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California Identifies the First Consumer Products for Assessment under its Safer Consumer Products Regulations

California's Department of Toxic Substances Control (DTSC) took an important step in implementing its Safer Consumer Products program by identifying the first three consumer products that will be targeted for scrutiny. More products will be added to the list in the future, resulting in a complicated assessment process and possible reformulation, or even prohibition. Because the agency is still in the process of developing its regulatory program, manufacturers and retailers of consumer products sold in California should take this opportunity to examine how the Safer Consumer Products program will impact their business.

The recently released list of so-called "Priority Products" subjects certain types of children's sleeping mats, spray foam used in building insulation, and paint or varnish strippers, for assessment, reformulation, and possible prohibition. Manufacturers and retailers of these products will have to react quickly to respond to the agency's notice.

California will continue to identify additional products, however, so all manufacturers and retailers of consumer products should take note of these developments and consider how the agency's implementation of its Safer Consumer Products program will affect their business in California. Given the size and importance of the California market, these regulations will likely become a model for consumer product and chemical safety regulations nationwide. Even if other jurisdictions do not adopt similar requirements, any manufacturer or retailer of consumer products sold in California will be forced to comply with the requirements, resulting in de facto nationwide standards for product safety.

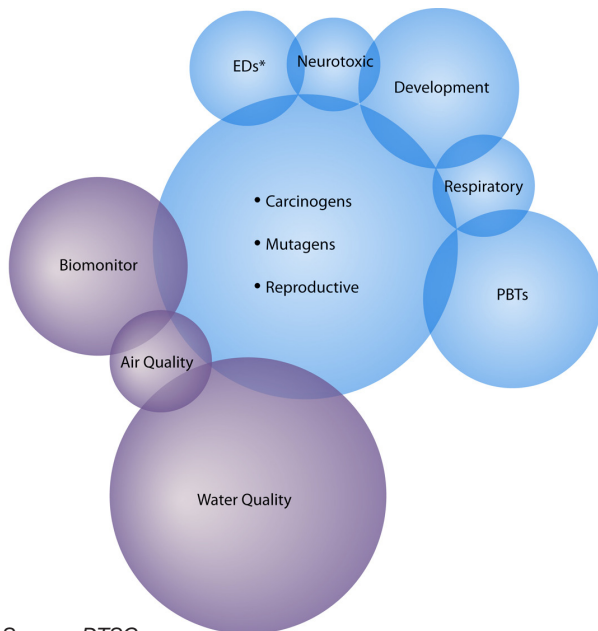
Therefore, manufacturers and retailers of consumer products sold in California should monitor the rulemaking process and consider assisting the agency in developing a regulatory program that works.

Green Chemistry in California California’s Green Chemistry program has been in development since the state legislature passed enabling legislation in 2008. The final version of the regulations, known formally as the Safer Consumer Products regulations, became effective in October 2013 after several years of rulemaking and multiple versions of proposed regulations.

The overall goal of the Green Chemistry program is to encourage the design of safer products and, in doing so, reduce or eliminate the use of toxic chemicals and the generation of hazardous substances. The focus is on environmental protection at the design stage of the production process, rather than at the disposal stage.

Instead of banning the use of certain chemicals without knowing the availability or safety of alternatives, the regulations provide a process for manufacturers to answer two questions: Is a chemical necessary? Is there a safer alternative?

Safer Consumer Product Regulations To accomplish the goals of the Green Chemistry program, DTSC’s Safer Consumer Products (SCP) regulations set forth a multi-stage process that will be implemented over the next several years.



Source: DTSC

The first step in the regulatory process, after the final regulations were adopted in October, was to establish a list of “Candidate Chemicals.” It is based on existing authoritative lists of chemicals of concern, including the Proposition 65 list, and contains about 1,100 chemicals. Chemicals on the list are those that exhibit at least one of seven hazard traits – (1) carcinogenicity, (2) reproductive toxicity, (3) mutagenicity, (4) developmental toxicity, (5) endocrine disruption, (6) neurotoxicity, and/or (7) persistent bioaccumulative toxicity – or are on “exposure indicator lists” for water quality, air quality, or biomonitoring.

Some of the chemicals on the Candidate Chemicals list have already been banned in the European Union.

The list of Candidate Chemicals is available at the DTSC [website](#).

Priority Products As the second step in the regulatory process, DTSC has identified its initial list of three proposed Priority Products – consumer products that contain at least one Candidate Chemical for which there is a significant risk of human or environmental exposure. Selection is based on a combination of the nature and extent of use, exposure, and potential harm posed.

