Washington Finalizes Green Chemistry Reporting Rule

On July 21, 2011, the Washington Department of Ecology ("WDE") released its final rule to implement the reporting obligations of the Washington Children's Safe Products Act.[1] The Rule[2] takes effect on August 21, 2011, making Washington the second state to fully implement a green chemistry reporting program. (Maine's green chemistry program imposes reporting obligations for Bisphenol A and nonylphenols, effective October 3, 2011,[3] while California, Connecticut, and Minnesota, among others, have adopted green chemistry laws and are in varying stages of implementation).[4] Manufacturers will have to report to WDE information on the use and presence of Chemicals of High Concern ("CHCC") in children's products beginning August 2012 for products intended to be sucked or chewed by a child under three for the "largest" manufacturers. The relatively long list of CHCCs will pose burdens on those subject to reporting to identify and report on substances in children's products. The list of CHCCs includes, among others, the six phthalates regulated at the federal level by the Consumer Product Safety Improvement Act of 2008, antimony, Bisphenol A, cadmium, formaldehyde, and mercury.

Significantly, CHCCs added intentionally to the product in any amount will need to be reported. The Rule adopts a 100 ppm reporting threshold for unintentionally added CHCCs present as a contaminant. More important, the final Rule does not require reporting for CHCCs present as a contaminant in any amount if the manufacturer has in place a manufacturing control program and exercises due diligence to minimize the presence of the contaminant in the product or component. To take advantage of this exception, importers may need to work closely with foreign manufacturers to confirm the existence of a manufacturing control program.

Who Must Report

A "manufacturer" is defined as the producer, importer, or wholesale domestic distributor of a children's product. A retailer that is not also the producer, manufacturer, importer or domestic distributor of the product is not considered a manufacturer. However, a retailer that is the direct importer of a children's product must report. WDE will make a web-based reporting database available in time for the first reports.

Required information in reports to WDE includes:

- The CHCC in the children's product;
- A description of the function of the CHCC in the children's product;
- The amount of the CHCC by weight in the children's product, which may be reported within specified ranges (e.g., 100 ppm - 500 ppm; 500 ppm - 1,000 ppm); and
- The name and address of the reporting entity.

WDE has explicitly stated that information it receives that is not confidential business information will be made available to the public, likely through its website. Given widespread lack of understanding about whether the
mere presence of a substance creates a health or safety risk, public posting of reports may well trigger deselection of products which contain listed substances, or even give rise to new litigation risks based on fear of exposure, suggesting that to avoid reporting companies could seek to eliminate certain substances prior to the deadlines.

**Reporting Timeline**

Reporting requirements will phase in beginning August 2012. The reporting schedule is based on the type of contact a child is expected to have with the product and the manufacturer’s annual aggregate gross sales in and outside of Washington state. The following chart shows the initial reporting dates; subsequent reporting will be required on an annual basis after the first report is submitted to WDE.

**Initial Reporting Timeline**

**Manufacturer’s yearly aggregate gross sales in and outside of WA State**

- **Children’s products intended to be put into a child’s mouth or applied to the child’s body, or any mouthable children’s products intended for children who are age three or under**
  - More than $1 billion
    - August 2012
    - February 2013
    - August 2013
    - Case-by-case
  - $250 million - $1 billion
    - February 2013
    - August 2013
    - August 2014

- **Children’s products intended to be in prolonged (more than one hour) direct contact with a child’s skin (including jewelry)**

- **Children’s products intended for short (less than one hour) periods of direct contact with a child’s skin**

- **Children’s product components that during reasonable foreseeable use and abuse of the product would not come into direct contact with the child’s skin or mouth**
Manufacturers must report based on their annual aggregate gross sales, which results in an interesting practical issue. If a major retailer serves as a direct importer for any covered children’s product and has total sales over $1
billion, the retailer will face reporting obligations even if sales of reportable products are relatively small.

Enforcement

WDE also issued an implementation plan outlining the expected compliance program. WDE will purchase products from various retailers and submit them for laboratory analysis to identify CHCCs. Products will be selected for testing based on data reported by others in the same sector, including complaints submitted to WDE. WDE has indicated that, where possible, X-Ray Fluorescence (XRF) screening will be used to detect metals and other substances on the CHCC list, suggesting that there may be a priority focus initially on heavy metals.

If there is a discrepancy between the values WDE obtains during laboratory analysis and the manufacturer's reported values, the manufacturer will be contacted and given 45 days to provide WDE with additional information. If the additional information provides an adequate justification for why there is a discrepancy, no further action will be taken. If the additional information is deemed inadequate to explain the discrepancy, WDE will initiate a formal enforcement action.

Civil penalties can be imposed for the failure to provide either the required notice for the presence of the CHCC, or the accurate amount of each CHCC in each product component. First time offenders are subject to a civil penalty not to exceed $5,000, with subsequent violations capped at $10,000. In addition, WDE will analyze the data submitted by manufacturers in annual reports to develop an enforcement strategy to ensure reports are received from all manufacturers of children's products.

With more states in various phases of their own rulemaking proceedings to implement state Green Chemistry laws, the landscape will likely become more complex. Further, the recent Environmental Protection Agency (EPA) Office of the Inspector General (OIG) report criticizing the agency's Voluntary Children's Chemical Evaluation Program (VCCEP)[5] may fuel additional interest in green chemistry reporting initiatives in other states.

For more information on green chemistry and related consumer product safety developments, contact Sheila A. Millar, millar@khlaw.com or JC Walker, walker@khlaw.com.


[4] These green chemistry programs can be found online at the following addresses: California (See http://www.dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/index.cfm#Green_Chemistry_Initiative_Documents_and_Information); Connecticut (see http://www.cga.ct.gov/2009/pub/chap420d.htm#Sec21a-335.htm); Minnesota (see http://www.health.state.mn.us/divs/eh/hazardous/topics/toxfreekids/index.html).