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# U.S. Chemical Regulation— Update of State Initiatives

Against the backdrop of efforts by Congress to reform the Toxic Substances Control Act of 1976 ("TSCA"), 15 U.S.C. § 2601 et seq., states like California, Washington and Maine have moved forward with the adoption of "Green Chemistry" laws. The laws will have wide-ranging impacts by restricting the presence of hazardous chemicals in consumer products and establishing mandatory priority chemical notification requirements.

These state "Green Chemistry" laws contain provisions that are very similar to the European Union's chemical regulation governing the "Registration, Evaluation, Authorization and Restriction of Chemical Substances" ("REACH"), which requires the pre-registration of all chemical products and substances that will be sold, used, and distributed in the markets in the European Union. Importantly, these state initiatives are merely the first in a wave of chemical reforms that will forever change chemical regulation at the state, federal and international levels.

## California's Green Chemistry Laws

On September 29, 2008, California enacted two laws that collectively established the foundation for the state's "Green Chemistry Initiative." Senate Bill No. 509 ("SB 509") requires the California Environmental Protection Agency Department of Toxic Substances Control ("DTSC") to create an internet-based "Toxic Information Clearinghouse" for the collection and dissemination of chemical hazard information. Assembly Bill No. 1879 ("AB 1879") requires the DTSC to develop and adopt regulations to identify and prioritize chemical ingredients in consumer products that may be considered a chemical of concern and to reduce public exposure to those chemicals.

On February 23, 2010, DTSC released a Conceptual Flow Chart of its "Regulations for Safer Products."[1] The Conceptual Flow Chart is the first in a three-step process designed by DTSC to ensure that it meets AB 1879's January 1, 2011 deadline to adopt implementing regulations. DTSC is currently seeking public comment on the Conceptual Flow Chart. DTSC then plans to prepare an outline of its proposed regulatory language. The final step in DTSC's process is the drafting of full regulatory language. DTSC expects to issue its formal rulemaking by late Spring or early summer and to adopt its final regulations by the end of 2010.

The Conceptual Flow Chart establishes a three-stage regulatory process: (1) Prioritization; (2) Alternative Assessment; and (3) Regulatory Response. The Prioritization stage requires DTSC to run the universe of chemicals through hazard traits developed by the Office of Environmental Health Hazard Assessment ("OEHHA"). If a chemical exhibits a specific hazard trait, DTSC will then assess the chemical using criteria such as whether the chemical is already regulated, potential exposure and toxicity, in order to determine whether the chemical is a "chemical of concern." DTSC will

1. DTSC's initial draft regulatory framework was issued in 2009 but was withdrawn after strong criticism by both industry groups and state regulators.

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then subject the universe of consumer products containing "chemicals of concern" to criteria such as dispersive volume, exposure and adverse impact on the environment, in order to determine whether the product is a "product of concern." DTSC will ultimately publish a list of "products of concern" on its website.

The second stage in the regulatory process requires manufacturers of "products of concern" to conduct "Alternative Assessments" to identify alternatives to the use of "chemicals of concern" in those products. Manufacturers must submit an "Alternative Assessment Work Plan" to DTSC.

The final stage in the regulatory process requires DTSC to review the "Alternative Assessment Work Plan" and assign a regulatory response. This response can range from requiring no action to completely prohibiting the manufacture and use of the product in the state.

Additional provisions identified in the Conceptual Flow Chart include allowing Certified Third-Parties to conduct the Alternative Assessments, developing a voluntary product registry, and permitting petitions from any party for the regulation of a specific chemical as a "chemical of concern."

## Washington's Children's Safe Products Act

In 2008, Washington adopted its Children's Safe Products Act, Rev. Code Wash (ARCE) § 70.240.010 et seq., which requires the Department of Ecology and Department of Health to develop a list of chemicals "of high concern for children." These chemicals are comprised of "high priority chemicals" that have been found to be present in humans, been found to be present in the home environment, or have been added to or are present in consumer products used in the home. The law also requires the Department of Ecology to identify children's products or product categories that may contain chemicals of "high concern for children." A current draft list of chemicals of "high concern for children" contains approximately 66 different chemicals and chemical compounds.

The Act requires manufacturers of children's products to provide annual notice to the Department of Ecology that the manufacturer's product contains a "high priority chemical." Manufacturers must also provide notice to the sellers and distributors of those products. Failure to provide the required notice could result in a civil penalty of up to ten thousand dollars for repeat offenses.

## Maine's Toxic Chemicals in Children's Products Law

In 2007, Maine adopted its Toxic Chemicals in Children's Products Law, 38 M.R.S. § 1691 et seq., to reduce exposure to "chemicals of high concern" by substituting safer alternatives where feasible. The law requires the Maine Department of Environmental Protection ("MDEP") to designate "chemicals of high concern", at least two of which must be designated as "priority chemicals" by January 1, 2011. Manufacturers and distributors are then required to provide notification to MDEP of children's products containing those "priority chemicals." The Law also permits the prohibition of the manufacture, sale or distribution of children's products containing "priority chemicals" in the state. Finally, the law permits the MDEP to participate with other state and governmental agencies in an "Interstate Clearinghouse" containing compiled chemical data and hazard information.

In conclusion, Congress' inability to amend TSCA since 1976 and the implementation of REACH has resulted in states adopting more expansive chemical laws and regulations than what are currently in place. It is important that business and industry remain informed on state "Green Chemistry" laws and initiatives, as these programs may be a precursor to how TSCA is ultimately amended.

Blank Rome LLP has a team of attorneys devoted to issues affecting the chemical industry. Our lawyers continue to evaluate chemical laws and regulations and are able to provide strategic counseling on issues affecting your company or business. ■

Blank Rome is dedicated to monitoring and reporting any legal and legislative developments that affect the chemical industry. Should you have any questions regarding the information contained in this Alert, please contact:

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