

Client Alert

October 2013

California's Safer Consumer Products Regulations Launched: Everyone in the Chain of Commerce in California Beware

California's Safer Consumer Products (SCP) regulations became effective October 1, 2013. These regulations apply to any "product or part of the product that is used, bought, or leased for use by a person for any purposes." Given this ample language, the regulations have the potential to affect a wide range of industries and parties in a distribution chain, including manufacturers, assemblers, importers, and even retailers.

The SCP regulations work by first identifying "candidate chemicals," and then identifying "priority products." On September 26, 2013, the Department of Toxic Substances Control (DTSC) published its initial list of more than 300 candidate chemicals. This list includes individual chemicals identified by CAS number, as well as groups of chemicals (such as lead and lead compounds). DTSC has until April 1, 2014, to identify the first five proposed priority products it intends to regulate under the SCP regulations.

The regulations' stated objective is to create a systematic, science-based approach to evaluating chemicals in consumer products and identify safer alternatives where available. While the final regulations do in fact create a process, they also create many uncertainties and are anticipated to be subject to multiple legal challenges.

Four Steps to Safer Consumer Products

The regulations are broadly structured into a four step process: (1) chemical identification, (2) product identification, (3) alternatives analysis, and (4) regulatory response.

In the first step, DTSC identifies candidate chemicals. These are drawn from 23 existing "authoritative lists" that identify substances with hazard traits or environmental or toxicological end points, including carcinogens, reproductive toxins, mutagenic toxins, neurotoxins, endocrine disruptors, toxic air contaminants, and water pollutants. DTSC's initial list of candidate chemicals are a subset of chemicals that appear on one or more of the 15 lists based on hazard traits, and one or more of the eight lists based on exposure potential. Given the range of chemicals on this initial list, the list provides little insight into the five priority products the regulations will initially target. Only manufacturers whose products contain none of the chemicals on DTSC's list can feel comfortable that their products will not be the first to be covered under the new regulations.

Step two requires DTSC to identify priority products. In developing the list of priority products, DTSC is to assess potential human, animal, or environmental exposures to candidate chemicals during a potential priority product's life cycle, and the potential for that exposure to have widespread adverse impacts on public health or the environment. Under the regulations, DTSC only has until April 1, 2014 to identify five proposed priority products. These proposed priority products will go through a formal rulemaking. Thereafter, under the current regulations, DTSC will evaluate new potential priority products on a 4-year cycle. As part of the priority product designation, DTSC identifies the chemical(s) from the candidate

chemical list which form the basis for DTSC's priority product designation. At that point, the chemicals are referred to as "chemicals of concern."

The third step in the process is the alternatives analysis (AA). Once a product is identified as a priority product, the product manufacturer must notify DTSC within 60 days that its product has been listed. The manufacturer has the option to remove or replace the chemical(s) of concern, cease production of the product, or conduct an alternatives analysis on the chemical. If the manufacturer does not inform DTSC of its intent to take one of these actions (or otherwise comply with the regulations), DTSC will place the product on its Failure to Comply list posted on its website, along with the brand name of the product, the name of the manufacturer, importer, or distributor, and a statement giving notice to retailers and product assemblers. Only if the manufacturer fails to comply and DTSC notifies the importer will the importer be required to comply. If the importer does not do so, the assembler or retailer will be responsible for compliance. They may cease new distribution of the product in California or proceed with an AA.

If the entity chooses to conduct an AA, a two-stage process follows. First, a preliminary analysis is prepared listing the product requirements and functions of the chemicals of concern, identification of alternatives, and identification of factors relevant for comparison. If there is no less hazardous alternative, the entity may conclude the process and submit an abridged AA report, and DTSC proceeds to step four. If alternatives exist, the entity must submit a preliminary AA report, work plan, and proposed implementation schedule. Once DTSC approves the submittals, the entity must complete the second stage of the AA. The second stage requires a comparison of alternatives and development of a plan to implement a selected alternative. The alternatives analysis is subject to public comment (including competitors' comments) and requires DTSC final approval.

In the fourth and final step, DTSC determines the regulatory response necessary to "protect human health or the environment." This decision is made after consideration of the adverse impacts or end-of-life effects of the chemical of concern or replacement chemical in the selected alternative, potential adverse impacts of the response, and existing regulations, among other factors. Regulatory responses include requiring the responsible entity to notify consumers, restrict or prohibit use of the product, implement safety measures or end-of-life management plans, or conduct research and development to advance green chemistry and green engineering.

Potential Concerns and Legal Challenges

Given the broad reach of the regulations, entities in the chain of title for consumer products sold in California should closely monitor DTSC's progress. An entity whose product is listed as a proposed priority product may face negative public perception of its brand. Furthermore, listing of a product could affect an entity's bottom line, in terms of the costly and lengthy AA process, as well as potential sales losses as retailers and customers select alternative products.

In addition, the requirement that entities produce information about chemicals of concern during the AA process may raise concerns about trade secret protection. Though the regulations contain provisions aimed to protect trade secrets, DTSC is the final decision maker as to whether the claim is valid or the information should be provided to the public (unless the entity seeks subsequent judicial review). Moreover, the regulations leave much uncertainty for regulated entities, particularly in regard to the regulatory responses. For example, DTSC may require an end-of-life guarantee, yet the regulations provide no guidance as to what type of guarantee will be required or how it will be determined. Finally, regulated entities face the threat of private litigation, particularly products liability or toxic tort claims, for products determined by regulators to be a hazard.

Given these concerns, the regulations are likely to be challenged by industry groups and other stakeholders. The first challenge is likely to be under the California Environmental Quality Act (CEQA), where the statute of limitations for filing a CEQA lawsuit is 35 days. Other administrative challenges include the failure to fully comply with the Administrative Procedure Act (APA) and the failure to properly

develop a multimedia life cycle evaluation, as required under the implementing act. In addition, there are rumblings of preemption challenges, as well as potential challenges under the constitution and trade and antitrust law.

Contacts

Malcolm C. Weiss

mweiss@hunton.com

Daniel E. Uyesato

duyesato@hunton.com

Colleen P. Doyle

doylec@hunton.com

Diana Pfeffer Martin

martindp@hunton.com

Timothy J. Carlstedt

tcarlstedt@hunton.com

Suedy Torabi

storabi@hunton.com

© 2013 Hunton & Williams LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.