

THE RECORDER

IN PRACTICE

The Safer Consumer Products Regulation



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Depending on one's perspective, California's Green Chemistry Initiative, with its vast array of burdensome requirements, trade secret concerns and potential to ban certain products, will either cause business to flee from California, or will simply be a non-burdensome continuation of what businesses are already doing to remove chemicals from their products. The truth likely lies somewhere in the middle.

As the law initially ramps up over the next five years or so, with only a small number of products to be targeted, few businesses will be directly impacted. Over time, however, as more products are considered and the law gets woven into the fabric of the state's regulatory environment, it is possible that 10, 15 or 20 years from now, the law will touch nearly every business and product in California within its reach, and may influence nationally the green chemistry landscape.

It took almost five years after the legislation was enacted, and almost three years after regulations were to have been in place, but on Oct. 1, the California Safer Consumer Products Regulation finally went into effect; however, that is just the start. In the short term, there will no doubt be lawsuits broadly challenging the regulations, and once the various stages of the law begin to be implemented and consequences become more apparent, further litigation directed at particular provisions of the regulations is sure to follow.

In addition, efforts on the federal level to reform the Toxic Substances Control Act could affect the impact of the SCPR.

Introduced in May 2013 by the late Sen. Frank Lautenberg and Sen. David Vitter, the Chemical Safety Improvement Act as proposed has many green chemistry-type provisions. However, it also includes a broad federal preemption provision that would essentially block many elements of the California law. For that reason, among others, significant concerns about the CSIA have been raised by many proponents of California's efforts, including Sen. Barbara Boxer and DTSC. It is possible that some bipartisan effort to reform TSCA may yet become law, but whether any such effort can include a broad preemption clause is uncertain.

BACKGROUND

Enacted in September 2008, the "Safer Consumer Product Alternatives" law was conceived as a new regulatory approach to pollution prevention that requires design of chemical products and processes that reduce or eliminate the use and generation of hazardous substances. Under the law, DTSC is charged to adopt regulations to establish a process for identifying and evaluating "chemicals of concern in consumer products and their potential alternatives."

The law is intended to apply to "all consumer products placed into the stream of commerce in California." Exempted from the SCPR are: dangerous drugs or devices, medical devices, dental restorative materials, food, pesticides, or other consumer products if they are regulated under other California or federal programs or international treaties or agreements with the force of domestic law and those other regulations address the same adverse impacts addressed by the SCPR and provide at least the same level of protection to human health and the environment that would be provided if the SCPR applied to the product.

While entities responsible for compliance include a product's manufacturer, im-

porter, and retailer (or assembler), it is the manufacturer who has the principal duty to comply with requirements applicable to a "responsible entity." Only if the manufacturer does not comply does the duty fall to the importer (if there is one). If both the manufacturer and importer (as applicable) fail to comply, the retailer (or assembler) becomes responsible. However, to ease the burden on single manufacturers, the obligations of a "responsible party" may be fulfilled by a consortium, trade association, public-private entity, or any other entity acting on behalf of the responsible party.

Another significant element of the SCPR, or more accurately, the absence of a significant element, is that unlike another California law that addresses chemicals in consumer products—Proposition 65—this law does not provide for citizen suits. Therefore, some of the problematic aspects of Proposition 65, which has generated a cottage industry for private plaintiffs and their attorneys, will not be a factor under the Green Chemistry Initiative, and enforcement of the law and SCPR will be left to the state.

No fewer than 11 drafts of the regulation were circulated or issued before the SCPR was finally approved. Throughout the process, the basic regulatory structure has remained generally constant, but the details within that structure have shifted as business, consumer advocates, and the environmental community weighed in at each stage. The final regulation represents DTSC's attempts to balance those competing interests.

THE BASIC ELEMENTS

The foundation of the SCPR is based on the following four components: (1) identification of candidate chemicals, (2) development of a list of "priority products," (3) an "alternatives analysis" performed by "responsible entities," and (4) DTSC imposition of "regulatory responses."