The three Priority Products selected by DTSC are:

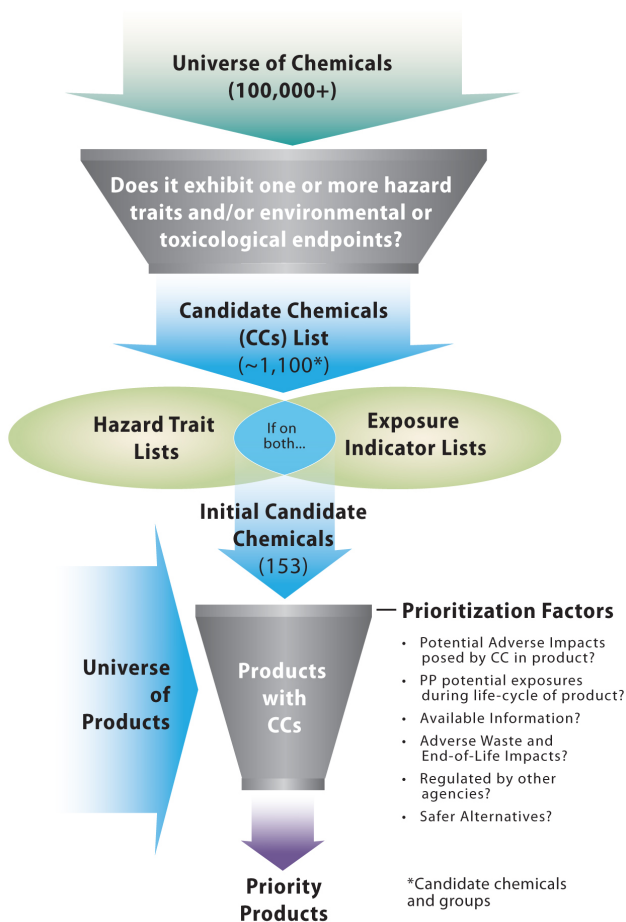
1. Children’s foam padded sleeping products, such as nap mats with polyurethane foam, that contain a flame retardant chemical called tris phosphate or TDCPP.
2. Spray polyurethane foam containing unreacted diisocyanates, an insulation product that can cause severe asthma for installers and do-it-yourselfers when it is still wet.
3. Paint and varnish strippers and surface cleaners with methylene chloride, used to remove old paint and varnish. Methylene chloride is linked to cancer and many other health problems.

According to DTSC, these three products were selected as Priority Products based on two criteria in the SCP regulations: (1) the products have the potential to expose people or the environment to one or more Candidate Chemicals; and (2) this exposure has the potential to “contribute to or cause significant or widespread adverse impacts.”

These three products are only *proposed* as Priority Products. DTSC will conduct three public workshops in May and June, and at the end of this year will then begin the rulemaking process, which the agency acknowledges will take up to a year to complete.

After the rulemaking process to add these three products as Priority Products, DTSC will then begin the process of adding additional Priority Products. As with these first three, the next set of proposed Priority Products will have to go through the rulemaking process before they are formally added as Priority Products and are subjected to additional requirements. Regulators expect to add three-to-five new Priority Products each year, subject to the rulemaking process.

Industry analysts predict that the next set of Priority Products may include nail polish that contains toluene, carpet adhesive with formaldehyde, and fluorescent lights that contain mercury. The next categories of Priority Products are to be released in October 2014.



Source: DTSC

Alternatives Assessments for Priority Products DTSC has been careful to clarify that the selection of a product as a Priority Product is not a ban. Rather, a Priority Product is subject to additional scrutiny and compared with potential alternatives, including chemical substitution and product redesign.

Once the Priority Products list is finalized, companies that manufacture, import, or sell a Priority Product will have 60 days to notify DTSC of its status as a “responsible entity,” and 180 days to develop and submit to DTSC a preliminary

“Alternatives Analysis” report. The primary responsibility for compliance belongs to the manufacturers of a product. Retailers will only be responsible for undertaking an Alternatives Analysis if no manufacturer or importer is available.

In the Alternatives Analysis report, responsible entities must evaluate different ways of making the product to limit exposure to the chemical of concern. An Alternatives

Analysis may consider reducing or eliminating the chemical from the product entirely, using an alternative chemical, or possibly constructing or formulating the product in a different way so that, even if the chemical is still used, the exposure risk to consumers and the environment is reduced. After DTSC approves a preliminary Alternatives Analysis report, responsible entities will have one year to develop and submit a final report.

