

# Client Alert.

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## Consumer Product Alert: California Revises Draft Green Chemistry Regulations

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On January 29, 2013, California's Department of Toxic Substances Control (DTSC) released revisions to the next generation of its proposed consumer product regulations. The draft regulations set out the details of California's Green Chemistry Initiative, which requires product manufacturers to examine whether they can replace existing chemical ingredients with alternatives that are deemed safer for consumers and the environment. These far-reaching regulations will require businesses selling products in California to make major investments in compliance and change the way manufacturers look at their supply chain and product design planning.

The revised regulations follow the same basic framework as previous drafts (discussed in further detail in our prior Updates, which you can access [here](#) and [here](#)). They establish a four-step regulatory process in which DTSC (i) identifies candidate chemicals of concern ("Candidate Chemicals"), (ii) develops a list of priority products containing those Candidate Chemicals ("Priority Products"), (iii) requires manufacturers of Priority Products to notify DTSC and analyze possible product alternatives, and (iv) imposes a regulatory response, which can include requiring reformulation or even banning the sale of products in California. Although the regulations impose the "principal duty to comply" on the manufacturer and, secondarily, on the importer, the retailer must also comply (or cease ordering the Priority Product component) if the manufacturer fails to do so, and DTSC provides notice of noncompliance to the retailer.

Some revisions are designed to reduce the impact on regulated businesses. Other revisions, however, will increase companies' administrative burdens and financial costs at each step of the regulatory process. Some notable changes include the following:

### PRIORITIZATION OF CHEMICALS AND PRODUCTS

- **List of Candidate Chemicals Expanded.** DTSC added chemicals to the already long list of approximately 1,200 Candidate Chemicals, including those classified by the European Union as Category 1 respiratory sensitizers, and additional chemicals listed in the Clean Water Act.
- **Applicability Exemption Added.** Exempt from the revised regulations are products regulated by other laws that provide equal or greater protections to public health and the environment and that address the same potential adverse impacts and exposure pathways addressed by the proposed regulations.

### ALTERNATIVES ANALYSIS

- **Public Review and Comment Required for Alternatives Analysis.** Businesses will now be required to subject their reports on product alternatives to public review and comment, and final reports will need to include a summary of public comments received and a response to those comments.
- **Economic Impacts Analysis Now More Complex.** Businesses will now be required to analyze public health costs of Priority Products and their alternatives, as well as costs to local government and others in managing waste.

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## REGULATORY RESPONSE

- **Response Guidelines Ultimately Unclear.** Although the provision allowing DTSC to respond to situations other than those specifically identified in the regulations has been eliminated, DTSC retains broad discretion on the types of information and analysis that it can require regulated businesses to submit and the factors it will consider in its review.
- **Notice of Regulatory Response and Public Comment Required.** DTSC will be required to provide notice of its proposed regulatory response (or no response) within 90 days after it issues a notice of compliance or notice of disapproval of an alternatives analysis. A public comment period (and workshop) will then follow.
- **“New Information” No Longer Triggers New Alternatives Analysis.** The provision allowing DTSC to require, based on new information, a new alternatives analysis has been eliminated.
- **Supplementary Alternatives Analysis May Be Required.** DTSC may require a supplementary alternatives analysis before or concurrently with other regulatory responses.

## OTHER CHANGES

- **Assembler Is Not a Manufacturer.** The definition of “manufacture” does not include acts that meet the definition of “assemble,” which is to “fit, join, put, or otherwise bring together components to create a consumer product.” When a manufacture fails to comply with the regulations, an assembler, like a retailer, can comply with the requirements themselves, or cease ordering the Priority Product component.

## PUBLIC COMMENT

The proposed regulations are subject to a 30-day public comment period that closes on February 28, 2013, and the regulations could be finalized as early as spring 2013. The public comment process is an important opportunity for affected stakeholders to participate and potentially influence the rulemaking process; it is also likely to be the last chance for companies wanting to preserve their right to challenge any aspect of the regulation in court.

Morrison & Foerster has one of the largest Cleantech groups in the nation. We represent retailers, consumer product manufacturers, chemical companies, and some of the leading biochemistry research and development companies. We are closely watching and participating in the development of Green Chemistry regulations and can provide additional information about this important process upon request.

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