



Chemical & Product Regulation ADVISORY ■

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Get Ready to Comply with California's Safer Consumer Product Regulations – Effective October 1, 2013

On August 28, 2013, California's safer consumer product [regulations](#) (otherwise known as the "green chemistry rules") were approved by the Office of Administrative Law and were filed with the Secretary of State; they will take effect on October 1, 2013. California now has the authority to regulate every ingredient in every product sold in California, with limited exceptions.¹ At 72 pages, the regulations set out a multi-year, information- and paperwork-intensive process that gets more voluminous and complex with each successive phase of implementation.

First Steps in Implementation?

September 2013 – List of Initial Set of Chemicals Released

In the next few weeks, the California Department of Toxic Substances Control (DTSC) will begin the implementation of these regulations. The first step will be the publication of the short list of chemicals ("chemicals of concern") that will be a target for regulation in the initial phase. That list is expected to be published in mid-September and to contain approximately 230 chemicals.

All companies selling products into California will want to review this list and determine if any of their products contain these chemicals.

All companies selling products containing an identified "chemical of concern" will want to determine which entity in their supply chain has the most information about the chemicals on the list and determine contractually which entity will be responsible for compliance with the data requests, toxicity testing and notification requirements that DTSC will impose under the regulations.

October 2013 – Initial Compliance Obligations Are Triggered

Commencing in October 2013 (and probably continuing throughout the end of 2013 and early 2014), DTSC is likely to be soliciting information about the use and prevalence of these chemicals in commerce, as well as requesting data about their toxicity and exposure pathways along the entire lifecycle of the product, from raw material extraction to manufacture, transportation, use and disposal.

¹ Food, pesticides, pharmaceuticals are some of the few product-types excluded from the very broad definition of "consumer product" in the law. California Health and Safety Code § 25251, a consumer product is defined as any "product or part of the product that is used, bought, or leased for use by a person for any purpose."

In addition to being authorized to request companies to provide “existing information,” the regulations allow DTSC to require companies to “generate new information.” §69501.4. Failure to respond adequately—the measurement of which is “to the Department’s satisfaction”—could land the company on a section of the DTSC website termed the “Response Status List,” the result being, at best, negative publicity, and at worst, fines and penalties if enforcement is pursued.

The regulations apply to “manufacturers,” “importers,” “assemblers” and “retailers,” but only require one of these responsible entities to comply for all of them. The definitions are not clear and are somewhat overlapping, and the answer as to which of these is the best entity to comply will be different depending on the product and its supply chain. Thus, some coordination will be required in advance to avoid duplication, miscommunication and noncompliance. Parties having supply chain responsibility for the same product do not want to submit conflicting or inconsistent information.

Spring 2014 – Priority Product Selection

In early spring of 2014, it is anticipated that DTSC will publish its initial list of priority products that will identify the products it is most interested in regulating immediately, and for which particular product/chemical combination it will likely request that the responsible entities perform an “alternatives analysis” to determine whether “safer” chemicals could be used. It is likely that DTSC will select a broader range of products to study in the work plan and then narrow down the list to those products that it will ultimately select to regulate (called “priority products”). The final selection in the full range of priority products is expected to occur no later than October 1, 2014.

Fall 2014 – Full Compliance Requirements Commence for Selected Products

The first 60-day compliance period is likely to be treacherous for those products selected. Confusion as to responsibilities within the supply chain could lead to businesses simply deciding not to sell their product in California, thereby potentially disrupting commerce for that product.

The number one question for everyone is what products will be selected. The answer is currently unknown, but the following chemical/product combinations do frequently come up as examples when this question is asked of DTSC staff: phthalates in nail polish, endocrine disruptors in toys, adhesives in carpet and flame retardants in foam furniture seating.

When priority products are finally identified by the DTSC, impacted companies can respond by sending in a “Priority Product Notification” alerting DTSC that it does sell a product in California that contains the chemical of concern. § 69503.7. Alternatively, and concurrently with the “Priority Product Notification,” a company can submit a set of two notices that indicate that it is either removing the product from sale (termed “Product Removal Intent Notification”), removing the chemical of concern from the product (termed “Chemical Removal Intent Notification”) or replacing the chemical in the product (termed “Product-Chemical Replacement Intent Notification”). After the first notice is submitted, the business is also required to submit a second notice that it has done so (termed the “Confirmation Notification”), or it must proceed to compliance with the rest of the regulations. § 69605.2.

