

State Legislation Gives Broad New Authority to Department of Toxic Substances Control

Background

California currently has no centralized regulatory scheme for the regulation of potentially hazardous substances in consumer products. While there are various state agencies with regulatory authority over specified categories, such as pesticides or lead in jewelry, there is not one state agency that has broad authority to regulate the use of potentially hazardous substances in consumer products.

The result of this dispersed responsibility has been continued political pressure to regulate and sometimes ban specific chemicals or the use of specific chemicals in specific products. This piecemeal approach to chemical regulation policy in California has led to significant issues being decided in an increasingly political environment where sound science does not prevail.

Chemical Regulation in United States and California

Federal law contains one major statute that enables regulation of chemicals both before and after they enter the stream of commerce. The Toxic Substances Control Act of 1976 (TSCA) requires chemical producers to generate and submit test data under certain conditions. When TSCA was implemented in 1979, there were 62,000 chemicals in commercial use in the United States that were grandfathered. Chemical producers are not required to provide information on the toxic properties of these chemicals, and the U.S. Environmental Protection Agency (EPA) is charged with assessing the risk associated with those chemicals. Many complain that there are hurdles under TSCA that prevent the EPA from collecting sufficient information from chemical producers, and that this lack of information leaves regulators and consumers in the dark.

TSCA also allows the EPA to regulate the use of chemicals if the agency can provide substantial evidence that the chemical presents an unreasonable risk to human health and the environment, the benefits of regulation outweigh the cost to industry and society, and the EPA

regulates in a way that eliminates only the unreasonable risk. Proponents of further regulation claim that EPA is limited in its ability to regulate chemicals by the legal standards contained in TSCA.

Proposition 65, California's Safe Drinking Water and Toxic Enforcement Act of 1986, applies to people doing business in California, including those who import products. Under Proposition 65, the state maintains a list of chemicals that are either carcinogens or reproductive toxicants. Businesses are prohibited from discharging listed chemicals into sources of drinking water, or exposing people to a listed chemical without prior warning. Proposition 65 has become a source of great controversy over the years because of a private right of action that allows individuals to sue to enforce the law.

California does have other chemical restrictions and regulations that have been passed over the last several years, but they are limited to specific substances and applications and do not contain broad regulatory authority.

2008 Legislation

The 2008 legislative year yielded significant changes in the way California will regulate the use of potentially hazardous substances in consumer products. The politicized piecemeal approach to chemical regulation led to a widespread desire to see a centralized regulatory structure that was removed from political influences and based on sound science. Assemblyman Mike Feuer (D-Los Angeles) and Senator Joe Simitian (D-Palo Alto) worked together with the Schwarzenegger administration and stakeholders to craft legislation that would give the state Department of Toxic Substances Control (DTSC) broad authority to regulate the use of potentially hazardous substances in consumer products.

In 2008 the Legislature passed, and Governor Arnold Schwarzenegger signed, AB 1879 (Feuer) and SB 509 (Simitian), which provide regulatory authority to DTSC to identify, study, prioritize and

regulate the use of potentially hazardous substances in consumer products.

Generally, AB 1879 provides DTSC with the authority to identify, prioritize and regulate potentially hazardous substances in consumer products. SB 509 clarifies what types of consumer products would be subject to the provisions of AB 1879 and creates a Toxics Information Clearinghouse designed to collect and store relevant scientific information. Specifically, AB 1879 and SB 509 provide for the following:

- **Toxics Information Clearinghouse.**

DTSC is required to establish the Toxics Information Clearinghouse, which will serve as a decentralized, web-based system for collecting, maintaining and distributing chemical hazard traits, environmental and toxicological information. The Office of Environmental Health Hazard Assessment (OEHHA) and DTSC will be responsible for evaluating data to be included in the clearinghouse, holding workshops and gathering stakeholder comments. DTSC will be responsible for developing requirements and standards related to the design of the clearinghouse and data quality and test methods for the data to be available through the clearinghouse. DTSC will make use of this data during the regulatory process.

- **Multimedia Lifecycle Analysis.**

DTSC will be required to complete a multimedia lifecycle analysis of any substance that is being considered for regulation under AB 1879. The analysis shall account for, at a minimum, emissions of air pollutants (ozone, particulate matter, toxic air contaminants and greenhouse gases); contamination of surface water, groundwater and soil; disposal of byproducts and waste materials; worker safety and impact on public health; and other anticipated impacts on the environment. Regulation of potentially harmful substances in consumer products will be

based not only on direct consumer exposure, but also on impacts of production and disposal. The multimedia lifecycle analysis will be reviewed by the California Environmental Policy Council.

