

What Companies Need to Know About California's Safer Consumer Products Regulations



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California has long prided itself on its forward-thinking regulations. For product manufacturers, distributors and retailers, access to the Golden State's massive consumer base comes at the cost of navigating a tangled web of consumer product requirements. This year, that web is likely to get even more tangled.

In 2008, Governor Arnold Schwarzenegger signed twin bills implementing the state's Green Chemistry Initiative, requiring the California Department of Toxic Substances Control (DTSC) to enact regulations forcing the creation of "safer consumer products." After a long gestation period, those regulations were finally released in October 2013. Since then, implementation has been slowly creeping forward.

This is not the first time that California has attempted to sway the national market. For example, since 1976, the California Energy Commission has imposed stringent efficiency standards for a wide range of electronics and appliances on California store shelves. Similarly, California's Proposition 65 has gained notoriety for its ubiquitous warning labels and dreaded "bounty hunter" citizen suits against businesses that fail to provide such a warning. With their implementation, the Safer Consumer Products regulations will bring a host of potential new duties for any business with current California sales or designs on California consumers.

What Will the Regulations Do?

The Safer Consumer Products regulations impose a complex, multi-step process to phase out, develop alternatives for and regulate specifically identified products-chemical combinations. The first several steps - listing chemicals that may be subject to regulation, prioritizing products to regulate and developing a work plan to prioritize future products – have not required action from businesses thus far. As a result, the effects of the regulations have been theoretical. That's about to change. Once DTSC finalizes its list of priority products, affected businesses will have no choice but to comply.

What Products Will Be Affected?

The DTSC is responsible for identifying and prioritizing products to undergo the regulatory process. A priority product can be any product that contains one of the nearly 2,300 individual chemicals found on the DTSC's "Candidate Chemical" list. In March 2014, the DTSC revealed the first three proposed priority products: (1) children's foam sleeping pads with certain flame retardants, (2) paint, varnish strippers, and surface cleaners with methylene chloride, and (3) spray polyurethane foam materials, which are used in home and building insulation, with

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diisocyanates. The DTSC has also finalized its work plan for choosing priority products over the next three years. The work plan lists a broad range of products and chemicals on which the DTSC hopes to focus, including beauty products, cleaning products clothing, office furniture, and, most controversially, fishing equipment. Each year, the DTSC will select between five and ten new priority products from this list.

Who Will Be Affected?

The regulations are designed in such a way that any party with a relationship to a product may have to comply with the requirements. Once a priority product is finalized, duties cascade down the stream of commerce until a responsible entity is found. Manufacturers are hit first, but if they fail to comply, compliance responsibilities flow down to importers, retailers and assemblers. Parties with even a vague connection to a product may find themselves responsible, as the regulations' definition of "assembler" applies to anyone who repairs, refurbishes, maintains, or otherwise makes alterations to a product.

What Actions Are Required?

When a product is listed, manufacturers of the product are given three options: (1) remove the product from the California market; (2) replace the chemical of concern in the product; or (3) undergo an intensive "Alternatives Analysis" process, which is meant to both develop a personalized plan to curb the potentially adverse effects of the product and provide DTSC with a comprehensive view of possible regulatory approaches.

A manufacturer's failure to respond to the DTSC will result in placement on a Failure to Comply List on the DTSC's website. When a manufacturer is listed, the duty to comply trickles downstream to the importer, which must promptly pursue one of the same three options. Listing of both the manufacturer and importer on the Failure to Comply List is considered sufficient notice to assemblers and retailers to trigger their responsibilities. Retailers and assemblers are then required to either cease ordering the manufacturers' product within 90 days and provide DTSC with a detailed statement certifying that the product will not be re-ordered, or to take on the manufacturer's substantial responsibilities.

What is an "Alternatives Analysis"?

Businesses opting to conduct an alternatives analysis will have to undertake a strenuous process. Ostensibly, an alternatives analysis is divided into two stages, the Preliminary AA and the Final AA. However, each of these stages is composed of numerous steps. The Preliminary AA has six steps:

1. Identifying the functional and legal requirements that any alternative to the product must meet, and the role that the chemical of concern plays in meeting those requirements

2. Identifying alternatives to the product-chemical combination
3. Identifying factors that will be used to compare the alternatives
4. Performing a comparison of the alternatives to the current product formulation
5. Considering any additional information that may apply to the analysis
6. Drafting a Preliminary AA report

If, after conducting the Preliminary AA, a business concludes that there is no feasible alternative, they may submit an abridged report stating as such. Upon doing so, the business must begin providing warnings to consumers either on the product packaging or at the point of sale. The business must also fund research and development projects or provide challenge grants to develop, improve, lower the cost, or increase market penetration of safer alternatives.

Once a Preliminary AA report is approved by the DTSC, the drafting business must undertake a Final AA. This process requires a factor-based comparison of the alternatives and the development of a comprehensive plan to implement a chosen alternative. The Final AA report is subject to notice and comment rule-making. Upon receipt, the DTSC will publish the report on its website and will review any comments to determine whether the business must address any further issues in a follow-up report. Once finalized, the reporting business must implement the proposed plan.

A business's proposed plan is not the final word on the handling of a product. The DTSC also has the authority to impose a range of supplemental regulatory actions. Along with the above-mentioned consumer notice and research funding, the DTSC may also impose use restrictions on listed chemicals, bans on the distribution or sale of priority products, development of safety measures or end-of-life management measures. Any or all of these regulatory responses may be imposed regardless of the thoroughness of a proposed alternative. A business that has expended considerable resources to develop an alternative plan may still ultimately find its product banned from the marketplace. To enforce the regulations, DTSC may list any business on the failure to comply list, but also retains the authority to assess administrative penalties or refer violations to prosecutors.

In short, substantial costs may be incurred through profit loss, the alternatives analyses and compliance with further regulatory responses.

What Should In-House Counsel Do to Protect Themselves?

The initial priority product list will likely be finalized within a year. In-house counsel should take steps now to get ahead of these regulations. If your company's products are on the initial list, or even if they are encompassed in the wide range of product categories in DTSC's work plan, you should consider the following steps:

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1. Conduct an analysis of your products to determine whether they contain any of the relevant chemicals on the Candidate Chemical list.
2. Implement manufacturing process controls to flag when such chemicals are introduced to existing or new products.
3. Conduct an internal analysis of the viability and cost of reformulating products containing the chemicals.
4. Determine the feasibility of halting California sales of the product.
5. If your products contain the chemicals and will continue to be sold in California, consider conducting a confidential internal alternatives analysis.
6. If you are one of the initial companies impacted by the regulations, consider challenging the applicability of the regulations. The regulations have yet to be tested by the courts and may not stand up to a challenge.
7. Begin analyzing the intellectual property, trade secret and public relations implications of participating in any official alternatives analysis.
8. Of course, to protect any confidential communications that occur, ensure that all discussions and documents are subject to attorney-client privilege.

No matter what steps are taken, or whether or not products are currently subject to the regulatory requirements, all companies that sell products in California should be aware of and continue to monitor this developing legal landscape.