

Safer Consumer Products Regulation

Businesses Brace for Announcement of Next Round of Priority Products

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 a 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.

DTSC is required to prepare a Work 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. DTSC selects 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 then identifies 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. 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.

DTSC’s listing of a priority product does not constitute a product ban. 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.

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Recent and Anticipated Regulatory Developments

Existing and Future Three-Year Work Plan

DTSC's 2015 to 2017 Work Plan identified 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.

In 2016, the Legislature added lead-acid batteries to the 2015–2017 Work Plan for evaluation as a potential priority product. DTSC held a workshop on November 6, 2017, to gather information on lead-acid batteries and alternatives as part of its evaluation.

DTSC is currently working on its 2018–2020 Work Plan and requested public comment regarding whether it should add or delete product categories from the Work Plan. The second Work Plan will likely include significant carryover product categories from the first Work Plan, and may include new products for consideration. The public comment period closed in November 2017. The 2018–to 2020 Work Plan will likely be released in the first half of 2018.

DTSC Designates First Priority Product, Moves Forward with Two Rulemakings, Identifies Additional Priority Product Listings

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

- 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.

Effective July 1, 2017, DTSC designated the first priority product—children's foam-padded sleeping products containing TDCPP or TCEP. Manufacturers had 60 days from the effective date to register with DTSC and begin the alternatives analysis to determine if a safer alternative is possible.

DTSC also released formal rulemaking proposals for the other two initial priority products—SPF systems with unreacted methylene diphenyl diisocyanates and paint or varnish strippers containing methylene chloride. The public comment period for the SPF systems proposal closed on June 6, 2017, and the deadline to submit public comments on the paint and varnish strippers proposal is January 18, 2018. DTSC will likely seek to finalize its evaluation of these priority products in 2018.

In 2017, DTSC announced the next round of priority product listings will include:

- Nail products containing 21 chemicals, including formaldehyde, toluene and dibutyl phthalate (DBP);
- Laundry detergent, commercial and household cleaners and dish soap containing nonylphenol ethoxylates (NPEs) and triclosan; and
- Carpets, rugs and upholstery and their associated care and treatment products containing perfluoroalkyl and polyfluoroalkyl substances (PFASs).

DTSC has conducted some workshops on these product-chemical categories in 2017, and intends to hold additional workshops in 2018. Notably, DTSC has stated that the evaluation of triclosan is being placed on the back burner due to recent federal action on the chemical.

Final Alternatives Analysis Guide Released

In June 2017, DTSC released the first version of the Alternative Analysis Guidance Document (AAG) intended to guide manufacturers of priority products through the regulatory alternative analysis process, including identifying safer alternatives. Completed alternative analyses will help inform DTSC's possible regulatory response to limit or prevent potential harm from chemicals in named products. The AAG is intended to be an “ever-green document,” meaning that it will be refined and augmented as the alternatives analysis process evolves and additional tools, approaches and examples are identified and developed.

Draft versions of the AAG were released in 2016 and early 2017. During the consultation and public comment process, various industry groups, including the California Chamber of Commerce through its membership in the Green Chemistry Alliance, raised several concerns, such as the document's lack of specificity and clarity for evaluating decisions made by a responsible entity. The lack of clarity regarding pathways or options to achieve compliance will likely lead to confusion, and the multiple rounds of data gathering will result in significant costs.

In July 2017, following the release of the AAG, some of the members on the Green Ribbon Science Panel—which provides technical expertise and recommendations to DTSC—agreed with industry concerns and called for greater guidance and specificity in the AAG. Members also identified potential concerns around competitive advantage, anti-trust, and whether admission regarding the existence of an unusable safer alternative may present litigation risk. DTSC acknowledged these concerns, but has not expressed an intent to address them in the near future.

Past and Probable Legislative Proposals

Despite the legislative intent behind the Safer Consumer Products Program to eliminate the adoption of piecemeal legislation regulating one chemical at a time, the Legislature introduced two bills doing just that in 2017.

AB 958 (Ting; D-San Francisco) would have required DTSC to add food contact materials containing PFASs to its Work Plan, identify those products as priority products, *and* begin adoption of regulations under the green chemistry initiative. **AB 1180 (Holden; D-Pasadena)** would have done the same for tires containing zinc oxide. These bills met with significant opposition from industry members, including CalChamber, and ultimately failed. The opposition explained that the bills would have circumvented DTSC’s prioritization process, infringed on the science-based regulatory listing process, and bypassed the regulatory framework DTSC has worked hard to establish.

In its October 6, 2017 report, the Independent Review Panel (IRP) recommended to the Legislature that it “[r]espect the Safer Consumer Products Program’s comprehensive, science-based review process and minimize legislation that duplicates its core regulatory activities.” Whether the Legislature will respect the science-based process and heed the IRP’s recommendation remains to be seen.

One piece of legislation that will most likely be introduced in 2018 relates to funding. DTSC has expressed concern regarding the lack of resources allocated to the program, and has indicated that it anticipates legislation in this regard in 2018. The scope and specifics of such proposed legislation are unknown.

CalChamber Position

The California Chamber of Commerce 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 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.

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