- **Green Ribbon Scientific Panel.**

DTSC must establish a Green Ribbon Science Panel composed of members with expertise in various scientific disciplines. DTSC is required to appoint members to the panel by July 1, 2009 and the members will serve for three year terms. The panel will be responsible for advising DTSC on issues related to data collection, prioritization of substances for regulation, and any other pertinent matter in implementing the law.

- **Definition of “Consumer Products.”** The types of consumer products subject to the provisions of AB 1879 and SB 509 are specifically outlined in the legislation. “Consumer product” means any product, or part of a product, that is used, bought or leased for use in California. There are specific exemptions to AB 1879 for products that already are regulated under other state and federal statutes, such as pharmaceuticals, food, pesticides and dental restorative materials. The new authority provided to DTSC does not authorize the department to supersede the regulatory authority of any other department or agency. The definition of “consumer product” contained in this legislation is very broad and will provide DTSC with authority to regulate most types of products.

- **Identify and Prioritize Chemicals.**

DTSC is required to adopt regulations to establish a process to identify and prioritize chemicals and chemical ingredients in consumer products by January 1, 2011. This process of prioritization will consider the volume of the chemical in commerce, the potential for exposure to consumers, and impacts on sensitive populations. These priorities will then

determine how DTSC proceeds with its new regulatory authority.

- **Trade Secret Protections.** Because DTSC has the power to require businesses to disclose product ingredients and manufacturing processes, the protection of trade secrets is vitally important. AB 1879 allows businesses that submit information to identify specific data as a trade secret as long as supporting documentation is provided. Information not identified as a trade secret will be available to the public upon request. If DTSC receives a request for information deemed a trade secret, DTSC will not disclose the information for 30 days. During that 30-day period, the company that disclosed the information will be responsible for obtaining a declaratory judgment that the information is subject to trade secret protection from an appropriate court. Companies that disclose information identified as a trade secret will have to remain vigilant in the protection of that information.

- **Regulation of Substances.** DTSC is required to adopt regulations that establish a process for evaluating “chemicals of concern” in consumer products, and their possible alternatives, to determine how to limit exposure to consumers and the environment. The evaluation shall take into consideration issues such as product function and performance, air emissions, energy efficiency, end-of-life disposal, public health impacts, economic impacts, and more. Following the evaluation, DTSC can take virtually any action, including:

- Requiring no action.
- Requiring the submission of additional information.
- Imposing labeling requirements or other types of information communication.
- Imposing restrictions on the use of a chemical or substance in a consumer product.

Green Ribbon Science Panel: Disciplines Law Requires Be Represented

Chemistry
Chemical engineering
Environmental law
Toxicology
Public policy

Pollution prevention
Cleaner production methods
Environmental health
Public health
Risk analysis

Materials science
Nanotechnology
Chemical synthesis
Research
Maternal and child health

- Prohibiting the use of a chemical or substance in a consumer product.
- Imposing requirements that control access or limit exposure to the chemical of concern in the consumer product.
- Imposing requirements for the manufacturer to manage the product at the end of its useful life (product stewardship), including recycling or responsible disposal of the consumer product.
- In addition to the specific actions listed above, the department has the authority to impose “any other outcome” that the department determines accomplishes the requirements of the law.

Alternatives Analysis

Some of the regulatory options available to DTSC would require alternative substances to be developed or used in some consumer products subject to regulation. AB 1879 recognized that it would be counterintuitive for DTSC to restrict the use of a substance without evaluating the potential alternative. DTSC would be able to evaluate and restrict potential alternatives to “chemicals of concern.”

Implementation of AB 1879 and SB 509

In order to implement the requirements of AB 1879 and SB 509, DTSC will be required to promulgate a significant number of regulations. AB 1879 and SB 509 both contain specific deadlines for the promulgation of regulations by DTSC.

The California Chamber of Commerce has already begun working with other business associations to ensure that there is organized and consistent engagement in the regulatory process so that sound scientific and economic principles prevail.

CalChamber Position

The CalChamber believes that the Department of Toxic Substances Control (DTSC) should use sound scientific principles when implementing AB 1879 and SB 509. Specifically, DTSC should use a systematic approach in which chemicals of concern, their uses and potential alternatives are first prioritized based on hazard and exposure. The regulations

should avoid duplicative and conflicting regulatory and reporting requirements, protect confidential business information, and minimize compliance costs and administrative burdens. Further, DTSC should ensure that regulations are cost-effective and protect the commercial and economic feasibility of products and industries.



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