

UPDATE 2: CALIFORNIA ISSUES FINAL POLICY RECOMMENDATIONS OF ITS GREEN CHEMISTRY INITIATIVE

The California Environmental Protection Agency (Cal/EPA) has issued the final policy recommendations resulting from its groundbreaking Green Chemistry Initiative (GCI).¹ The recommendations, when fully implemented by legislation or administrative changes, will fundamentally alter the way California regulates chemicals in consumer products. They will make California unique among US jurisdictions and, due to the global marketplace, will likely affect products sold around the world as well. Implementation may also lead to fees and place significant disclosure obligations on companies in the chemical distribution and product manufacturing chain.

Although the GCI report reflects and expands upon the green chemistry legislation enacted by California in September 2008, its broad policy recommendations do little to clarify the contours of the State's green chemistry program, much less the practical impact that the program may have on products sold around the world. It will be critical for companies to keep abreast of any steps taken in 2009 to implement these policy recommendations and the green chemistry legislation. Federal legislation is also a possibility.

BACKGROUND

The GCI is a collaboration between the Cal/EPA and other state agencies. Over an 18-month period, the GCI consulted with experts worldwide, held dozens of stakeholder workshops, and received more than 57,000 comments and 800 proposed options. The following six policy recommendations resulted and are set forth in the GCI's December 2008 final report:

1. **Expand Pollution Prevention** and product stewardship programs to more business sectors to refocus additional resources on prevention rather than cleanup.
2. **Develop Green Chemistry Workforce Education and Training, Research and Development, and Technology Transfer** through new and existing educational programs and partnerships.
3. **Create an Online Product Ingredient Network** to disclose chemical ingredients for products sold in California, while protecting trade secrets.

Brussels

+32 (0)2 290 7800

Denver

+1 303.863.1000

London

+44 (0)20 7786 6100

Los Angeles

+1 213.243.4000

New York

+1 212.715.1000

Northern Virginia

+1 703.720.7000

San Francisco

+1 415.356.3000

Washington, DC

+1 202.942.5000

This advisory is intended to be a general summary of the law and does not constitute legal advice. You should consult with competent counsel to determine applicable legal requirements in a specific fact situation.

arnoldporter.com

¹ The report is available at: <http://www.dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/index.cfm>.

4. **Create an Online Toxics Clearinghouse**, an online database of chemical toxicity and hazards populated with the guidance of a Green Ribbon Science Panel to help prioritize chemicals of concern and data needs.
5. **Accelerate the Quest for Safer Products**, creating a systematic, science-based process to evaluate chemicals of concern and alternatives to ensure product safety and reduce or eliminate the need for chemical-by-chemical bans.
6. **Move Toward a Cradle-to-Cradle Economy** to leverage market forces to produce products that are “benign-by-design,” in part by establishing a California Green Products Registry to develop green metrics and tools (e.g., environmental footprint calculators and sustainability indices) for a range of consumer products and encouraging their use by businesses.

CALIFORNIA'S GREEN CHEMISTRY LEGISLATION

Policy Recommendations Four and Five of the GCI report are being implemented through legislation enacted on September 30, 2008. That legislation, drawn from a draft version of the GCI report, provides for a Toxic Information Clearinghouse via a state-run website directed to consumers (SB 509) and authorizes the Department of Toxic Substances Control (DTSC) to adopt regulations by January 1, 2011 that will help the State to identify and prioritize chemicals of concern, analyze alternatives to hazardous chemicals, and take a range of regulatory responses where such chemicals are found (AB 1879). The legislation also requires that DTSC establish a Green Ribbon Science Panel by July 1, 2009 to serve as an advisory body regarding green chemistry issues.

To date, the specifics of California's green chemistry program—including how it will operate, the chemicals and products it will regulate, and in what ways—are largely unknown. A variety of stakeholders, including manufacturers, suppliers, retailers, consumers, litigants, and decision-makers, will nevertheless need to understand, implement,

and interpret its requirements. Furthermore, businesses will need to assess the extent to which California's green chemistry requirements interact with existing state and federal requirements. No schedule has been set for proposing regulations or accepting comments.