Because an Alternatives Analysis report will likely contain valuable trade secret information about how the products are made and about the availability or viability of any potential reformulations, this disclosure requirement raises a variety of questions regarding what companies must disclose, what they can withhold, and what the government will do to safeguard trade secret information.

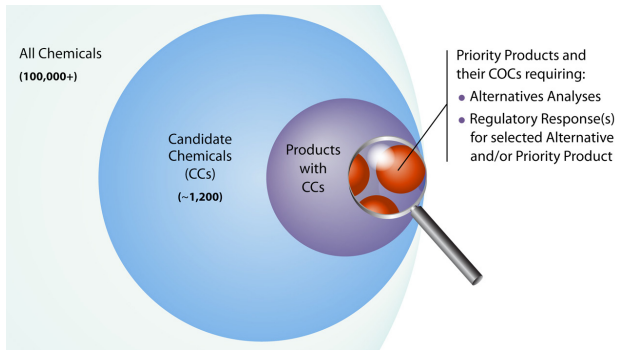
Regulatory Response Once DTSC has received the final Alternatives Analysis report, it will use that information to require implementation of “regulatory

responses,” which could include requiring notice to consumers, mandating alternative designs or reformulation, restricting the use of a product, or simply banning sales of the product in California altogether.

Next Steps for Priority Products DTSC will hold a series of three public workshops in May and June 2014 to engage in a dialogue with the public and with companies that manufacture, distribute, or sell any of the Priority Products.

DTSC then expects to initiate rulemaking to codify the initial Priority Products list in regulations in the latter part of 2014, a process that may take up to one year.

After the list of Priority Products is finalized, a responsible entity will have to begin the process of preparing an Alternatives Assessment report. This process is expected to be long and complicated – and potentially very expensive.



Source: DTSC



Source: DTSC

If you are concerned that your products may be proposed as Priority Products in the future, DTSC is expected to issue additional guidance this autumn. DTSC is required to issue a Priority Product Work Plan by October 1 that will identify and describe the product categories that the agency will evaluate to select Priority Products for the following three years (2015 to 2017). DTSC will hold a separate workshop in summer 2014 to discuss developing its Work Plan.

What Should Manufacturers and Retailers Do? All manufacturers and retailers of consumer products in California, even those that do not make or sell any of the three proposed Priority Products, should pay attention the regulatory process as it unfolds.

Because this is the first time DTSC will assess Priority Products under the new SCP regulations, many standards are likely to be established that will affect products added to DTSC's list later. For example, DTSC will decide important issues involving the use of analytical test methods, required quality-assurance/quality-control measures, cumulative impacts analysis, and threshold levels for triggering compliance obligations. Manufacturers will have a critical opportunity to work with DTSC at this early stage in the process to develop standards that will work.

For companies that make or sell the proposed Priority Products, it is important to note that the primary responsibility for compliance rests with the manufacturers of the Priority Products. But if a manufacturer fails to fulfill its regulatory obligations, compliance duties move down the supply chain to importers, then assemblers, and finally to retailers. At this time, DTSC has not indicated that these parties will receive any additional time to comply if a manufacturer misses the initial reporting deadline. Therefore, all companies that distribute or sell consumer products in California should use the coming months to determine whether they are involved with any of the initially identified Priority Products, and should scrutinize the next product categories when they are identified later this year.

Developing an action plan now, before a product is on a final Priority Product list, could save a company substantial financial resources.

How Reed Smith Can Help Reed Smith's environmental attorneys have decades of collective experience advising clients in complying with regulations relevant to consumer products, manufacturing, and hazardous substances. Our substantial experience working with manufacturers and retailers in California and across the country provides insight into how California's Safer Consumer Products regulations will affect their operations. Consequently, our team of skilled attorneys can provide top-quality advice on submitting comments on these rulemaking activities and complying with the Safer Consumer Products regulations when a product is selected for additional assessment.

Resources:

- DTSC's Green Chemistry Program and Safer Consumer Products Regulations: <https://dtsc.ca.gov/SCP/index.cfm>
- Candidate Chemicals List: <https://dtsc.ca.gov/SCP/ChemList.cfm>
- Alternatives Analysis Process: <https://dtsc.ca.gov/SCP/AA.cfm>

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