Another potential compliance avenue in the first 60 days is the submission of a notification that a business’ product contains less than the threshold amount of the chemical of concern, termed the “Alternatives Analysis Threshold Notification,” concurrently with the Priority Product Notification. § 69505.3. The AA Threshold Notification must include:

- the name and contact information of the person submitting the notification;
- the name and contact information for all manufacturers, importers, assemblers and retailers;
- certification that the chemical is present in the product only as a contaminant and the concentration does not exceed the PQL threshold I, and the method used to determine the PQL;

- the source of the chemical in the product;
- all brand name(s) and labeling information for products, and if a component, the names of all known product(s) in which the component is used;
- laboratory methodologies, location and quality assurance/quality control protocols used to measure the chemical; and
- certification that controls will assure the threshold will not be exceeded.

Thus, depending on the course of action, a business may have between one and three notifications it must submit in the first 60 days. Failure to supply the requisite notifications or their information content is a violation, subject to severe fines and penalties. The agency has created no means of electronic submission, so one can imagine that they will be swimming in notifications, given how many businesses may be engaged in the sale in each product category.

Once it is settled that a company sells a product containing the chemical of concern—and it is not possible to remove the chemical of concern, or cease sales of the product in California—then a company must begin working immediately on developing a complex alternative analysis, or AA Report. The Preliminary AA Report is due within 180 days of the Priority Product Listing. DTSC will review the Preliminary AA Report and issue a notice of compliance. The Final AA Report is then due 12 months after the date that DTSC issues a notice of compliance. § 69505.1. The regulations do provide for the opportunity for some limited extensions to these very tight time periods.

The data and analysis requirements for the AA Report contained in the regulations are burdensome, well beyond the capabilities of most companies at this time. §69505.7. Compliance will involve not only a major investment of time and resources, but publicizing information that most businesses protect as proprietary: a thorough, publicly vetted exploration of how a company might be able to make its product differently without the chemical of concern, and a comparison of the potential environmental and health effects along the lifecycles of the alternative material and design choices. DTSC is expected to post guidance on the proper completion of an AA Report on its website in the next six months. When that happens, it is anticipated that portions of the [Alternatives Assessment Guidance Document](#) that Washington State is developing under a grant from U.S. EPA will become part of what is required to meet the California AA Report standards.

Once the AA Report is completed, DTSC will issue a Notice of Proposed Determination and a Notice of Final Determination, following a 45-day public comment period, listing the required regulatory response. Depending on the outcome of this process, DTSC may require a variety of responses, including product warning labels, use restrictions during manufacture, place of sale restrictions, the creation and funding of an end-of-life product management program or the funding of fundamental green chemistry research with a third party—or the agency may impose a ban on the sale of the product in California.

The earlier a company begins lining up its communications and enhancing the transparency of its product's ingredients, the less likely it is to be in noncompliance during the very short timeframes imposed and the less likely it is to have its commercial sales in California disrupted by another company in its supply chain. For additional advice on how a company can get its chemical inventories and supply chain communications in order and best prepare for compliance, see [GreenBiz.com](#).

If you would like to receive future *Chemical & Product Regulation Advisories* electronically, please forward your contact information to **environmental.advisory@alston.com**. Be sure to put “**subscribe**” in the subject line.

For more information on the detailed content of these regulations, to discuss compliance strategies or to begin preparing for what will be required, feel free to call any member of the Chemical & Product Regulation team listed below.

Ward L. Benshoof
213.576.1108
ward.benshoof@alston.com

Ryan W. Koppelman
650.838.2009
ryan.koppelman@alston.com

Maureen F. Gorsen
916.498.3305
maureen.gorsen@alston.com

Joshua L. Becker
404.881.4732
joshua.becker@alston.com

Nicki Carlsen
213.576.1128
nicki.carlsen@alston.com

Peter E. Masaitis
213.576.1094
peter.masaitis@alston.com

Bruce Pasfield
202.239.3585
bruce.pasfield@alston.com

Donald E. Segal
202.239.3449
donald.segal@alston.com

Elise N. Paeffgen
202.239.3939
elise.paeffgen@alston.com

BJ Shannon
202.239.3344
bj.shannon@alston.com

Andrea S. Warren
213.576.1008
andrea.warren@alston.com

Susan P. Kennedy
213.576.1124
susan.kennedy@alston.com

ALSTON & BIRD LLP

WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213-576-1100
NEW YORK: 90 Park Avenue ■ 12th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
SILICON VALLEY: 275 Middlefield Road ■ Suite 150 ■ Menlo Park, California, USA, 94025-4004 ■ 650-838-2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333
VENTURA COUNTY: 2801 Townsgate Road ■ Suite 215 ■ Westlake Village, California, USA, 91361 ■ 805.497.9474 ■ Fax: 805.497.8804