The GCI report does little to flesh out the details missing from the legislation. For example, in developing the regulations mandated by AB 1879, Policy Recommendation Five broadly suggests that California look to other governmental entities implementing new statutory programs to regulate chemicals, such as Maine, Michigan, Oregon, Washington, Canada, and the European Union. Some of these existing laws and regulations provide good models; others provide good lessons. The GCI report provides no substantive evaluation.

The report also notes that, in implementing the Policy Recommendations, Cal/EPA intends to focus on those products and chemical ingredients “that currently are not subjected to environmental and human health analysis and mitigation prior to their introduction into the marketplace.” Given the potential broad reach and impact of the green chemistry regulations, potentially affected parties will need to participate in the rulemaking process.

THE GREEN CHEMISTRY REPORT'S OTHER POLICY RECOMMENDATIONS

- **Policy Recommendation One** suggests expanding DTSC's Pollution Prevention (P2) Program and modifying the California Accidental Release Program (Cal/ARP) in order to reduce the environmental footprint of business facilities, manufactured products, and services. At this stage, the recommendation contemplates that business participation in the expanded and enhanced P2 Program would be voluntary, although participation incentives such as grants, loans, relief from certain regulatory reporting, or fee reductions might be considered.
- **Policy Recommendation Two** focuses on incorporating green chemistry concepts in educational institutions throughout the state, fostering research and development in new green materials and product design, and

encouraging the transfer and commercialization of green chemistry technologies and processes. Although the report notes that funding for such efforts could be generated through state government revenues, public pension funds, and private capital, it also discusses imposing fees on products with toxic ingredients and/or those that impose a long-term waste management cost to California taxpayers.

- **Policy Recommendation Three** proposes an online product ingredient network providing non-confidential information regarding the chemicals in products for purchase in California. The web-based portal would be supported by manufacturers, suppliers and retailers, and manufacturers and suppliers would have to disclose product ingredients and allow a state agency to review confidential business information for the presence of a hazardous chemical.
- **Policy Recommendation Six** suggests that product manufacturers selling products in California provide to retailers and consumers an environmental footprint calculator or “green scorecard” for their products or categories of products, in order to “[s]timulat[e] competition among market participants to reduce their product’s environmental impacts and costs.” In addition, retailers voluntarily would evaluate and attempt to reduce the environmental impact of the products that they sell. The report recommends the establishment of a non-governmental California Green Products Registry to develop consensus-based green metrics, protocols, and tools to assist product manufacturers and retailers.

Due to the broad policy recommendations in the GCI report, it is difficult to gauge what they will mean for businesses. As a result, it will be important to monitor any new developments this year.

FEDERAL CONTEXT

Criticism of the federal government’s efforts at regulation of chemicals, which formed a basis for California’s GCI, received the official endorsement of the US Government Accountability Office (GAO) in January when it added the

US Environmental Protection Agency’s (US EPA) chemical assessment program to its list of government programs at high risk of waste, fraud, and abuse. GAO reported that US EPA has made “inadequate progress” in assessing toxic chemicals and that therefore reform of the Toxic Substances Control Act (TSCA) should be a high priority. This has prompted calls by members of the US Senate Committee on Environment and Public Works to overhaul TSCA, with some Senators expressing interest in California’s Green Chemistry Initiative and the European Union’s REACH pre-approval program as models for federal legislation. Bills introduced in the last session of Congress are reportedly being revised for possible introduction in the new session. California’s efforts, unique among the 50 states, will likely have a disproportionate effect on the federal debate.

Arnold & Porter LLP is well situated to assist clients in addressing these issues. Over two dozen attorneys in all eight of our offices focus their practices on regulatory and litigation issues involving chemicals and consumer products, with a particular emphasis on chemicals and products about which questions have been raised by scientists, regulators, public interest groups, and plaintiffs’ attorneys.

We hope you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

Trenton H. Norris
+1 415.356.3040
Trent.Norris@aporter.com

Matthew Heartney
+1 213.243.4150
Matthew.Heartney@aporter.com

Karen J. Nardi
+1 415.356.3010
Karen.Nardi@aporter.com

Sarah Esmaili
+1 415.356.3078
Sarah.Esmaili@aporter.com