

Product Liability - USA

First consumer products subjected to new green chemistry rules

Contributed by **Morrison & Foerster LLP**

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The California Department of Toxic Substances Control (DTSC) has announced its highly anticipated list of the first products and chemicals to be evaluated under the state's innovative Safer Chemical Product Regulations. Although the DTSC had legal authority to regulate five classes of products under the implementing regulations, it selected only three classes of products.

The products and their chemicals of concerns are:

- **children's foam padding sleeping products** containing the flame retardant TDCPP, also known as chlorinated tris. As many companies may know, these products have been the subject of extensive Proposition 65 private enforcement litigation;
- **spray polyurethane foam systems** containing unreacted diisocyanates, which are commonly used in home insulation; and
- **paint strippers, varnish removers and industrial-strength surface cleaners** containing methylene chloride.

In its announcement, the DTSC stated that the selection was based on three primary criteria:

- the potential for the chemical to create significant harm to the public or the environment;
- the potential for the product to create a pathway for exposure to the chemical of concern; and
- whether the chemical exposure affects sensitive sub-populations, such as children or the elderly.

The product selection has been issued for public notice and comment before the DTSC finalises its determination.

By announcing the first priority products, the DTSC has taken the next major step forward to implement its innovative Green Chemistry Programme, enacted in 2008. The law seeks to regulate toxic chemicals in consumer products and to reduce or eliminate those hazards, in part by encouraging the elimination or substitution of safer chemical ingredients. While the initial list of priority products contains only three product/chemical pairings, the DTSC plans to expand the list over time in order to cover a significantly greater number of products and chemicals. The DTSC will announce additional products that it will regulate in October 2014.

The law has four steps. First, the law directs the DTSC to identify lists of chemicals of concern. The second step is to prioritise consumer products containing those chemicals for regulation. The third step is for the manufacturer of the consumer product or other responsible entities to prepare an analysis for submission to the DTSC to describe alternatives to mitigate exposure to the chemical of concern at all points during the product's lifecycle. The fourth step is a regulatory response from the DTSC, which can include content or use limitations, mandatory recycling programmes or a ban on the use of the chemical, among other options.

The details of the regulation and additional useful guides can be found at the [Green Chemistry](#) portal webpage.

The announcement of the first three priority products is not a ban on those products or chemicals. The public comment period and the DTSC's finalisation of its initial priority products list is expected to take another year, until 2015. Once the list is finalised, a manufacturer or other responsible party must notify the DTSC that its product appears on the product list. That party must then choose between:

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- removing the chemical of concern without substituting any other chemical on the DTSC's list of chemicals of concern;
- ceasing sales of the product in California; or
- preparing the analysis of alternatives for submittal to the DTSC.

The DTSC may seek civil penalties and injunctive relief against companies that fail to comply with these requirements.

Both manufacturers and retailers are now "on the clock" to submit comments and prepare for potentially difficult decisions regarding the reformulation or limitation of the sales of these products in California. These products are the canary in the coalmine for both the DTSC and the regulated consumer product companies.

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