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California Proposes Groundbreaking Green Chemistry Regulation for Safer Consumer Products

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On September 14, 2010, the California Department of Toxic Substances Control ("DTSC") proposed its widely anticipated "Green Chemistry" regulation, known as "Safer Consumer Product Alternatives." A formal 45-day public comment process ends on November 1, 2010, with a hearing to be held the same day in Sacramento.

If adopted, the regulation will establish a comprehensive new system for requiring safer alternatives to consumer products and chemicals as prioritized by DTSC based upon the relative degree of threat posed to public health and the environment, availability of reliable information to substantiate the threat, and DTSC resources.

The proposed Safer Consumer Products regulation is being promulgated pursuant to AB 1879, which was signed into law in 2008. Thereafter, DTSC entertained two years of public and stakeholder feedback. The regulation would apply to consumer products placed into the stream of commerce in California and has the objective of creating a systematic, science-based process to evaluate chemicals of concern and identify safer alternatives to ensure product safety.

The proposed regulation contains a three-step process:

1. Chemical and Product Prioritization

DTSC will evaluate and prioritize chemicals of concern and consumer products to establish a list of "Priority Chemicals" and "Priority Products" by December 1, 2013. Manufacturers and other entities responsible for consumer products, including owners of brand names and trademarks, importers, distributors, and retailers, will be required to provide chemical and product information to DTSC needed for the prioritization process. Prior to finalization of both lists, DTSC will make them available for public review and comment.

2. Alternative Assessments

Responsible entities will be required to perform Tier II Alternative Assessments ("AA") for Priority Products with Priority Chemicals by

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qualified, accredited assessors, which will involve the submission of an AA Work Plan and AA Report to DTSC. The objective of AA's is to identify and select potential viable safer alternatives to using the Chemical of Concern in the Priority Product, if one exists. AA's include a Chemical Hazard Assessment to evaluate and compare a Priority Product and identified alternatives. An Exposure Potential Assessment is then required to evaluate and compare the Priority Product and considered alternatives which contain chemicals that also exhibit hazard traits. Following this assessment, alternatives still under consideration are then subject to a multimedia life cycle evaluation involving an assessment of product function and performance, materials and resource consumption impacts, environmental impacts, and economic impacts. Among other things, AA's could determine that an alternative product is available, that an alternative is not available and the Priority Product should remain in commerce, or that a Priority Product will remain in commerce pending development and distribution of a selected alternative.

As an incentive for early product reformulation and redesign, the proposed regulation provides a means for avoiding the Tier II AA process. The Tier II AA is not required for a product reformulation or redesign that is selected and implemented to replace a Chemical Under Consideration or a Priority Chemical before the product is listed as a Priority Product. Instead, an AA Notification and Tier I AA report by a verified assessor involving a simplified alternative assessment protocol need only be submitted to DTSC. This would also avoid the next step in the process, the Regulatory Response by DTSC, described below.

3. Regulatory Response

DTSC is tasked with providing a response to Tier II AA's. If the Priority Product is retained or an alternative product contains a Priority Chemical, at a minimum, the regulatory response will require the provision of certain product information to consumers and the establishment, maintenance and funding of an end-of-life product stewardship program, if a product is required to be managed as a hazardous waste at end of life. DTSC may require additional measures based upon specific findings, ranging from a request for additional information to the prohibition of the sale of a product where DTSC determines there is a safer alternative that does not contain a Priority Chemical and that is functionally equivalent and technologically and economically feasible.

Certain exemptions are provided under the regulation, including a de minimis exemption and the exclusion of certain types of products, such as prescription drugs, medical devices, food, and pesticides. Provisions for addressing and safeguarding the confidentiality of information are also included in the proposed regulation.

Why It Matters: The proposed Green Chemistry regulation is another truly groundbreaking California environmental requirement. As Linda

Adams, the Secretary of the California Environmental Protection Agency, put it: "this regulation propels California to the forefront of the nation and the world with the most Comprehensive Green Chemistry program." While California certainly has bragging rights at this stage, only time will tell whether it will ultimately inure to the benefit of the state and whether the federal government or other states will follow suit. Regardless, as history shows with other trendsetting California regulations, responsible entities that place products into the stream of California commerce should take notice as the regulation will have wide-ranging effects beyond California.

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