

Environmental and Land Development ADVISORY

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Increased Risks to Disclosure of Proprietary Information and Trade Secrets Presented by New California Environmental Legislation

Product design and manufacture used to be functions that a company could conduct internally, and in so doing, protect valuable proprietary processes and trade secret information from public disclosure.

That's no longer the case—at least for products sold into California.

In order to assure the consuming public that products sold in California contain “safe” chemicals, California's recent Green Chemistry Initiative promises to open up a manufacturer's internal processes to public disclosure, inspection and comment by any party—including environmental advocacy groups and business competitors.

Under the proposed “Safer Consumer Products Alternatives” regulations, issued by California's Department of Toxic Substances Control (DTSC) to implement the state's recently enacted green chemistry laws, disclosure of product ingredients, quantities and product formulations are proposed to be reviewed by environmental regulators in a quest to identify safer ingredients and safer product design.

[*Rare Meeting of the California Environmental Policy Council \(CEPC\) to Be Convened on October 27, 2010, to Consider Whether the DTSC Green Chemistry Regulations — Or Safer Consumer Product Alternatives Regulations — Will Have Multimedia Impacts*](#)

[*New Global Supply Chain Responsibilities and Risks for Companies Selling Products into California: Proposed “Safer Consumer Product Alternatives” Regulations*](#)

Environmental law, no longer simply concerned with the disposal or release of hazardous substances, is beginning to assume a greater role in fundamental product design.

California's Green Chemistry Initiative is on the leading edge of this paradigm shift.

What Products Will Require Disclosure of Proprietary and Trade Secret Information?

Product manufacturers and sellers of just about every conceivable product—e.g., sneakers, bedding, cosmetics, office furniture, plastic cup holders, toilet paper, soap, holiday ornaments, beverage containers, sports equipment, drywall or building components, electronics, cell phones, engines, industrial intermediaries, tractors, houses, airplanes, you name it—may be compelled to participate in a regulatory review process that examines proprietary and trade secret information concerning the

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chemical constituents of any products that are sold in California, as well as proprietary information concerning the marketing of those products.

The definition of “consumer product” is extraordinarily broad.

“Consumer product” means a product or part of the product that is used, brought, or leased for use by a person for any purposes.

(Cal. Health and Safety Code Section 25251(e).)

While pharmaceuticals, certain medical devices and pesticides are exempt from the application of California’s new green chemistry program (since such products are already subject to environment and public health regulatory compliance approvals from the Food and Drug Administration and the Department of Pesticide Regulation), virtually everything else that a person would buy is covered by the sweeping terms of this legislation.

What Proprietary Information and Trade Secrets Are at Risk?

Under its proposed new regulations issued on September 14, 2010, the DTSC may require a manufacturer who sells goods in California to submit information that includes:

- identification of all intentionally added ingredients, including the quantities in the entire consumer product (Section 69301.6(c)(1)(C));
- disclosure of proprietary market data, such as customer lists, volume of units sold and descriptions of sales locations in California (Section 69301.6(c)(1)(D)); and
- information concerning a product that has been reformulated or redesigned to remove a listed chemical if the reformulation, redesign or replacement occurred subsequent to the listing as a chemical by the state (Section 69305.1), including:
 - information identifying and describing the original product and the reformulated, redesigned or substituted product, including the brand name(s) and labeling information for both products; and
 - the intended uses and targeted customer base(s) for the product.

How Does California’s Process of “Safe” Consumer Product Regulation Require Disclosure?

DTSC’s proposed regulations establish several processes under which a product manufacturer might have to disclose its proprietary business information. For the most part, these are public processes that involve posting documents on the DTSC website and inviting public comment from anyone interested, including advocacy groups and business competitors. Below, we summarize three of the processes.

