

Safer Consumer Products Regulation

Businesses Brace for Announcement of Next Round of Priority Products

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Background

In 2008, California lawmakers passed two bipartisan measures that sought to create a new, science-based framework for regulating chemicals in consumer products. The Safer Consumer Products Initiative, authorized by AB 1879 (Feuer; D-Los Angeles; Chapter 559) and SB 509 (Simitian; D-Palo Alto; Chapter 560), was the product of a collaborative effort by legislators, the Schwarzenegger administration, and stakeholders to give the California Department of Toxic Substances Control (DTSC) the authority to regulate potentially hazardous substances in consumer products. The primary purpose of the consumer products initiative (aka green chemistry initiative) was to eliminate the adoption of piecemeal legislation regulating one chemical at a time, in favor of one comprehensive regulatory framework based on scientific judgment. After 11 iterations, DTSC finalized the consumer products regulations in October 2013.

The regulations establish an immediate list of approximately 1,200 candidate chemicals based on the work already done by other authoritative organizations, and further specify a process for DTSC to identify additional chemicals as candidate chemicals. Not all consumer products containing candidate chemicals are subject to the regulations. Only manufacturers of so-called “priority products”—those products specifically targeted by DTSC that contain one or more candidate chemicals—fall within the gambit of regulation. A candidate chemical that serves as the basis for a product being listed as a priority product is designated as a chemical of concern (COC) for that product.

Instead of banning the use of COCs without knowing the availability or safety of alternatives, the regulations provide manufacturers with an opportunity to determine whether the chemical is necessary and whether a safer alternative exists. To this end, manufacturers of priority products must either remove the COC from the marketplace or conduct what is called an “alternatives analysis”—a process that compares the existing priority product with potential alternatives using 13 factors evaluated at each stage of the product’s life cycle to determine how to best limit exposure to, or the level of adverse public health and environment impacts imposed by, the COCs in the product.

The alternatives analysis process is divided into two stages:

- During the first stage, a preliminary alternatives analysis report must be submitted 180 days after a product is listed as a priority product. The preliminary alternatives analysis report must provide DTSC with information regarding whether the specified candidate chemical or substitute chemical is necessary to make the specified product. Alternative chemicals must then be identified and evaluated.
- During the second stage, a final alternatives analysis report must be submitted one year after DTSC approves the preliminary alternatives analysis report. The final alternatives analysis must evaluate each product and alternative with respect to relevant factors and associated exposure pathways, and life cycle segments. During this stage, the business will either select an alternative chemical that will replace or modify the priority product, do nothing to modify the priority product, or discontinue the distribution of the product in California.

After evaluating the final alternatives analysis report, DTSC is required to select what the regulations refer to as a “regulatory response” for a priority product (if the manufacturer decides to retain it), or choose an alternative product to replace the priority product. In selecting a regulatory response, DTSC may consider the following factors: 1) public health and environmental protection; 2) private economic interests of responsible parties; and 3) government interest in efficiency and cost containment.

Recent and Anticipated Regulatory Developments

DTSC Begins Rulemaking for Children’s Foam-Padded Sleeping Products

On March 13, 2014, DTSC released a Draft Initial Priority Products List. The three priority products are:

- Spray polyurethane foam (SPF) systems containing unreacted diisocyanates;
- Children’s foam-padded sleeping products containing tris (1,3-dichloro-2-propyl) phosphate (TDCPP) or tris (2-chloroethyl) phosphate (TCEP); and
- Paint and varnish strippers, and surface cleaners with methylene chloride.

The initial listing does not constitute a product ban. Instead, once the initial priority products are adopted in final regulation, manufacturers of the priority products will be required to notify DTSC and begin the alternatives analysis process. The findings of each manufacturer's alternatives analysis report ultimately will determine what regulatory response, if any, DTSC may impose.