Whether a product will be considered for the initial priority product list, and potentially subject to a detailed alternatives analysis, will be determined by the extent to which the use of the product results in exposure to a “candidate chemical.” DTSC’s initial “informational” list contained approximately 2,300 candidate chemicals that exhibit a hazard trait, or specific environmental or toxicological endpoints and are listed by one or more authoritative bodies specified in the regulations.

Of the initial informational list, approximately 250 of those candidate chemicals will be considered by DTSC as chemicals of concern developing an initial list of priority products. Candidate chemicals that are the basis of a product being listed a priority product are thereafter considered. Chemicals can later be added to or deleted from the list in accordance with the state’s Administrative Procedure Act.

DTSC will then identify and prioritize products containing those chemicals. Specifically, DTSC will seek to identify “product-chemical combinations,” with consideration to potential exposure and adverse impacts to the public, or to aquatic, avian or terrestrial plant or animal organisms, and the extent to which the product or the candidate chemical in question is regulated under federal or other California regulatory programs, and applicable international agreements or treaties.

DTSC must propose the initial priority products list no later than April 1, 2014. The initial list may not contain more than five products. Subsequent to that initial listing, DTSC will issue by Oct. 1, 2014 a Priority Product Work Plan that will identify and describe the product categories that DTSC will assess—on the basis of their product-chemical combinations—to be considered as additional priority products.

The alternatives analysis is the cornerstone of DTSC’s implementing regulations. It forms the basis for choosing the most suitable product alternative and the appropriate regulatory response imposed on a responsible entity. The AA process is detailed and complicated. Under the SCPR, DTSC is required to make available on its website guidance materials and examples

of AAs to assist in performing an AA.

Significantly, the AA requirements will not apply if the manufacturer of a priority product either (1) provides notifications under procedures and conditions prescribed in the SCPR of chemical removal, product removal, or product-chemical replacement, or (2) can certify that either (i) the COC is simply a contaminant in the product (as opposed to an intentionally added chemical) and the concentration of the COC does not exceed the established “practical quantification limit,” i.e., the lowest practical measurable detection level, or (ii) the COCs do not exceed an established “alternatives action threshold” concentration, if a threshold has been established for a particular priority product.

Of heightened concern to manufacturers is the extent to which trade secrets will be protected, given the vast amount of information that must be provided under the AA process. The SCPR includes trade secret protection provisions, but whether those protections will be implemented in a manner to adequately protect trade secrets remains problematic.

Lastly, following submission of the AA report, DTSC would then select its regulatory response. The regulatory responses can range from requiring additional information, to “no regulatory response required,” to product bans.

Measures less draconian than a comprehensive product ban include: requiring supplemental information, providing product information to consumers, placing use restrictions on the product, and/or implementing engineered safety measures or administrative controls or end-of-life management requirements.

Of the array of possible regulatory responses, most significant is the “product sales prohibition.” There are two scenarios under which DTSC may order a product sales ban. First, if the selected alternative contains a COC, or if an alternative is not selected, and DTSC notifies the responsible entity that it has determined that “a safer alternative exists that does not contain the chemical(s) of concern or replacement candidate chemical(s) and that is both functionally acceptable,

technically feasible, and economically feasible,” the “product sales prohibition” requirements will apply.

Second, even if DTSC finds that there are no safer alternatives that are functionally acceptable or technically or economically feasible, it can still seek to ban the product, but the ban can be avoided if it can be demonstrated to DTSC’s satisfaction that “the overall beneficial public health and/or environmental impacts and/or social utility of the product significantly outweigh the overall adverse impacts of the product” and administrative and/or engineering restrictions on the nature or use of the product can adequately protect human health and the environment. In addition, the responsible entity may avoid the product sales prohibition if, after it receives a sales prohibition notice from DTSC, it agrees to submit a revised final AA report that selects an alternative that does not contain the offending chemicals.

The SCPR initial implementation is simply the end of the first act in what is sure to be a long drama that will unfold as green chemistry becomes more and more established, in both California and nationally, as well as internationally. How it will play out remains to be seen, but there is now at least some definition to the playing field.

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