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CALIFORNIA GOES GREEN(ER) THROUGH NEW CHEMICAL INITIATIVE

by

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“Sustainable commerce.” “Cradle-to-cradle economy.” “Benign by design” product development. These phrases define the new California Green Chemistry Initiative (the “Initiative”), the goal of which is to reduce the toxic footprint of California commerce through a comprehensive and radically different approach to chemical and product regulation. As a public policy to be implemented by specific legislation, the Initiative will have a broad and potentially burdensome impact on entities that do business in California. Such entities should remain alert to how California will implement the Initiative and associated legislation.

Two new laws illustrate the breadth and depth of the Initiative’s impact. AB 1879, the “safer alternatives regulation,” creates a process for identifying and prioritizing chemicals of concern in “consumer products” (a term that embraces much more than what is traditionally considered “consumer products”), and methods for assessing safer alternatives to such chemicals. SB 509 establishes a web-based Toxics Information Clearinghouse that will provide the public with chemical toxicity and hazard information about consumer products. In conjunction with AB 289,¹ these and future pieces of Initiative-based legislation are the foundation of a regulatory continuum unique in the nation.

The Initiative. After launching the Initiative in 2007, the California Department of Toxic Substances Control (“DTSC”) held numerous public meetings to develop and refine the Initiative’s goals and elements. Ultimately, DTSC defined the Initiative’s goal as the development of policy recommendations “to stimulate the ‘green’ design of products so that the manufacturing, use or disposal of products generates, uses and releases less hazardous chemicals.”² With this definition, the Initiative represents a major shift in chemical and product regulation in the state, rejecting the traditional chemical by chemical, product by product approach perceived by the California public as too slow-moving and piecemeal (e.g., AB 1108, regulating phthalates in children’s products).

In its 2008 *California Green Chemistry Initiative – Final Report* (the “Report”), DTSC identified six key elements, which will serve as the basis for legislative and regulatory packages implementing the Initiative:³

¹Passed in 2006, AB 289 authorizes state environmental agencies, like DTSC, to require “manufacturers” to submit information about chemicals in California commerce. Under this law, “manufacturer” is a person who produces a chemical in California or who imports a chemical into this state for sale in California. Health & Safety Code § 57018. Unlike data call-ins issued by other regulatory bodies such as the U.S. Environmental Protection Agency, AB 289 data call-ins are mandatory in nature, and any entity receiving an AB 289 request for information must provide a response within one year of the date of the request. Health & Safety Code § 57019. DTSC already has issued an AB 289 data call-in for carbon nanotubes. See http://www.dtsc.ca.gov/TechnologyDevelopment/Nanotechnology/upload/Formal_AB289_Call_In_Letter_CNTs.pdf.

²DTSC 2008. *California Green Chemistry Initiative – Final Report*, http://www.dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/upload/GREEN_Chem.pdf at 7.

³Report at 3.

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- **Accelerate the quest for safer products.** AB 1879, the “safer alternatives regulation,” implements this key element by establishing a “scientifically-based decision-making framework to evaluate chemicals of concern in products sold in the state and [prompting] manufacturers of those products to use less toxic alternatives.”
- **Create an online toxics clearinghouse.** This web-based information tool, the subject of SB 509, “will improve the ability of businesses, government and consumers to make better decisions that lead to safer choices.”
- **Create an online product ingredient network.** With this component, intended to allow product information to flow freely through the supply chain, entities whose products enter California commerce would be required to disclose their product ingredients.
- **Develop Green Chemistry workforce education and training, research and development, and technology transfer.** This component is intended to enrich California’s new chemical and product regulation policy by introducing green chemistry principles at all levels of education, funding green chemistry research and development, and encouraging public-private collaborations.
- **Expand pollution prevention and product stewardship programs.** DTSC’s pollution prevention programs will be expanded and modified to create further incentives for the development of “green” products.
- **Move toward a cradle-to-cradle economy.** Continuous product improvement and innovation, supplemented by green “scorecards,” will result by leveraging market forces driven by consumers and retailers.

AB 1879. AB 1879⁴ requires DTSC to develop a “safer alternatives regulation” to reduce or eliminate “chemicals of concern” from “consumer products” by January 1, 2011. DTSC’s goal is to create a transparent regulatory process that will drive continuous improvement in the design and chemical footprint of consumer products sold, used or leased in California. Pursuant to the statute, the safer alternatives regulation must contain:

- a process for identifying chemicals of concern (“COCs”) in consumer products;
- a process for prioritizing COCs in consumer products; and
- methods for analyzing safer alternatives to prioritized COCs in consumer products, i.e., developing a process to identify “better” chemicals, or “better” manufacturing processes – or even “better” products – to eliminate COCs from California commerce. The safer alternatives assessment must include a lifecycle analysis that accounts for elements specified in the statute.

