

## Client Alert.

---

October 17, 2011

# California Takes Action on Bisphenol-A: What Is the Impact?

By Peter Hsiao, Robin Stafford and Meredith Klein

California has joined 11 other states in limiting the sale of selected products that contain the chemical Bisphenol-A (BPA). BPA is an industrial chemical used to make a hard, clear plastic known as polycarbonate, found in a multitude of plastic products, including reusable water bottles and baby bottles. It is also found in epoxy resins, which act as a protective lining on the inside of metal-based food and beverage cans, and metal closures for glass jars. BPA coatings have been used to ensure that foods can be canned and stored safely over extended periods of time.

In October 2011, both the California Legislature and its health hazard assessment agency took action regarding BPA. Taken in context, those actions will have only limited effect on the sale of BPA-containing products. The resulting debate underscored the fact that significant evidence supports the safe and effective use of BPA in certain products.

### THE NEW LEGISLATION

On October 4, 2011, Governor Jerry Brown signed the Toxin-Free Infants and Toddlers Act (A.B. 1319 (Butler)) into law. The law takes effect on July 1, 2013, and applies to baby bottles and sippy cups, prohibiting the manufacture, sale, or distribution in commerce of any bottle or cup designed or intended to be filled with any liquid, food, or beverage, intended primarily for consumption by children three years of age and under, that contains detectable BPA above 0.1 parts per billion. The legislation also directs manufacturers to use the least toxic alternative to replace BPA in containers, and it specifically prohibits the use of any replacement chemical that is:

- classified by U.S. EPA (EPA) as carcinogenic to humans, likely to be carcinogenic to humans, or for which there is suggestive evidence of carcinogenic potential;
- identified by EPA as a reproductive toxicant that causes birth defects, reproductive harm, or developmental harm; or
- listed on the Proposition 65 list of chemicals known to the state to cause cancer or reproductive toxicity.

The ban will be superseded when DTSC adopts a “regulatory response” under its new green chemistry program regarding the use of BPA. Exceptions to the ban include medical devices and food and beverage containers designed or intended primarily to contain liquid, food or beverages for consumption by the general population.

The products affected by the ban have largely already been reformulated by many manufacturers to eliminate BPA. Indeed, the ban was substantially more limited than early proposals considered by the Legislature in 2009 and 2010, and than a 2011 bill that would have banned BPA in any infant formula, liquid, baby food, or beverage. The new legislation also contains no enforcement provision, and would probably be enforced under California’s broad Unfair Business Practices Act.

# Client Alert.

---

## CALIFORNIA OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT'S ACTION

California also deferred further consideration of adding BPA to the Proposition 65 list as a known carcinogen. At its October 12, 2011 meeting, the Carcinogen Identification Committee (CIC) of the Office of Environmental Health Hazard Assessment's (OEHHA) Science Advisory Board assigned BPA a "medium" priority. The CIC's decision will result in an indefinite postponement of further consideration of BPA as a chemical known to the state to cause cancer. In 2009, OEHHA's other panel of scientific experts, the Developmental and Reproductive Toxicant Identification Committee, voted unanimously not to list BPA as a chemical "known to the state to cause reproductive toxicity."

## WHAT WILL HAPPEN NEXT IN CALIFORNIA

The next policy confrontation over BPA may come when California's new green chemistry program, still not finalized, is implemented. (Prior MoFo Legal Updates have tracked the development of this program; see [California Issues New Green Chemistry Requirements for Consumer Products](#).) By not deferring its decision on BPA to the green chemistry program, the California Legislature has expressed its impatience with that anticipated agency review. However, its limited action is far from a wholesale ban on the use of BPA and mirrors the CIC's more qualified decision regarding the anticipated further study of BPA.

Morrison & Foerster's environmental lawyers have worked on BPA issues on behalf of companies and trade associations. They have a recognized specialty in the science, evaluation and toxicology of BPA and other chemicals, and with respect to consumer product content, disposal, and warning requirements. They have followed the scientific debate on BPA's toxicity and carcinogenicity throughout its extensive history and understand how OEHHA's new Assessment may affect a wide variety of clients and their interests.

### Contact:

**Michèle B. Corash**  
Partner  
(415) 268-7124  
[mcorash@mofo.com](mailto:mcorash@mofo.com)

**Robert L. Falk**  
Partner  
(415) 268-6294  
[rfalk@mofo.com](mailto:rfalk@mofo.com)

**Peter Hsiao**  
Partner  
(213) 892-5731  
[p hsiao@mofo.com](mailto:p hsiao@mofo.com)

**Michael Jacob Steel**  
Partner  
(415) 268-7350  
[msteel@mofo.com](mailto:msteel@mofo.com)

**Robin Stafford**  
Of Counsel  
(415) 268-6674  
[rstafford@mofo.com](mailto:rstafford@mofo.com)

**William F. Tarantino**  
Of Counsel  
(415) 268-6358  
[wtarantino@mofo.com](mailto:wtarantino@mofo.com)

# Client Alert.

---

## **About Morrison & Foerster:**

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for eight straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at [www.mofo.com](http://www.mofo.com).

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.*