Apart from the reporting requirements in Berkeley, California, there is little public health or environmental regulation in the United States directed specifically at nanotechnology. But in California, that may soon change. In draft regulations released this month as part of its Green Chemistry Initiative, the Department of Toxic Substances Control specifically branded nanomaterials as chemicals subject to regulation. The regulations will establish an extensive process for identification and prioritization of chemicals of concern, and for "priority products" containing such chemicals. That designation triggers a manufacturer's obligation to perform an alternatives analysis of relevant consumer products, which essentially compares the chemical use to other alternatives. The process will typically end with a determination of the appropriate regulatory response, which could include mandatory substitution, labeling, use restrictions or other actions.

Nanomaterials are mentioned in the draft regulations in several spots. First, as already mentioned, they are expressly included in the definition of "chemical." Second, in listing criteria for prioritization of chemicals of concern, the regulations include "[o]ther physical, chemical, or quantum properties specific to nanomaterials." Third, nanomaterials are specifically excluded from a de minimis exemption to regulation available for other chemicals.

Of course, much has to happen before these provisions will have direct legal impact on nanomaterials in California. Obviously, the regulations must be finalized and anything could happen between now and the statutory deadline for completion of January 2011. Also, even if the provisions survive intact, the actual process of identifying chemicals of concern, and ultimately priority products, could take years. Nonetheless, it is possible that even the specter of regulation might have some impact on manufacturers considering the use of nanomaterials in consumer products.