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Next Generation of Consumer Product Rules: California Issues Draft Green Chemistry Regulations

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On July 27, 2012, following a series of contentious administrative hearings, California's Department of Toxic Substances Control ("DTSC") finally released its proposed green chemistry regulations for public notice and comment. The draft regulations set out the details of California's Green Chemistry Initiative, which requires product manufacturers to examine whether they can replace existing chemical ingredients with alternatives that are deemed safer for consumers and the environment. The proposed regulations establish a four-step regulatory process in which DTSC (i) identifies chemicals of concern ("COCs"), (ii) develops a list of Priority Products containing those COCs, (iii) requires manufacturers of Priority Products to notify DTSC and analyze possible product alternatives, and (iv) imposes a regulatory response, which in its most extreme form includes banning the sale of the product in California.

The draft regulations are late, as the statute required that the regulations be in place by January 1, 2011. The newly proposed regulations follow the same basic framework as previous drafts (discussed in further detail [here](#)), but proposed changes affect each step of the regulatory process. Although the regulations continue to be extremely broad in scope, imposing significant administrative burdens and financial costs on regulated businesses, the proposal does reflect an effort to reduce the impact on business. Some of the more notable details are as follows:

PRIORITIZATION OF CHEMICALS AND PRODUCTS

- **COC List Reduced to 1,200.** The initial list of COCs will include approximately 1,200 chemicals identified by other authoritative organizations and regulations. This revised COC list is narrower than the October 2011 draft, which was expected to include as many as 3,000 COCs. Nevertheless, it is far broader than the Proposition 65 list, which only covers about 800 chemicals.
- **Tightened Criteria for Priority Products.** Until January 2016, DTSC will only list a product as a Priority Product if: (i) the COC is listed because it exhibits one or more of seven hazard traits (carcinogenicity, reproductive toxicity, mutagenicity, developmental toxicity, endocrine disruption, neurotoxicity, and/or persistent bioaccumulative toxicity); and (ii) the COC is included on one of the exposure indicator lists for water quality, air quality, or biomonitoring.
- **Three-Year Work Plan.** DTSC will issue a Priority Product Work Plan by January 2014 that identifies the product categories to be evaluated for inclusion on the Priority Products list during the next three years. DTSC will hold public workshop(s) to discuss candidate products prior to issuing the proposed Priority Products list for further public review and comment.
- **Petition for De-listing COCs.** The petition process has been revised to allow petitions requesting removal of chemicals from the COC list and products from the Priority Products list. However, petitions may also request that additional existing chemical lists be incorporated to expand the list of COCs.

ALTERNATIVES ANALYSIS

- **Product-Specific AA Threshold.** The regulations no longer specify a default Alternative Analysis ("AA") threshold. Instead, DTSC will specify the AA threshold for each COC in a Priority Product during the Priority Product listing process, and the AA threshold will be subject to public comment.

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- **COC Removal Notification Process.** If the only change to a Priority Product is the removal of the COC, the manufacturer can submit a Chemical of Concern Removal Notification instead of a full AA.
- **Revised Definitions.**
 - In determining whether an alternative is “technically and economically feasible,” externalized costs cannot be considered, but consumer acceptance and impacts on the manufacturer’s operating margin can be taken into account.
 - For an alternative to be “functionally acceptable,” it must meet all applicable legal requirements and be accepted by consumers.
- **Options for Infeasible Alternatives.** If a manufacturer meets certain criteria to demonstrate that no viable alternative currently exists, it may file an abridged AA but will be required to conduct a research and development project or fund a green chemistry challenge grant for the product.

REGULATORY RESPONSE

- **Clearer Response Guidelines.** The proposed regulations provide additional guidance regarding the circumstances under which specified regulatory responses, including use restrictions, sales prohibitions, engineering or administrative controls, and research and development projects, will be required and what factors DTSC will consider.
- **No Point of Sale Requirement.** The requirement to post product information at the point of sale is now optional, rather than required as in previous drafts.
- **No Recall Requirement.** There is no longer a requirement to implement an inventory recall if a product is subject to a sales ban.

IMPLEMENTATION TIMELINE

The proposed regulations are subject to a 45-day public comment period that closes on September 11, 2012. The regulations could be finalized as early as the end of 2012. The regulations define key implementation milestones, as reflected in the chart below.

| First COC List | Effective date of the regulations |
|--|---|
| First (proposed) Priority Products list | 180 days after the regulations’ effective date |
| Preliminary AA Report due to DTSC | 180 days after listing on final Priority Products list |
| Final AA Report due to DTSC | 1 year after the notice of compliance for the Preliminary AA Report |
| Regulatory Response Implementation | |
| • Product information for consumers | 1 year after the notice of compliance for the Final AA Report |
| • End-of-life product management program | 1 year after the notice of compliance for the Final AA Report |
| • Product sales prohibition | 1 year after DTSC provides notice of a safer alternative – unless a new AA is submitted within 1 year |

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| <ul style="list-style-type: none">All other regulatory responses | To be specified by DTSC in the regulatory response determination notice |
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Despite these changes, this extremely far-reaching and burdensome regulation will require businesses selling products into California to make major investments in compliance and will doubtless engender more litigation. The 45-day public comment period for the proposed regulations, which closes on September 11, 2012, is an important opportunity for affected stakeholders to participate and potentially influence the rulemaking process. This public comment process is the last chance for companies that want to preserve their right to challenge any aspect of the regulation in court to establish a record upon which to do so. Significant concerns remain about the details of the process and the DTSC's capabilities to administer such a complex regulatory scheme. The process and DTSC's response to comments should provide further information and hopefully answer some of these concerns.

Morrison & Forester has one of the largest Cleantech Groups in the nation. We closely follow the Green Chemistry regulations for our national and international consumer product clients, and participate in the Green Chemistry Alliance, a coalition of companies and trade associations representing the consumer market and global supply chain. For additional information regarding the comment process or the impacts these regulations will have on your business, please contact Peter Hsiao or William Tarantino.

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