



# WASHINGTON WATCH

## The Rise of Ingredient Disclosure: The California and New York Experience

By Lynn L. Bergeson

In the recent past, two important states—California and New York—have launched extensive and precedent-setting ingredient disclosure laws regarding cleaning products with the clear goal of prompting the deselection of certain chemical substances and forcing product reformulation. Industry prefers to refer to this trend as “ingredient communication,” a goal we can all agree is desirable. By whatever name, these state measures will have a significant impact on ingredient disclosure trends across product lines, likely well beyond their stated application to cleaning products. These state laws are summarized below, followed by a discussion of their similarities, key differences, and their implications.

### CALIFORNIA'S CLEANING PRODUCT RIGHT TO KNOW ACT OF 2017

On October 15, 2017, then-California Governor Jerry Brown, Democrat (D), signed the Cleaning Product Right to Know Act of 2017 (Senate Bill [S.B.] 258; State of California, [2017](#)). The law requires manufacturers of cleaning products to disclose certain chemical ingredients on the product label and on the manufacturer's website. The online disclosure requirements apply to a designated product sold in California on or after January 1, 2020. The product label disclosure requirements apply to a designated product sold in California on or after January 1, 2021.

Section 108954(a) of the California's Cleaning Product Right to Know Act of 2017 requires a manufacturer of a designated product sold in California to disclose several categories of information. The required disclosure elements (unless the ingredient is confidential business information) include:

- A list of each “intentionally added ingredient” contained in a product that is included on a “designated list” (State of California, [2017](#); Section 108954(a)(1)(9A));
- A list of each specified fragrance allergen, when present in the product at a concentration at or above 0.01% (100 parts per million (ppm); State of California, [2017](#); Section 108954(a)(1)(B)); and
- An intentionally added ingredient that is listed on the California's Safe Drinking Water and Toxic Enforcement Act, also known as the California Proposition 65 (Prop 65) list (State of California, [2017](#); Section 108954(a)(1)(C); enforceable after January 1, 2023).

Under the Act, a “designated product” is defined as “a finished product that is an air care product, automotive product, general cleaning product, or a polish or floor maintenance product used primarily for janitorial, domestic, or institutional cleaning purposes” (State of California, [2017](#); Section 108952(f)). Excluded products include foods, drugs, and cosmetics and a variety of personal care products, including toothpaste, shampoo, and hand soap.

An “intentionally added ingredient” is defined as “a chemical that a manufacturer has intentionally added to a designated product and that has a functional or technical effect in the designated product, including, but not limited to, the components of intentionally added fragrance ingredients and colorants and intentional breakdown products of an added chemical that also have a functional or technical effect in the designated product” (State of California, [2017](#); Section 108952(k)). A nonfunctional constituent is defined as one of 35 substances that is an incidental component of an intentionally added ingredient, a breakdown product of an intentionally added ingredient, or a by-product of the manufacturing process that has no functional or technical effect on the designated product (State of California, [2017](#); Section 108952(m)), including, 1,4 dioxane, 1,1 dichloroethane, acrylic acid, and benzene. Confidential Business Information (CBI) includes any intentionally added ingredient for which a claim has been approved by the U.S. Environmental Protection Agency (EPA) for inclusion on the Toxic Substances Control Act Confidential Inventory, or for which the manufacturer, or its supplier, claims protection under the Uniform Trade Secrets Act.

“Designated list” refers to a heroically long aggregated list of more than 20 state, federal, and international lists of chemical substances identified by name in the regulation. The list includes the usual suspects: Prop 65; chemicals classified by the European Union (EU) as carcinogens, mutagens, or reproductive toxicants; chemicals included in the EU Candidate List of Substances of Very High Concern (SVHC) for endocrine disrupting properties, persistent, bioaccumulative, and toxic (PBT) properties, or very persistent and very bioaccumulative (vPvB) properties; and many, many others (State of California, [2017](#); Section 108952(g)).

The online disclosure requirements apply to designated products sold in California on or after January 1, 2020, a date that is fast approaching. The product label disclosure requirements will apply to designated products sold in California on or after January 1, 2021. Under the program, a designated product manufactured before these dates will be deemed to be in compliance only if the designated product displays either the date of manufacture or a code indicating the date of manufacture. Manufacturers may label designated products manufactured before January 1, 2021, in accordance with the requirements.

