

# Client Alert.

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June 23, 2010

## California Considers Requiring Disclosure of Consumer Product Ingredients on the Internet

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California's legislature is considering new legislation that would ban the manufacture, sale, or distribution of certain consumer products sold in California unless manufacturers publish a comprehensive list of ingredients on a publicly available website, and include the website addresses on the products' labels. As currently drafted, Senate Bill 928 ("SB 928") applies to automotive products, cleaning products, polish or floor maintenance products, and air fresheners and deodorizers. The scope of products, however, is under review and could be changed by the legislature before enactment.

### LEGISLATIVE HISTORY

SB 928 was approved by the California State Senate on April 8, 2010. The bill was supported by a coalition of environmental groups, including Environmental Working Group, Environment California, and Sierra Club. The bill was recently amended by an assembly committee on June 17. The assembly committee revised SB 928 in three significant ways, as discussed below: (1) it added a prohibitory provision and authorized civil penalties for any violation; (2) it expanded and clarified SB 928's scope; and (3) it included a trade secret exemption.

### PROHIBITORY PROVISION AND PENALTIES

As originally drafted, SB 928 required manufacturers or wholesalers of the categories of consumer products identified above to post on their websites all substances contained in those products. As revised by the assembly committee, the bill now further prohibits, as of July 1, 2011, the manufacture, sale, or distribution of those products unless they comply with the required web and label disclosures. Moreover, the revised version of the bill brings the proposed legislation under the California Hazardous Waste Control Law ("HWCL"), subjecting violators to statutory penalties that have long been provided for under that statute. Violators of the HWCL are liable for a civil penalty up to \$25,000 per violation, or per day for a continuing violation.

### EXPANDING AND CLARIFYING THE SCOPE OF SB 928

As revised by the assembly committee, the bill also significantly expands the scope of SB 928. The original version of SB 928 defined "manufacturer" as "a person who manufactures a designated product in this state." The revised bill expands the definition of "manufacturer" in two ways. First, it includes persons or entities that not only manufacture certain consumer products, but also those who assemble, produce, package, repackage, or relabel those products. Second, the new definition clearly applies to "manufacturers" located outside of California so long as their products are "sold, distributed, or used" in California.

One positive development is that the revised bill clarifies the scope of the four product categories that would be covered. The original version categorized products by their design. The revised bill, however, categorizes products by their intended purpose as evidenced by their design *or label*. In addition, the bill as revised by the assembly committee provides greater detail regarding the types of products each category would cover. For example, under the revised bill,

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the definition of “automotive products” excludes automotive paint or paint repair products, and the definition of “cleaning products” excludes “personal hygiene” products, such as soaps or shampoos. Furthermore, the bill as revised does not require manufacturers to disclose “incidental” ingredients (e.g., substances with no technical or functional effect in an amount no greater than .01% of the product).

## TRADE SECRET EXEMPTION

Perhaps most importantly, the bill as revised by the assembly committee contains provisions exempting manufacturers from disclosing product ingredients when doing so would involve the release of trade secrets as described in section 3426.1 of the California Civil Code. To justify a claim of trade secret exemption, a manufacturer must make a written disclosure to the California Department of Toxic Substances Control.

## INDUSTRY REACTION

The assembly committee’s latest version of SB 928 presents a mixed bag for California businesses. Groups such as the California Chamber of Commerce argued that mandatory disclosures of product ingredients on the Internet would likely cause regulatory confusion, increase business costs, and harm product innovation. While the revised bill clarifies the scope of the products covered and includes protection for trade secrets, it also expands the type of entities that could be subject to the newly added penalty provisions.

We are continuing to monitor these developments as SB 928 proceeds through the California legislature.

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Morrison & Foerster LLP is widely recognized as a leader among law firms on “green chemistry” issues such as the ones covered by SB 928, and maintains full service environmental law and consumer products practices

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