stains and varnishes, adhesives and glues, caulking, sealants, roof coatings, carpeting, carpet padding, engineered wood and laminate flooring, plywood and OSB subflooring, and vinyl flooring.
  - The DTSC will focus on products containing brominated or chlorinated organic compounds and organophosphates (flame retardants), isocyanates (reactant, precursor), metals such as Chromium VI (dyes and pigments), perfluorochemicals (water, oil and stain repellants), phthalates (plasticizer) and volatile organic compounds such as formaldehyde, n-hexane, n-methyl-pyrrolidone, and toluene (solvents).
- **Household, Office Furniture, and Furnishings**
  - Including bedding, fabric and textile furnishings, seating and sofas, and curtains.
  - The DTSC will focus on products containing chlorinated and brominated organic compounds and organophosphates (flame retardants) and perfluorochemicals (water, oil, and stain repellents).
- **Cleaning Products**
  - Including air fresheners, bathroom cleaners, carpet cleaners, detergents, surface cleaners, floor cleaners, floor waxes and wax removers, general-purpose cleaners, deodorizers, oven cleaners, scouring cleaners, spot removers, and window cleaners.
  - The DTSC will focus on products containing alkyl phenol ethoxylates (surfactant), hydrogen fluoride (anti-scaling agent), phthalates (emulsifier), triclosan (antimicrobial) and volatile organic compounds, such as n-hexane, methyl ethyl

ketone, n-methyl pyrrolidone, toluene and xylene (solvents).

➤ **Clothing**

- Including full body wear, lower body wear, sleepwear, sportswear, underwear, and upper body wear.
- The DTSC will focus on products containing alkyl-phenol ethoxylates (surfactant), aromatic amines and azo dyes (colorant, dye, and pigment), perfluorochemicals and/or formaldehyde (water repellents and oil, stain or wrinkle resistance), phthalates (plasticizer), and triclosan (antimicrobial agent and material preservative).

➤ **Fishing and Angling Equipment**

- Generally focusing on fishing weights and gear.
- The DTSC will focus on equipment containing chemicals that can potentially harm birds and other wildlife such as lead, zinc, and copper.

➤ **Office Machinery**

- Generally focusing on consumable products such as ink cartridges, thermal paper, and toner cartridges.
- The DTSC will focus on products containing azo dyes (colorant), bisphenols (developer), phthalates (stabilizer, plasticizer), and volatile organic compounds such as hexane, toluene and xylene (solvents).

Pursuant to the three-year plan, the DTSC intends to announce up to three new priority products in 2015, with an expected increase in the number of priority products released in 2016 and 2017. The three-year work plan is available on the DTSC's website [here](#).

### **Stage 3: Alternatives Analysis**

After the DTSC identifies a “priority product,” the manufacturer (or other responsible entity) must provide a notification to the DTSC within 60 days of the listing that identifies the responsible entity, whether it is a manufacturer, importer, assembler, or retailer, and the product.<sup>xxxvi</sup> Subsequently, within 180 days of the identification of the priority product, the responsible entity must perform an extensive “alternatives analysis” that either justifies the product’s current composition or reformulates the product with an alternative safer than the CoC at issue.<sup>xxxvii</sup>

The process for the “Alternatives Analysis” stage of the SCP program has not been finalized. On September 24, 2015, DTSC released a draft guide for the first stage of the Alternatives Analysis for public review and comment. The guide is intended to help responsible entities conduct a first-stage Alternatives Analysis to meet the regulatory requirements. The draft guide is available on the DTSC's website [here](#).

### **Stage 4: Regulatory Response**

After the Alternatives Analysis stage is complete, the regulations authorize the DTSC to take one or more measures for priority products where no alternative has been identified, or for products that will continue to be sold while the responsible entity develops an alternative, including: (1) notification requirements from the responsible entity regarding the product’s hazards to consumers;<sup>xxxviii</sup> (2) use restrictions, including restrictions on the concentration of the CoC, use of the CoC, and form in which the product is sold;<sup>xxxix</sup> (3) prohibition on the distribution or sale of the priority product;<sup>xl</sup> (4) requirements for the responsible entity to develop safety measures that limit exposure or access to the CoC;<sup>xli</sup> (5) end-of-life management requirements;<sup>xlii</sup> and (6) additional research and development for green alternatives.<sup>xliii</sup>

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## QUESTIONS

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