AB 1879 authorizes DTSC to take a broad range of actions following the safer alternatives assessment. These regulatory responses include taking no action, further requirements for research and development of safer alternatives, restrictions on COCs in consumer products, or bans of COCs in consumer products.⁵

Significantly, the term “consumer products” is defined very broadly, and encompasses much more than products traditionally considered “consumer products.” With certain statutory exceptions, the term is defined as: “a product or part of the product that is used, bought, or leased for use by a person for any purposes.”⁶ As confirmed by DTSC representatives at various meetings, the term “consumer products” encompasses business-to-business transactions, including the sale of bulk chemicals, aircraft, computer servers, and sales of products to state and federal government agencies located in California.

⁴Health & Safety Code §§ 25252 *et seq.*

⁵Health & Safety Code § 25253(b).

⁶Health & Safety Code § 25251(e). Excluded from the definition of “consumer product” are the following categories: (1) A dangerous drug or dangerous device as defined in Section 4022 of the Business of Professions Code (i.e., prescription drugs and devices); (2) Dental restorative materials as defined in subdivision (b) of Section 1648.20 of the Business and Professions Code; (3) A device as defined in Section 4023 of the Business of Professions Code (certain nonprescription devices); (4) A food as defined in subdivision (a) of Section 109935 (which tracks the definition of “food” under the Federal Food, Drug and Cosmetic Act); (5) The packaging associated with any of the items specified in paragraph (1), (2), or (3); (6) A pesticide as defined in Section 12753 of the Food and Agricultural Code or the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. Sec. 136 and following); and (7) Mercury-containing lights defined as mercury-containing lamps, bulbs, tubes, or other electric devices that provide functional illumination

In April 2009, DTSC released its “straw man” draft regulatory proposal (the “Proposal”), a concept document intended as the starting point for drafting regulations implementing AB 1879.⁷ In the Proposal, DTSC identified categories for the identification of COCs, including:

- Any chemical with any potential or anticipated negative or adverse impacts to human health and safety or the environment;
- Any chemical for which there is scientific evidence of any potential adverse effects to human health or the environment;
- Any chemical shown to potentially adversely impact worker safety and/or public health; and
- Any chemical which, during manufacturing, gives rise to hazardous by-products and waste materials that requires treatment and/or disposal.⁸

The above proposed categories are deliberately broad to “capture,” in the words of DTSC’s representatives at various public workshops, “a large universe” of chemicals. The proposed criteria are to be used in addition to the statutory criteria for identification of COCs: the volume of the chemical in California commerce; the potential for exposure to the chemical in the consumer product; and the potential effects on sensitive subpopulations.⁹

The prioritization criteria identified in the Proposal are similarly broad and include, in addition to the same statutory COC identification criteria:¹⁰

- Lack of minimum data sets required to fully evaluate the hazard characteristics of the COCs. (A minimum data set consists of the following endpoints: acute toxicity; chronic toxicity; teratogenicity or developmental/reproductive toxicity; mutagenicity; ecotoxicity and environmental fate);
- Human experience suggesting that the chemical or chemical ingredient poses a substantial risk to human health, safety, or the environment;
- Evidence of any actual adverse environmental impact of the COC;
- Evidence of accumulation/persistence in the environment; and
- Any evidence that otherwise suggests that there are “reasonable grounds of concern” regarding the potential adverse impacts of the chemical.¹¹

Under the Proposal, if a consumer product contains a COC that meets even one prioritization criterion, it must undergo a safer alternatives assessment. Any entity which places such products in California commerce – manufacturers, distributors or retailers – will be required to undertake these assessments.¹² The assessments must include a lifecycle analysis meeting statutory requirements, including an analysis of worker safety and impacts to public health.¹³ The assessments, which must be posted publicly on the web, will be open to public comment for a period of three months.¹⁴ Pursuant to DTSC’s conceptual approach articulated in the Proposal, if the assessment concludes that *no* safer alternative is available for a COC in the consumer product, the assessment remains subject to public comment for an indefinite period of time and must be revised if a public comment demonstrates that a safer alternative is available.¹⁵ Given the broad nature of the prioritization criteria, entities which place virtually any product in California commerce would be required to present a very public scientific defense to their products’ ingredients and manufacturing processes—or be required to implement “safer alternatives.”