First, DTSC plans to regularly post on its website requests for data concerning identified products, which would require responses from all responsible entities or manufacturers of a specific chemical or product or group of chemicals or products (Section 69301.6(e)(2)). As currently drafted, product manufacturers and sellers will not receive written notice of these data requests, but rather will have to subscribe to a “listserv” established by the Department.

Second, when California's Green Chemistry laws take effect on January 1, 2011, the DTSC will promulgate a "Chemicals Under Consideration" list, comprised initially of about 800 chemicals. Once the laws are effective, this list is expected to substantially expand.

Any manufacturer using one of those listed chemicals in their product who decides, for whatever reason, to remove or reduce the use of that chemical in their product formulation will be required to perform a "Tier 1 Alternatives Analysis," comparing the two products and providing the following information:

- information explaining the rationale for, and the factors considered in, selecting the reformulation, redesign or substitution alternative;
- identification and a qualitative or quantitative description of any reduction(s) to adverse public health or environmental impacts achieved by the reformulation, redesign or substitution; and
- identification of any hazardous traits exhibited by the substitute chemical.

Third, DTSC plans on targeting certain specific product categories that are deemed to present particular "risks" to consumers. If a manufacturer's product is in this group, the manufacturer will have to perform a complex "Tier II Alternatives Analysis" that will be made public, subject to review by a third-party "assessor," in which the manufacturer must examine ways it could have redesigned its product to make it "safer" or less toxic, and revealing, in the process, many formerly private business decisions about ingredient, raw material, intermediary and manufacturing supply chain logistics.

Limitations on a Manufacturer's Ability to Prevent Disclosure of Proprietary Information and Trade Secrets

DTSC's proposed regulations set out a complex process for companies to assert a claim that certain information is confidential and must be protected as a trade secret (Sections 69310.1 and 69310.2). DTSC personnel, however, are not necessarily well-qualified to evaluate what is legitimately proprietary information or trade secret, and what is not; yet if the Department deems a manufacturer's claim to be deficient, it will consider the information to be public record subject to disclosure within 30 days of notifying the business by certified mail. During the 30 days, it will be incumbent upon the business asserting the trade secret to either correct the "deficiency" identified by the Department, or seek appropriate judicial relief by filing a legal action for a writ of mandate, injunction, protective order or other appropriate relief.

In addition to potential disclosures of trade secrets and litigation costs to prevent such disclosures, any failures of businesses to respond to the Department's data and information requests may also result in public shaming on the Internet. The department plans to have a "Failure to Respond List" on its website identifying manufacturers and their products who failed to submit requested data (Section 69310.5).

What Can a Business Do Now to Ensure That Its Proprietary Information and Trade Secrets Are Protected?

The draft regulations are currently open for public comment until November 1, 2010, and are expected to be finalized and effective on January 1, 2011. Companies with products containing ingredients that DTSC would like to know more about in order to determine whether that product can be made “safer” will start being identified and asked to submit data commencing July 1, 2011.

The protection of intellectual property is essential for every business’ ability to remain competitive and sustainable. As these regulations develop, it will be critical to ensure that the process for maintaining the confidential business information and protection of trade secrets is well-developed and secure. For many businesses, the continued market viability of their products depends upon protection of trade secrets and confidential business information.

For businesses selling products in California, now is the time to review their trade secrets relating to their non-public formulas, processes and data that are not protected by patents and evaluate their sensitivity to disclosure. Further, to the extent formal policies, practices and procedures are not in place now to protect these trade secrets (e.g., policies to limit access, marking of key documents, employee confidentiality and assignment agreements), these matters should be addressed. Businesses that have not created a clear record of trade secret status for their sensitive information will undoubtedly have a harder time convincing regulators that the information should now be respected as proprietary trade secrets.

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For further guidance on how to protect your business from being adversely impacted by California’s new Green Chemistry process, please contact either Maureen Gorsen of Alston & Bird’s Environmental and Land Development Group; Jon Gordon of the firm’s Intellectual Property Group; or any other member of the firm’s Green Chemistry Team listed below.

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