On July 15, 2016, DTSC released a formal rulemaking proposal governing children's foam-padded sleeping products containing tris (1,3-dichloro-2-propyl) phosphate (TDCPP) or tris (2-chloroethyl) phosphate (TCEP). DTSC opened the rulemaking for a 45-day comment period; however, following the public hearing on August 29, 2016, DTSC learned that interested parties were not able to submit their comments through the online Safer Consumer Products Information Management System (CalSAFER). To ensure that all interested parties had an opportunity to comment, DTSC re-opened the 45-day comment period from October 7, 2016 to November 21, 2016.

Three-Year Work Plan and Future Priority Products

In April 2015, DTSC issued its much-anticipated Priority Product Work Plan (Work Plan). DTSC prepared the Work Plan pursuant to the regulations, which require DTSC to prepare a plan every three years describing the product categories that it will evaluate to identify product-chemical combinations to be added to the priority products list. The Work Plan, which covers 2015 to 2017, identifies seven product categories:

- **Beauty, Personal Care and Hygiene Products:** Examples include body wash and soaps, deodorants, lip balms and gloss, lotions, ointments, hair care products, pomades, cosmetics and nail care products.
- **Building Products: **Paints, Adhesives, Sealants, and Flooring**:** Examples include adhesives and glues, carpeting, caulking, paints and primers, paint and graffiti removers and cleaners, engineered wood, plywood subfloors, compressed wood flooring products, sealants, stains and varnishes, vinyl flooring and roof coatings.
- **Household, Office Furniture and Furnishings:** Examples include bedding, seating and sofas, fabric and textile furnishings, and curtains.
- **Cleaning Products:** Examples include air fresheners, floor cleaners, oven cleaners, bathroom cleaners, carpet cleaners, floor waxes, detergents, general-purpose cleaners, scouring cleaners, spot removers and window cleaners.
- **Clothing:** Examples include full body wear, lower body wear, upper body wear, sportswear, sleepwear and underwear.
- **Fishing and Angling Equipment:** Examples include fishing weights and gear.
- **Office Machinery (consumable products):** Examples include ink cartridges, thermal paper, and toner cartridges.

DTSC selected the product categories considering factors and criteria required by the consumer products regulations, including potential exposures, significant adverse impacts or end-of-life effects, as well as the availability of information, other regulatory programs, and safer alternatives. DTSC will identify future potential priority products by choosing specific products from the categories identified in the Work Plan, in conjunction with chemicals found on the candidate chemicals list.

On November 15, 2016, the department hosted a webinar to provide stakeholders an opportunity to submit information to, and help inform, DTSC in making decisions about the next priority products. During the webinar, DTSC presented its findings on the following three topics:

- Exposure of nail salon workers to hazardous chemicals found in nail products.
- Nonylphenol ethoxylates and triclosan found in consumer products that can enter the aquatic environment and harm aquatic life.
- Per- and polyfluoroalkyl substances (PFAs), a class of stain- and water-repellant chemicals used in a wide variety of consumer products. DTSC also discussed its findings and questions about the use of PFAs in upholstered furniture, carpets, rugs, and carpet treatment products.

Draft Stage 1 Alternatives Analysis Guidance Document

The consumer product regulations do not include an alternatives analysis template or tools to which a business can refer when deciding how to conduct an alternatives analysis. For this reason, in September 2015, DTSC released a much-awaited Draft Stage 1 Alternatives Analysis Guide (Draft AA Guide). The Draft AA Guide covers only the first stage alternatives analysis required by the consumer products regulations.

During Stage 1, the responsible entity identifies the goal, scope, legal, functional, and performance requirements of the priority product and the chemical of concern, and uses this information to identify alternatives to consider, if any exist.

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Stage 2 of an alternatives analysis contains an in-depth analysis that refines the relevant factors and product function descriptions of the first stage and expands the analysis to consider additional impacts, including life cycle and economic effects. The guide also points out (and very briefly describes) that there are alternative compliance options other than a full alternatives analysis, such as an Abridged AA, Alternative Process AA, and Previously Completed AA. A draft of the second stage alternatives analysis will likely be released in early 2017.

The Draft AA Guide provides some general overview regarding what DTSC is looking for in the beginning processes for Stage 1 in an alternatives analysis.