⁷<http://www.dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/upload/Draft-straw-proposal-outline.pdf>.

⁸Proposal at 3-6.

⁹Health & Safety Code § 25252(a)(1)-(3).

¹⁰AB 1879 identifies the same statutory criteria for both COC identification and prioritization. Health & Safety Code § 25252(a)(1)-(3).

¹¹Proposal at 6-7.

¹²Proposal at 7.

¹³Health & Safety Code § 25253(a).

¹⁴Proposal at 8.

¹⁵Proposal at 9.

The outcome of the safer alternative assessment will drive the regulatory response for the consumer product at issue. AB 1879 authorizes a wide range of regulatory responses.¹⁶ Product labeling (including providing end-of-life instructions) is a potential regulatory response, as is requiring further research and development of safer alternatives. In this regard, DTSC strongly promotes public-private research partnerships with the University of California, which presumably would ease the burden and costs of undertaking R&D efforts as well as lending further credibility to those efforts. Finally, bans also are a regulatory response option, although the criteria for triggering this extreme remains unclear.

Since the April 2009 release of the Proposal, and in response to public comments, DTSC has reconsidered its conceptual approach to implementing AB 1879. The agency plans substantial revisions to the Proposal during the summer of 2009, and expects to release a revised Proposal by early August 2009. During this period, DTSC anticipates drafting formal regulatory language which will be available for review by the end of August 2009. The formal public notice and comment period is expected to begin in October 2009. In the interim period, the draft regulations will be submitted to the newly created Green Ribbon Science Panel for review, as well as to the California Environmental Policy Council.¹⁷ The earliest effective date of the regulations is May 30, 2010—well in advance of the statutory deadline of January 1, 2011.

SB 509. SB 509 requires DTSC to establish the Toxics Information Clearinghouse (the “Clearinghouse”) by January 1, 2012, for the collection, maintenance, and distribution of specific chemical hazard trait and environmental and toxicological end-point data relating to “consumer products.”¹⁸ SB 509 also establishes a number of key definitions applicable to AB 1879 and, presumably, future Initiative legislation.

The California Office of Environmental Health Hazard Assessment (“OEHHA”) is required to advise DTSC on the appropriate hazard traits and end-point data for the Clearinghouse. To that end, the law requires OEHHA to conduct public workshops on this aspect of SB 509. On February 8, 2009, a panel of experts as well as members of the public participated in OEHHA’s first workshop.

Implementation of SB 509 is not as advanced as is that for AB 1879. Notwithstanding this slower pace, entities whose consumer products are bought, used or leased in California should be aware that, in less than two years, they will be called upon to provide chemical information relating to such products.

What next? AB 1879, SB 509, and AB 289 represent a significant shift in California chemical and consumer product regulation. In light of the laws’ broad definitions and regulatory authority, entities doing business in California can expect greater public scrutiny of their products than ever before. Such entities can also expect substantially greater burdens in defending their products in the California marketplace, with numerous evaluation criteria for the safer alternatives assessments making these efforts extremely data-intensive. Compliance with each of these laws also will implicate trade secret issues, and in various public workshops, DTSC representatives have repeatedly requested input from stakeholders on the details of trade secret protection. DTSC continues its call for input in this regard.

DTSC is revisiting the key aspects of its Proposal, primarily with respect to the identification and prioritization of COCs, and the available triggers for the various regulatory responses. Now is an opportune time for affected businesses to contact DTSC with their concerns and suggestions, before the agency’s conceptual approach becomes more firmly entrenched in regulatory language.

¹⁶Health & Safety Code § 25253(b).

¹⁷AB 1879 has created the Green Ribbon Science Panel, a group of experts in various disciplines (including chemistry, chemical engineering, environmental law, public policy, toxicology and nanotechnology) with authority to advise DTSC on a wide range of matters. Health & Safety Code § 25254. Also under the new law, DTSC must submit the regulatory package to the California Environmental Policy Council, made up of the heads of the various agencies of the California Environmental Protection Agency, for a “multimedia evaluation” designed to ensure that the regulatory package will not cause a significant adverse impact on the public health or the environment. Health & Safety Code § 25252.5.

¹⁸Health & Safety Code § 25256.