## **NEW YORK'S HOUSEHOLD CLEANSING PRODUCT INFORMATION DISCLOSURE PROGRAM**

On April 25, 2017, New York Governor Andrew Cuomo (D) announced an initiative to require manufacturers of household cleansing products sold in New York to disclose the chemical ingredients on their websites (New York State, Governor's Office, [2017](#)). According to the press release, manufacturers are required to identify all the ingredients and impurities in their products, including those that are “chemicals of concern,” as well as their content by weight in ranges. According to the New York State Department of Environmental Conservation (DEC), the agency implementing the program, authority for the program derives from Article 35 of the Environmental Conservation Law and New York Code of Rules and Regulations Part 659, authority that dates back to the 1970s. DEC published a draft [2017](#) Household Cleansing Product Information Disclosure Certification Form and Guidance Document for public comment (DEC, Division of Materials Management [DoMM], [2017](#)). Although the enabling law states that DEC must proceed by regulation, DEC's draft “Guidance Document” (Guidance) outlined critical elements of the disclosure program. DEC requested comment on the Guidance, and the comment period closed

on July 14, 2017. DEC announced the new ingredient disclosure program in June 2018.

The program applies to “household cleansing products” defined to include soaps and detergents, containing a surfactant as a wetting or dirt emulsifying agent, and used primarily for “domestic or commercial cleaning purposes” (DEC, DoMM, [2017](#), p. 8). Personal care items are excluded, as are products intended for use primarily in industrial manufacturing, production, and assembling processes.

The Guidance states that information to be disclosed on manufacturer websites is to be grouped into several categories. First, product and manufacturer information is required to be disclosed, including a description of the product, its use and form (e.g., liquid and powder), whether the product contains fragrance ingredients, including ingredients added to mask the scent of other ingredients (solvents, surfactants) in so-called unscented products; and the complete name of the company that manufactures the final product. Second, all ingredients intentionally added to a covered product, including those present in trace quantities, must be disclosed unless withheld as CBI. All ingredients present only as an unintended consequence of manufacturing and present above trace quantities should be disclosed where the manufacturer “knows or should reasonably know” of the presence of such ingredients, impurities, or contaminants, unless withheld as CBI. Third, unless such information is not available, not known, or withheld as CBI, the Chemical Abstracts Index Name and Chemical Abstracts Service Registry Number, percentage of content by weight, GreenScreen benchmark, whether there is a “nano” component, and the role of the component in the formulation must be disclosed. Fourth, “chemicals of concern” must be disclosed. Similar to the California program, a chemical of concern is any chemical substance listed on one or more of another heroically long list of chemicals. Finally, human health and environmental effects information must be disclosed. Manufacturers must also post on their websites information regarding the nature and extent of investigations and research performed by or for the manufacturer concerning the effects on human health and the environment of covered products or the chemical ingredients of such products. This last requirement is truly consequential and includes posting information on research performed by the manufacturer or at the direction of the manufacturer. The Guidance anticipates the posting of links to the actual studies, and not merely a summary of them.

The program is not static. Manufacturers are required to update their disclosures each time the ingredients in a product are changed, or a new product is introduced to the market. Legacy data for discontinued products should be posted until the expiration date of the product. All disclosed information should be reviewed, at a minimum, once every two years, including the presence of a product or ingredients on a priority hazard list, or whether a product or ingredient meets a hazard characteristic.

## DISCUSSION

These new state programs are formidable and, unfortunately for the product manufacturers subject to them, quite different. Part of the programs' nonalignment stems from the fact that industry trade groups worked closely with California in crafting the California program. Its provisions were carefully vetted, understood, and largely accepted before issuance. Not so with regard to the New York program. Although Governor Cuomo had indicated his desire for an ingredient disclosure law in his 2017 State of the State address, the program that was eventually rolled out was not extensively vetted and did not reflect in key cases the views or broad support of the regulated community. The two programs were developed in isolation of one another, not in tandem. And, importantly, despite the fact that New York's Disclosure Program was released only eight months after California's S.B. 258, DEC intended to require the first phase of its implementation six months earlier, or by July 1, 2019. This, too, has inspired concern within the household cleaning products industry.

To get a flavor of some of the reasons for industry concern, a brief review of two key differences between California's Cleaning Product Right to Know Act of 2017 and New York's Household Cleansing Product Information Disclosure Program is instructive. Although there is some overlap in the lists of chemicals of concern—Prop 65, carcinogens identified by the International Agency for Research on Cancer (IARC), SVHCs, neurotoxicants identified by the Agency for Toxic Substances and Disease Registry (ATSDR), PBT chemicals covered by EPA's Toxics Release Inventory (TRI) Program—New York's program is more expansive. If a product or ingredient meets one or more of certain named "hazard characteristics" listed in the draft Guidance, such information must be disclosed, even if the ingredient or chemical is not listed elsewhere. In addition, under New York's Program, ingredients with a GreenScreen benchmark and "nanomaterial" ingredients must be identified. For each ingredient, a term describing its functional use or reason for

inclusion should be disclosed. These requirements are not based on a risk finding. Nano stakeholders in particular are unhappy with the potentially stigmatizing impact of the nano disclosure requirement.