- When beginning a priority product analysis, responsible entities must clearly describe the product requirements (functional, performance, and legal). They also must determine if the chemical of concern is even necessary to meet those product requirements. Potential alternatives also can be initially identified under the same evaluation.
- When looking at the impact of the priority product, the responsible entity must look at the entire life cycle, and not just the period when the product is in use, such as processing, manufacturing, transportation, and waste treatment. The guide also offers some scientific and government resources to turn to when assessing impact, and screening alternatives.
- Finally, the draft includes several appendices that offer other resources, such as some regulation requirements and tables with various factors and subfactors to consider with the priority products and chemicals of concern.

Green Chemistry Alliance Concerns

On November 16, 2015, the Green Chemistry Alliance, of which the California Chamber of Commerce is a member, submitted a comment letter outlining several concerns with the Draft AA Guide. Specifically, the alliance had expected and hoped for a more detailed description of DTSC perspectives and expectations in conducting alternatives analyses based on sound science, credible data and information that are in line with statutory and regulatory authority. To this end, the alliance requested definitive information regarding what is required in an alternatives analysis as opposed to what would be optional for an alternatives analysis.

The alliance also urged DTSC to provide specific examples of alternatives analyses that meet DTSC's expectations. This recommendation was in direct response to repeated statements in the Draft AA Guide that the Guide is an advisory resource only and is not a regulatory document or legal standard, either for conducting an alternatives analysis or for reporting results of an alternatives analysis. Of course, this leaves open-ended the question of whether responsible entities may deviate from the Guide and yet still conduct a sufficient alternatives analysis.

The alliance attached some more specific concerns to the letter:

- Some of these concerns included requests for more guidance from the DTSC for small businesses that do not have resources to rely on in-house or contract resources, and more information in compliance options outside of a full alternatives analysis, such as those listed above.
- Perhaps most significant, there are no established criteria setting forth how DTSC will respond to the alternatives analysis. This means a business can spend a year or longer, and tens of thousands of dollars, only to be told that the alternatives analysis it performed was inadequate and that more information is needed.
- Further, because the consumer products regulations do not establish a finite list of regulatory responses, a business has no way of knowing what costs it might incur once it completes the alternatives analysis.

All these questions must be addressed in order to provide the business community with a sense of certainty and predictability.

Draft Alternatives Analysis Guide

Building on its Draft Stage 1 AA Guidance Document, on December 12, 2016, DTSC released its more comprehensive Draft Alternatives Analysis (AA) Guide, which covers all phases of the alternatives analysis process. The 238-page draft is divided into 11 chapters: 1) alternatives analysis framework; 2) product requirements and alternatives; 3) relevant factors; 4) impact assessments; 5) screening of alternatives; 6) exposure; 7) lifecycle impacts; 8) economic impacts; 9) information needs in alternatives analysis; 10) selection of alternatives; and 11) self-evaluation of alternatives analysis.

The AA Guide was to be open for public comment until January 20, 2017. CalChamber remained engaged throughout the process.

The CalChamber supports the underlying goal of the consumer products initiative to significantly reduce adverse impact to human health and the environment. Further, with respect to the nature of the alternatives analysis process, the CalChamber Originally published in the California Chamber of Commerce's publication "Expanding Opportunity: An Agenda for All Californians"

supports the creation of an alternatives analysis guidance document that clearly defines the process step-by-step, sets reasonable parameters with respect to cost and compliance, and provides certainty and predictability.

CalChamber Position: As this process moves forward, the CalChamber believes that a proactive dialogue with product manufacturers will allow DTSC the opportunity to better understand what chemicals are being used, for what purpose they are being used, in what quantity they are being used, and whether any potential alternatives have been evaluated already. In some cases, alternatives that have been identified are in fact a greater concern and would fall into the category of “regrettable substitutions,” a situation DTSC has repeatedly stated it seeks to avoid. Accordingly, DTSC should consider the regulated community a knowledgeable and indispensable resource.