California requires the disclosure of intentionally added ingredients—“a chemical that a manufacturer has intentionally added to a designated product and that has a functional or technical effect in the designated product, including, but not limited to, the components of intentionally added fragrance ingredients and colorants and intentional breakdown products of an added chemical that also have a functional or technical effect in the designated product” (State of California, [2017](#); Section 108952(k)). Nonfunctional constituents—certain substances that are incidental components of intentionally added ingredients, breakdown products of intentionally added ingredients, or by-products of the manufacturing process that have no functional or technical effect on the designated product—must also be identified (State of California, [2017](#); Section 108952(m)). New York requires more, and the Guidance specifies that disclosure is required for all ingredients intentionally added to a covered product, including those present in trace quantities, and chemicals where the manufacturer “knows or should reasonably know” of such ingredients, including impurities, contaminants, breakdown products, and chemicals that are the unintended consequence of the product formulation process (DEC, DoMM, [2017](#); pp. 11–12). The manufacturer requirements are more clear-cut under California's program than under New York's, and manufacturers should be able to make disclosure decisions with a higher degree of precision. Under New York's program, it is unclear exactly what a manufacturer should reasonably know with regard to impurities or contaminants present only as an unintended consequence of manufacturing.

That the two programs are not aligned is a key concern. This lack of alignment inspired two trade associations, the Household and Commercial Products Association and the American Cleaning Institute, to challenge the New York Disclosure Program in court. According to a Joint Statement issued by the trade associations, the suit alleges DEC violated important administrative procedures and that its refusal to work with industry has created an “unworkable and impractical” policy that should be retracted so that a consistent national model for ingredient communication can be implemented instead (ACI & HCPA, [2018](#)). Some claim that DEC exceeded its legal authority by issuing the Disclosure Program under the authority of the Environmental Conservation Law, a law that, as noted, was enacted over

four decades ago and contemplated notice and comment rulemaking. Although public comment was solicited on the draft Guidance, reasonable people will disagree as to whether this process satisfies the requirements of a formal rulemaking.

Perhaps in response to the litigation, on January 9, 2019, DEC announced it was delaying its enforcement of the New York Disclosure Program to October 1, 2019, from July 1, 2019. DEC's announcement was published in its Environmental Notice Bulletin.

## IMPLICATIONS

The household products community has long recognized the importance of ingredient communication and has worked hard to develop communication strategies that are both helpful to consumers and mindful of the need for CBI protections. The California program was expected to serve as a model in this regard. That the New York program reflects significant areas of nonalignment is troubling. The questionable legal basis for the program may not bode well for the ultimate disposition of the litigation challenging the program, and the lawsuit has certainly dimmed the hopes of ingredient disclosure enthusiasts seeking a more durable regulatory program in New York.

Regardless, it is fair to conclude that these programs, and others in states thinking about similar disclosure programs, are likely to become part of the new normal and unlikely to recede. Indeed, on January 21, 2019, New York Governor Cuomo announced as part of his Executive Budget a proposal intended to protect New Yorkers from “unknown exposure to toxic chemicals” (New York State, Governor's Office, [2019](#)). According to Governor Cuomo's press release, the Consumer Right to Know Act would authorize DEC, in consultation with the New York State Department of Health and the New York State Department of State, to develop regulations establishing on-package labeling requirements for designated products indicating the presence of potentially hazardous chemicals, including carcinogens.

Under the proposal, the agencies would assess the feasibility of on-package labeling and develop regulations establishing a labeling requirement for designated products, creating a list of more than 1,000 carcinogens and other chemicals that would trigger labeling, and identifying the types of consumer products that would be subject to the new regime. The press

release states that the proposal would *extend* DEC's Cleansing Product Information Disclosure Program requirements "to cover all cleaning products sold in New York State," and it will give New York State Department of Health "the authority to require similar disclosure for the manufacturers of personal care products like shampoo, deodorant or baby powder" (New York State, Governor's Office, [2019](#)). According to the press release, the proposal would require cleaning product and personal care product manufacturers to "make certain product ingredient information publicly available on their websites and on a publicly accessible database" (New York State, Governor's Office, [2019](#)). The Cleansing Product Information Disclosure Program already requires manufacturers to make certain product ingredient information publicly available on their websites.

Stay tuned. We likely are only just getting started. Unless Congress seeks to preempt disparate state programs or activists' pursuit of enhanced ingredient disclosure somehow subsides, dealing with these "one-off" state programs may be here to stay.

## **Authors Biography**

Lynn L. Bergeson is Managing Partner of Bergeson & Campbell, P.C. (B&C), a Washington, DC, law firm focusing on conventional, nanoscale, and biobased industrial, agricultural, and specialty chemical product regulation and approval matters, environmental health and safety law, chemical product litigation, and associated business counseling and litigation issues. Lynn is also President of The Acta Group (Acta), with offices in Washington, DC, Manchester, UK, and Beijing, China, and President of B&C Consortia Management, L.L.C. (BCCM) with offices in Washington, DC. A version of this article was submitted to the American Bar Association (ABA) Section of Environment Energy and Resources (SEER) Spring Meeting in April 2018.